EXPLANATORY MEMORANDUM TO

THE CIVIL PROCEDURE (AMENDMENT) RULES 2013

2013 No. 262 (L. 1)

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 1998 (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.

2.2 The amendments to the CPR covered by this instrument relate to Government initiatives (in the main resulting from Lord Justice Jackson's *Review of Civil Litigation Costs: Final Report* and from Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) and a European Directive.

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

3.1 In the light of comments on the use in rules of court of the expression "will", in the Committee's 31st and 41st reports of the 2010-2012 session of Parliament, the Committee's attention is drawn to rules 5(g), 5(h), 7(c), 7(d), 7(e), 9(c), 10. 12, 16(b), 21(12), 21(13) and 21(14) in this instrument, and Schedule to it which inserts in the CPR new rules 44.2, 44.3, 44.4, 44.5, 44.6, 44.9, 44.10, 44.18, 45.1, 45.2, 45.5, 45.11, 45.12, 45.13, 45.16,45.18, 45.19, 45.20, 45.21, 45.22, 45.23, 45.25, 45.26, 45.29, 45.30, 45.31, 45.34, 45.39, 45.44, 46.1, 46.2, 46.3, 46.5, 46.6, 46.8, 46.9, 46.12, 46.13, 46.14, 47.6, 47.8, 47.11, 47.12, 47.14, 47.15, 47.16, 47.17, 47.18, 47.19, 47.20, and 48.1, where the expression "will" is used. Many of these references are simply reproducing provision in existing rules, as part of the restructuring of the costs Parts of the rules in the Schedule.

3.2 In some instances in these rules, the use of the word "will" denotes an automatic outcome - see, for example, rule 5(h) which inserts Rule 3.14 which, in turn, provides for the action the court will take when a party fails to comply with the requirement to file a costs budget. In other instances, the use of the word "will" denotes a non-discretionary function - see, for example rule 7(c) which inserts new Rule 26.3(1)(b) which provides that a court will serve a notice of proposed allocation on the parties following the filing of a defence. In one instance, new 52.9A provides that the court will consider the "circumstances of the case, the means of the parties and the need to facilitate access to justice" before making an order limiting the costs recoverable on appeal.

3.3 As the Committee will be aware, it is the Civil Procedure Rule Committee ("the CPR Committee") which makes the CPR (subject to approval by the Lord Chancellor). The CPR Committee's continuing view is that, in relation to the functions of the court, it is appropriate to refer to what the court "will" do, not what it "must" do. Consequently, the CPR do not in general operate to compel the court to perform its non-discretionary functions by imposing a duty in relation to each one and there is no sanction which applies to the court should it fail to do so. Imposing a further notional duty on the court to perform its individual functions by use of the word "must" is considered by the CPR Committee to be, in general, unnecessary and, arguably, misleading.

3.4 In each context that it is used, both the CPR Committee and the Ministry of Justice consider the expression "will" to be accurate and its meaning in the particular context to be clear. As noted in the Ministry of Justice's memorandum of 7th February 2012, neither the Ministry of Justice nor the CPR Committee is aware of any instance where the use of the expression "will" when referring to such functions of the court has given rise to any complaint among practitioners or court users (including litigants in person) that the meaning or outcome is unclear.

4. Legislative Context

4.1 The Civil Procedure Act 1997 established the CPR Committee and gave it power to make Civil Procedure Rules. The first CPR were made in 1998. 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 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.

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 the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 This instrument amends the CPR as follows. The amendments explained at (a) and (b) implement recommendations from Lord Justice Jackson's report, either

[1] This work is ongoing: the few remaining CCR and RSC are contained in two schedules to the CPR.

directly or by way of implementation of provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

(a) A number of provisions are introduced and existing provisions strengthened to bring the expenses of costs management to a proportionate level and bring down the total costs of litigation. These include:

- Strengthening the overriding objective of the rules to enable to the costs to deal with cases "at proportionate cost" as well as justly; the test is intended to control the costs of activity that is disproportionate to the value, complexity and importance of the claim.

- Extending the court's case management powers in respect of costs. New rules set out the provisions for Costs Management and introduce costs budgets for higher value cases. The court will require the parties to file a costs budget at an early stage of the proceedings and encouraged to agree the budgets where possible. The court may make a "costs management order" and if it does so will thereafter will control the parties' budgets in respect of recoverable costs. The scheme will apply to all multi-track cases with the exception of the Admiralty and Commercial Courts. A further section on Costs Capping brings rules previously included in another part of the rules in the new section on costs management and provides for parties to file a costs budget rather than an estimate of costs with any application for a costs capping order.

- Widening the scope of the rules on applications for relief from sanctions to provide the court with the power to deal with failure to conduct litigation at proportionate cost.

- Introducing rules for a new system of qualified one way costs shifting (QOCS) in personal injury cases, devised as an alternative to after the event (ATE) insurance. The effect of QOCS is that a losing claimant will not pay any costs to the defendant, and a successful claimant against who a costs order has been made (for example, where the claimant does not accept and then fails to beat the defendant's "part 36 offer" to settle) will not have to pay those costs except to the extent that they can be set off against any damages received. QOCS protection will however be lost altogether if the claim is struck out or is found to be fundamentally dishonest. QOCS protection will be lost in part, and subject to the court's permission, in two instances: first, if an otherwise successful claim includes an unsuccessful non-personal injury element (e.g. housing disrepair or costs of credit hire in arranging an alternative vehicle), and there is an order for costs against the claimant of that unsuccessful element, the claimant is liable for all the defendant's costs of that unsuccessful element to the extent that it is just and fair; and second, where the claim, or an element of it, is made for the financial benefit of someone other than the claimant (e.g. a credit hire claim in respect of the financing company), an order for the defendant's costs of the claim, or that element, may be made, and enforced, against that person/organisation.

- Modifying the rules in Part 36 of the Civil Procedure Rules in respect of offers to settle claims and the costs consequences of a party's failure to accept an

offer which is better than the result secured by that party at trial. To encourage early settlement of claims, the rules are amended to provide for an additional amount to be paid by a defendant who does not accept a claimant's offer which the defendant then fails to beat at trial (that is, that the trial outcome is no more advantageous to the defendant than the claimant's offer). In respect of claims for damages only, and mixed claims (i.e. a claim which concerns both a claim for damages and a non-financial benefit, such as an injunction), the additional amount is calculated as a percentage of the damages awarded to the claimant; and in respect of non-damages claims (such as a claim for an injunction alone), the additional amount will be calculated as a percentage of the costs ordered by the court to be paid by the defendant to the claimant.

– Amendments in consequence of the introduction of damages-based agreements (DBAs) in civil proceedings. A DBA is a private funding arrangement between a representative and a client whereby the representative's agreed fee is contingent upon the success of the case and is determined as percentage of the compensation received by the client. Under a DBA the lawyer may not recover by way of costs more than the total amount payable under the DBA fee.

– Streamlining the procedure for processing bills of costs in which the costs claimed are £75,000 or less, which will be assessed by a judge who will make a provisional assessment of the amount of costs due to the receiving party. The costs of the assessment will be limited to not more than £1,500. If any party is dissatisfied with the assessment an oral hearing will be fixed. If the dissenting party achieves a result at the oral hearing which is better the provisional assessment the court will award costs accordingly.

– Limiting costs on appeals where the decision under appeal was made in a no-costs or limited costs jurisdiction. The amendments enable the court at the outset of such an appeal to order that the costs be limited to the extent which the court specifies. The court will take into account the means of both parties; the circumstances of each case; and the need to facilitate access to justice before making any such order.

– Limiting the material contained in factual evidence, so that in appropriate cases the court will be able to give directions defining and limiting the factual evidence which may be called, with the intention of managing costs in heavy, high value cases.

– Providing a menu of standard directions for use by practitioners and judiciary. The clauses, which set out common directions or orders, will regularise the draft orders being submitted to and by courts. Case management conference hearings will be focussed on identifying and narrowing the issues in each particular case rather than agreeing directions and timetables. In some less complex cases the case management conference hearing may not be necessary. These reforms together with the fixing of a timetable and hearing date at an early stage in the proceedings and monitoring of compliance with the

timetable by the court will reduce delay and pre-empt the need for sanctions for non-compliance, thus reducing costs.

- Revision of the existing CPR Parts 43 to 48 and Costs Practice Direction to remove irrelevant and obsolete procedures. In particular the rules relating to assessment of costs are redrawn to ensure that material presented to the court is relevant to the particular bill of costs and sets out any contentions clearly and concisely. Referral to authorities, quoting of well known judgments and explanation and responses to individual points of dispute are discouraged.

- Providing for disclosure of material relevant to the particular case. In heavier and more complex cases the costly disclosure of material by default may not be justified. Rather than default disclosure the rules are modified to allow a tailored list of disclosure requirements thus reducing the overall costs of providing the material.

- Clarifying the costs of providing expert evidence before any order for such evidence is made. In order to restrict recoverable costs in respect of expert evidence, amendments are made requiring a party who is seeking permission to adduce expert evidence to furnish the court with an estimate of the costs of that evidence.

(b) Increasing small claims track limit/expert fees: The upper limit of the small claims track for civil claims (excluding personal injury and housing disrepair claims) is increased from £5,000 to £10,000. The Jackson Report recommended that the limit of £5,000, in place since 1999, be increased for business to business disputes. The Ministry of Justice consulted on the proposal in 2011 and on the basis of responses received recommended the limit should be increased to £10,000 for all claims, not just business disputes. A further amendment is made which removes the necessity for both parties to consent to a higher value case being allocated to the more suitable small claims track, allowing the judiciary more flexibility when managing cases. The small claims track provides a proportionate procedure for the most straight-forward cases and as such only limited costs are recoverable; one such cost is experts' fees. Once a case is allocated to the small claims track parties may only adduce expert evidence with the permission of the judge; should permission be given the costs of the expert may be recovered. However, the amount that can be recovered is subject to an upper limit, which these amendments increase from £200 to £750 to allow for the possibility of more expert evidence being required as more complex cases with a value of £5-£10,000 will now fall into the small claims track.

(c) Aarhus Convention: The Aarhus Convention has in large part been given effect in EU law by EU Directive 2003/35/EC (The Public Participation Directive).which amended existing Directives in relation to pollution control and requirements for environmental impact assessments. The Directive requires Member States to ensure that a system for challenging decisions in environmental matters is open to members of the public and is among other things not "prohibitively expensive". Following a consultation by the Ministry of Justice the rules in relation to costs in claims for judicial review falling within the ambit of the Convention's requirements are amended to allow for fixed recoverable costs. Two limits are set - on the costs recoverable by a defendant from a claimant (£5,000 where the claimant is an

individual and £10,000 in any other circumstances), and on the costs recoverable by a claimant from a defendant (£35,000).

(d) Streamlining of the allocation of claims procedure: Amendments are made to ensure that where possible administrative processing of claims is centralised and cases are only transferred once a hearing is required. To facilitate this rules are modified to allow court staff to decide provisionally the track to which a claim may be allocated based on its value; to send out the appropriate documents; initiate steps where parties fail to return the documents; and where parties agree make stay orders to allow parties time to settle matters. Parties will also be required to serve copies of certain documents on all parties reducing the administrative burden on the court.

(e) Transitional arrangements are made in respect of funding arrangements commenced before the new rules come into force on 1 April 2013. Three types of cases mesothelioma, insolvency and defamation/privacy are excluded, as the provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 have not been commenced for those proceedings, which will still be subject to the existing rules in relation to such funding arrangements.

(f) Amendments are made to the Glossary with the addition of the definition of Budget and Damages-Based Agreement in the context of the Civil Procedure Rules.

(g) Amendments are made to correct an incorrect cross reference in the CPR (8(b) of these rules) and to omit CCR Order 27 Rule 7A(3) as a consequence of the introduction of Part 81 of the Civil Procedure Rules in 2012.

- Consolidation

7.2 The Rules involve a consolidation of the heavily restructured Parts 44 to 48. No further consolidation is planned at present.

8. Consultation outcome

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

8.2 Recommendations in respect of the costs management follow the recommendations made in Lord Justice Jackson's *Review of Civil Litigation Costs* and the Ministry of Justice consultation following Lord Justice Jackson's report.

The reforms requiring legislative force are contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 supported by commencement orders.

8.3 The Ministry of Justice consulted widely in 2011 on reforming the Civil Justice system. The consultation invited comments on, amongst other matters, increasing the upper jurisdiction threshold for small claims (excluding claims for personal injury and housing disrepair). In the Ministry of Justice response to the

consultation published in 2012 reported that the majority of respondents (65% of 206) favoured an increase of the upper limit.

8.4 The Ministry of Justice consulted on Cost Protection for Litigants in Environmental Judicial Review Claims in October 2011. The consultation invited comments on Government proposals to implement the UK's obligations under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the "Aarhus Convention") and Directive 2003/35/EC ("the Public Participation Directive" or "PPD"), in relation to England and Wales (separate consultations were also undertaken in Scotland and Northern Ireland). The Ministry of Justice received 22 responses and a response to the consultation was published in August 2012.

8.5 The relevant documents can be found at:

Lord Justice Jackson's Review of Civil Litigation:
http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs.htm

The Ministry of Justice consultation and response paper Proposals for Reform of Civil Litigation Funding and Costs in England and Wales:
http://www.justice.gov.uk/consultations/jackson-review.htm

Legal Aid, Sentencing and Punishment of Offenders Act 2012:
http://www.legislation.gov.uk/ukpga/2012/10/contents

Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013:
http://www.legislation.gov.uk/uksi/2013/92/contents/made

Offers to Settle in Civil Proceedings Order 2013:
http://www.legislation.gov.uk/uksi/2013/93/contents/made

Conditional Fee Agreements Order 2013:
http://www.legislation.gov.uk/ukdsi/2013/9780111533437/contents

Damages-Based Agreements Regulations 2013:
http://www.legislation.gov.uk/ukdsi/2013/9780111533444/contents

Solving disputes in the county courts: creating a simpler, quicker and more proportionate system:
https://consult.justice.gov.uk/digital-communications/county_court_disputes

9. Guidance

9.1 A preview summarising the forthcoming changes will be published on the Ministry of Justice website in February 2013 at http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/index.htm. The Ministry of Justice will also write to key stakeholders detailing the changes in February 2013.

9.2 The rules will be published by the Stationery Office and will be available on the Ministry of Justice website when the majority come into force in April 2013.

10. Impact

10.1 The majority of the amendments will impact on businesses and individuals, some will directly impact on charities and voluntary bodies. Any sectors that derive an income from civil litigation may be affected. This may include for example, lawyers, after the event (ATE) insurers, claims management companies and experts. The recovery of costs landscape will change for most claimants and defendants and their representatives who will need to consider the appropriate funding arrangements for any litigation. Certainty as to the amount of costs will be provided in higher value cases with the introduction of costs budgets. Similarly in lower value claims the increase in the upper limit small claims financial threshold, where recovery of costs is restricted, will provide litigants with surety as to the amount of costs payable.

Charities and voluntary organisations will benefit from the changes in matters taken to judicial review in respect of environmental matters where the extent of their liability for costs will be capped.

10.2 There will be some potential impact on the public sector in that the additional Part 36 sanction will increase costs for defendants who do not accept a reasonable offer which is then not bettered at trial; but this impact is considered likely to be minor.

10.3 An Impact Assessment has not been prepared for this instrument which gives effect to a variety of changes from different sources. The impacts of the Government's programme of legal aid and costs reform are set out in an Impact Assessment, which was updated following the LASPO Act receiving Royal Assent in May 2012. This is available at http://www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information.

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 by writing to key stakeholders and through the CPR website.

11.3 There has been extensive consultation with relevant bodies, including claimant and defendant representative groups throughout the development of these provisions. We do not anticipate that the requirements will have any special impact on small firms over and above those that apply to any other party in civil litigation.

12. Monitoring and 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.

12.2 Those provisions which implement provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will be reviewed as part a wider review of the entire package of reform policies implemented following the passing of that Act. Further details are attached to Annex A of the Impact Assessment.

13. Contact

Jane Wright at the Ministry of Justice Tel: 020 3334 3184 or email: jane.wright@justice.gov.gsi.uk can answer any queries regarding the instrument.