

EXPLANATORY MEMORANDUM TO
THE CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2023

2023 No. 572 (L. 6)

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His 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. These Rules implement the extension of fixed recoverable costs (FRC) in civil cases and establish an intermediate track for claims above £25,000, but not more than £100,000. These Rules come into force on 1 October 2023, subject to paragraph 7.18 below. References to a Part or rule by number alone are references to the Part or rule so numbered in the CPR.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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 Civil Procedure Rules are made by the Civil Procedure Rule Committee (CPRC) under the Civil Procedure Act 1997, section 2(6) of which requires the CPRC before making rules to meet (unless inexpedient to do so) and consult such persons as they consider appropriate. The CPRC meets nine times a year. The CPRC considered these Rules at six meetings since October 2022 and approved them at their meeting on 31 March 2023. Consultation is addressed in section 10 of this memorandum.

7. Policy background

What is being done and why?

- 7.1 These Rules set out the provisions which will implement the extension of FRC in civil cases. These Rules are the product of extensive collaborative work between the CPRC costs sub-committee and the Ministry of Justice.

- 7.2 The general principle in civil litigation in England and Wales is that the losing party pays the successful party's legal costs. While FRC already exist in most personal injury claims for damages up to £25,000, in most other cases the costs are subject to agreement between the parties, or assessment by the judge, at the end of the case. The extension of FRC is part of a series of reforms to civil costs over recent years – since Sir Rupert's 2010 report *Review of Civil Litigation Costs: Final Report*, and the relevant provisions in Part 2 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* and associated reforms which came into force on 1 April 2013. These reforms are intended to deliver access to justice at proportionate cost and as such are consistent with the overriding objective in CPR 1.1.
- 7.3 The Rules will help to ensure that legal costs are more certain and proportionate across a wider range of civil claims, and will thereby enhance access to justice. With the certainty that FRC will provide, parties will be able to make more informed choices throughout the litigation process, which will also facilitate earlier resolution.
- 7.4 As set out by Sir Rupert at Chapter 1, 1.3 of his 2017 report on FRC, *Review of Civil Litigation Costs: Supplemental Report*, the intention is:
- to modify the CPR with the aim of reducing actual costs so far as possible.
 - to restrict recoverable costs to that which is “proportionate” as defined in the proportionality rule at 44.3.
 - to control the recoverable costs in advance.
- 7.5 The main features of the Rules are as follows.
- The extension of FRC to all civil claims across the fast track, including a new process and separate table of costs for Noise Induced Hearing Loss (NIHL) claims valued up to £25,000.
 - A new intermediate track and corresponding FRC for less complex claims valued at more than £25,000, but not more than £100,000.
 - FRC will apply to all cases in the fast track and the new intermediate track, with limited exceptions (see below at paragraphs 7.8 and 7.17 respectively).
 - Rule 45.10 sets out specific provisions for vulnerable parties and witnesses under the extended FRC regime.
 - The arrangements for Part 36 offers to settle in low value personal injury cases already subject to FRC have been updated to cover all FRC claims.
- 7.6 The amended Rules are primarily in the new Part 45 (Fixed Costs). Both the new tables of fixed costs and those previously included in Part 45 will, going forward, be set out in Practice Direction (PD) 45, to which the rules in Part 45 refer as appropriate. Revisions have been made to Part 26 (Case Management – Preliminary Stage) supplemented by new PD 26; Part 28 (The Fast Track and the Intermediate Track) and supplemented by new PD 28; and Part 36 (Offers to Settle). There are also various consequential amendments in other Parts. The most salient features of the different Parts and PDs, including the new intermediate track, are highlighted below.

Part 26 (Case Management – Preliminary Stage)

- 7.7 Part 26 has been revised to provide for matters relevant to the allocation and assignment of cases to the fast track and the new intermediate track, which has been reinstated following the 2021 Ministry of Justice consultation response. The normal bands for different types of case are set out in the Rules (at rule 26.15 for the fast

track, and at rule 26.16 for the new intermediate track). The complexity band to which a claim is assigned determines the level of FRC allowed under Part 45 and PD 45. In summary, Part 26:

- provides for the new intermediate track, including its scope and the matters the court shall have regard to when deciding whether to allocate a claim to that track;
- provides for claims allocated to either the fast track or the intermediate track, to be assigned to one of four complexity bands and the matters the court shall have regard to when deciding the complexity band to which a claim should be assigned; and
- specifies those claims which must be allocated to the multi-track, so will not be subject to fixed costs.

7.8 The scope of the fast track and the new intermediate track is set out in rule 26.9. The scope of the new intermediate track is at rule 26.9(9). There are some cases which, because of complexity or otherwise, will not be suitable for allocation to the fast track or intermediate track. Accordingly, rule 26.9(10) specifies a number of claims which must be allocated to the multi-track and, so, will not be subject to FRC in any circumstances. The exceptions are:

- A mesothelioma or asbestos lung disease claim.
- A claim for clinical negligence, unless (i) the claim is one which would normally be allocated to the intermediate track; and (ii) both breach of duty and causation have been admitted.
- A claim for damages in relation to harm, abuse or neglect of or by children or vulnerable adults.
- A claim that the court could order to be tried by jury if satisfied there is in issue a matter set out in section 66(3) of the County Courts Act 1984 or section 69(1) of the Senior Courts Act 1981.
- A claim against the police involving an intentional or reckless tort, or relief or relief or remedy in relation to the Human Rights Act 1998. This exclusion does not apply to a road accident claim arising from negligent police driving, an employer's liability claim, or any claim for an accidental fall on police premises.

7.9 PD 26 has been amended by way of substitution in consequence of the changes to Part 26.

Part 28 (The Fast Track and the Intermediate Track)

7.10 Part 28 as amended makes provision about the management of cases allocated to the fast and intermediate tracks, including provision regarding NIHL claims allocated to the fast track. As far as possible, the amendments provide a consistent approach to case management in the fast track and intermediate track, while making separate provision for each track as necessary.

7.11 PD 28 has also been amended by way of substitution to support the extension of FRC.

Part 36 (Offers to Settle)

- 7.12 The Rules update the arrangements regarding Part 36 offers to settle in low value personal injury cases, which are already subject to FRC, to cover those claims in the fast and intermediate tracks to which FRC will now apply.
- 7.13 In respect of those claims, where judgment against the defendant is at least as advantageous to the claimant as the claimant's Part 36 offer, rule 36.24 provides that costs will not be awarded, as is currently the case, on the indemnity basis under rule 36.17(4), but will be a percentage (35%) of the costs specified and calculated in accordance with rule 36.24(5).

Part 45 (Fixed Costs)

- 7.14 The Rules which implement the extension of FRC in civil cases are primarily those in Part 45, for which a new Part is substituted. There is a new PD 45, which contains the tables of FRC applicable to the relevant Section in Part 45.
- 7.15 A summary of the structure of the new Part 45 is as follows:
- Section I identifies the categories of case to which the Part as a whole applies and includes further provisions applying generally to Sections IV, VI, VII and VIII.
 - Section II is concerned with FRC on commencement of proceedings, entry of judgment and enforcement. Subject to minor amendments, the rules in this Section replicate those previously to be found in Section I of Part 45 and the tables of costs previously in that Section will, now, be in PD 45.
 - Section III is concerned with FRC in County Court debt recovery claims by HMRC. Again, subject to some minor amendments, the rules in this section are similar to those previously to be found in Section II of Part 45. Again, the tables of costs previously in that Section will now be in PD 45.
 - Section IV is concerned with FRC in claims proceeding through the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the RTA Protocol) and the Pre-action Protocol for Low Value Personal Injury Claims (Employers' Liability and Public Liability) Claims (EL/PL Protocol). These provisions were previously to be found in Section III of Part 45. The tables of costs previously in that section will now be in PD 45.
 - Section V is concerned with FRC in those claims where there has been a failure to comply with or continue under the Pre-Action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents or the Pre-Action Protocol for Low Value Personal Injury (Employers Liability and Public Liability) Claims. These provisions were previously to be found in Section IIIB of Part 45.
 - Section VI is concerned with FRC in all fast track cases.
 - Section VII is concerned with FRC in intermediate track cases.
 - Section VIII is concerned with FRC in NIHL cases allocated to the fast track.
 - Section IX is concerned with disbursements in claims to which Sections IV, VI, VII and VIII of Part 45 apply.
- 7.16 The fixed costs which are allowed in any claim to which Part 45 applies are those specified in the relevant tables in new PD 45. In particular, Tables 12 and 13, 14 and 15 specify the FRC applicable to cases allocated to the fast track, intermediate track

and NIHL claims, respectively. The FRC matrices, which were set out in Sir Rupert's 2017 report on FRC, have been updated for inflation using the January 2023 Services Producer Price Index (SPPI). The FRC figures in PD 45 have also been rounded to two significant figures, to ensure that the extended FRC regime commences with a clearer set of figures.

7.17 Numerous changes have been made to Part 45 to facilitate the extension of FRC. In particular:

- Rule 45.1 exempts housing claims, as defined in the rule, from the extension of FRC. The implementation of FRC for these claims will be delayed for two years from October 2023 pending further work. These cases will be allocated to the appropriate track (generally the fast track), as now, but will not be subject to FRC for the duration of the delay.
- Rule 45.5 provides that where, in a claim to which Section VI or VII of Part 45 applies, more than one claimant is represented by the same legal representative, each claimant in whose favour a costs order is made will be entitled to their own costs. This is subject to exceptions. In particular, if it considers that it is in the interests of justice to do so, having regard to whether the claim of each claimant arises from the same or substantially the same facts and gives rise to the same or substantially the same issues, the court may order that additional claimants are each entitled only to 25% of the principal claimant's FRC. The court shall consider making such an order at allocation or assignment (see rule 26.7(9)).
- Rule 45.7 provides that if in any case to which Section VI or Section VII applies, (a) the defendant brings a counterclaim and (b) the court makes an order for the costs, the rules shall apply as if the counterclaim were a claim. However, there are exceptions: first, this rule will not apply where the only remedy sought by the counterclaim is a defence to the claim; and secondly, where in a claim to which the RTA Protocol applies there is a counterclaim which does not include a claim for personal injuries, any order for costs shall be for a sum equivalent to one half of the applicable Type A and Type B costs in Table 10.
- Rule 45.10 provides that the court may consider a claim for an amount of costs (excluding disbursements) which is greater than the FRC referred to in Section VI, Section VII or Section VIII of Part 45 where:
 - (a) a party or witness for the party is vulnerable;
 - (b) that vulnerability has required additional work to be undertaken; and
 - (c) by reason of that additional work alone, the claim is for an amount that is at least 20% greater than the amount of FRC.
- For claims where FRC are, in part, calculated by reference to the damages agreed or awarded, rules 45.45(1)(a)(ii) (for the fast track) and 45.50(2)(b)(ii) (for the intermediate track), assign notional values for those claims for, or which include, non-monetary relief (NMR). In claims including both monetary and NMR, the amount of FRC will be calculated by reference to both the damages awarded and the assigned value for NMR taken together.
- What was formerly in Section VII of Part 45 (which is concerned with costs limits in Aarhus Convention claims) has been moved to Section IX in Part 46 (Costs special cases). Subject to minor amendments, these provisions are unchanged.

Transitional Provisions

- 7.18 Insofar as they apply to the extension of FRC, allocation, case management and offers to settle, amendments made by these Rules will apply to claims where proceedings are issued on or after 1 October 2023, save for personal injury and disease claims. The new FRC regime will apply to personal injury claims where the cause of action accrues on or after 1 October 2023; and will only apply to disease claims where the letter of claim has not been sent to the defendant before 1 October 2023. If, at any point, the amounts of fixed costs specified in the tables in Practice Direction 45 are changed, new rule 45.18 provides that a reference to an amount in those tables is a reference to the amount applicable to a claim on the date that proceedings are issued, notwithstanding that the amount might be subsequently changed.

Consequential Amendments

- 7.19 Consequential amendments have also been made by these Rules, to facilitate the extension of FRC, in Part 2, Part 3, Part 16, Part 21, Part 27, Part 29, Part 39, Part 44, Part 46, Part 52, Part 54, Part 55, Part 63, and Part 65.

8. European Union Withdrawal and Future Relationship

- 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 FRC are already in force for most lower-value personal injury cases in the fast track. As is covered in section 7, these amendments extend FRC across the fast track and in the new intermediate track, with exceptions as outlined above.

10. Consultation outcome

- 10.1 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). The 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.
- 10.2 The genesis of the proposals and subsequent work on the Rules was a report on extending FRC produced by (as he then was) Lord Justice (Sir Rupert) Jackson in July 2017. Jackson’s 2017 report on FRC is available to read [here](#). The Ministry of Justice consulted on the implementation of these proposals from March to June 2019 and responded to that consultation in September 2021 (see below).
- 10.3 In March 2019, the Ministry of Justice published a consultation entitled “Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson’s Proposals”. The consultation ran from 28 March 2019 to 6 June 2019, during which time 149 responses were received. The consultation document is available to read [here](#).

- 10.4 The Ministry of Justice consulted on the central recommendations of Sir Rupert’s 2017 report on FRC, with two exceptions. Sir Rupert recommended:
- (i) The extension of FRC across the fast track, including a new process and separate grid of costs for NIHL claims valued below £25,000.
 - (ii) The introduction of a new, intermediate track and corresponding FRC for less complex claims from £25,000 to £100,000.
 - (iii) The extension of the “Aarhus” rules across all judicial review (JR) cases, as well as costs budgeting in “heavy” JR cases.
 - (iv) A Civil Justice Council (CJC) working group to be commissioned to devise bespoke process and an FRC regime for clinical negligence cases of up to £25,000. This work is being taken forward separately by the Department of Health and Social Care (DHSC).
 - (v) A voluntary pilot of capped costs in business and property cases up to £250,000.
- 10.5 The Ministry of Justice consulted on these recommendations, with two exceptions:
- The first exception was that, while it agreed with the principle of extending FRC to all the cases recommended for the proposed intermediate track, the Ministry of Justice did not consider it necessary to introduce a new track. Instead, the consultation proposed assigning these intermediate cases to an expanded fast track. Following further engagement, it was decided to introduce a new intermediate track – as is outlined above in section 7 – which is broadly in line with Sir Rupert’s initial recommendation. This was noted in the Civil Procedure Rule Committee minutes of 7 October 2022.
 - The second exception was that the Ministry of Justice did not consult on pursuing the extension of the “Aarhus” rules across all JR cases.
- 10.6 In responding to this consultation, respondents were divided as to the benefits of extending FRC. As is set out in Chapter 3 of the 2021 consultation response, responses were clearly divided between claimant and defendant respondents, and included solicitors’ firms, barristers, legal representative bodies, insurance companies, charities, and the judiciary. Broadly speaking, those from defendant perspectives were generally supportive, while claimant respondents tended to disagree with the proposals. There were clear exceptions to this trend and there were instances where both categories of respondents agreed. Despite disagreement constructive suggestions were offered to make the policy proposals more workable.
- 10.7 The FRC consultation response document was published [here](#) on 6 September 2021. This response included further changes to what Sir Rupert originally proposed, including the provision of 25% additional FRC for additional claimants, and the explicit exclusion of certain categories of case such as actions against the police. The Government also outlined specific policy proposals on vulnerability, including the option of a percentage uplift on FRC of 25%, in line with the legal aid “Family Advocacy Scheme”, which could be available in respect of parties where the criteria are met, upon judicial certification. The position on vulnerability has developed since then, as is outlined below.
- 10.8 In May 2022, the Ministry of Justice consulted on two issues which had arisen from the Civil Procedure Rule Committee costs sub-committee’s drafting consideration of the extended FRC regime. 38 responses were received to the consultation on vulnerability provisions to be implemented as part of the wider extension of FRC, whilst 33 responses were received to the consultation on Qualified One-Way Costs

Shifting (QOCS); provisions on the latter consultation have been taken forward separately.

- **Vulnerability:** Having carefully considered the points raised, the Government decided to implement the rule changes on vulnerability as set out in the consultation without further amendment. These rule changes are included at rule 45.10 to 45.12 of the revised Part 45 (see section 7). No changes are proposed to the arrangements for disbursements for vulnerability in FRC cases. The vulnerability changes will take effect from 1 October 2023.

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 Civil Procedure Rule 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>
- 11.2 The Ministry of Justice has also issued a public notice on the Rules. This public notice seeks to provide those who will use the new rules, primarily judges and lawyers, with further information about the new arrangements.

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 the Impact Assessment which was prepared in 2021 dealt with questions of impacts on the private sector in particular. The Ministry of Justice prepared an Impact Assessment for its 2019 FRC consultation, and a revised version for the 2021 consultation response. We do not consider that any policy changes following the Impact Assessment are sufficient to warrant revising the IA: the exemption of housing cases from the FRC regime is significant, but it is only temporary.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses, save that applicable cases which may be brought or defended by small businesses will be subject to FRC.

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.
- 14.2 The Ministry of Justice, in conjunction with HM Courts and Tribunals Service, will ensure that the operation of the extended FRC regime is kept under review as appropriate.

15. Contact

- 15.1 Harry Chancellor at the Ministry of Justice email: harry.chancellor@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Steven Jarman, Deputy Director for Civil Justice & Law Policy, Access to Justice Directorate, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Lord Bellamy KC at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.