

Approved Minutes of the Civil Procedure Rule Committee

Friday 6th November 2020 (via video conference due to the Covid-19 Pandemic)

Members attending

Lord Justice Coulson (Chair)
Mr Justice Kerr
Mr Justice Trower
His Honour Judge Jarman QC
His Honour Judge Bird
Master Cook
District Judge Parker
District Judge Cohen
Brett Dixon
Masood Ahmed
John McQuater
Lizzie Iron
Dr Anja Lansbergen-Mills
David Marshall
Isabel Hitching QC
Tom Montagu-Smith QC

Item 1 Welcome, Apologies, Minutes, Action Log and Matters Arising

1. No member apologies were recorded, other than noting Masood Ahmed would be late due to a conflicting professional commitment. Apologies from David Parkin (MoJ) were duly noted and the Chair welcomed the MR Designate, The Rt Hon Sir Geoffrey Vos was present for the first part of the meeting.
2. The minutes of 09 October 2020 were **AGREED**.
3. The Action Log was duly **NOTED**, along with updates in relation to the following:
 - **AL(20)03 Part Transfer of Deeds Poll**
Master Cook provided an oral update to advise that the joint CPRC/FPRC Working Group had met and a paper is due before the next Family Rule Committee meeting to agree to the transfer of work to the Family Court. The provisional timetable suggests drafting to both CPRC & FPRCs in the New Year.
 - **AL(20)71 Urgent SI for Contempt (DJ powers etc)**
The Chair advised that the SI had been signed by the Minister on 3rd November and continues its Parliamentary passage, with the expectation that it comes into effect in early December. Thanks were conveyed to the secretariat and all those involved in expediting this at such pace.
 - **AL(20)85 CJC's Report on Anti-Social Behaviour Injunctions**
The Chair reiterated the importance of the Civil Justice Council's report (obtainable via this link <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/anti-social-behaviour-injunction-asbi-working-group/>) which includes recommendations (at pages 134 onwards and summarised at page 140, paragraph 516.) that require CPRC consideration. Accordingly, it was **RESOLVED** to form a sub-committee. HHJ Bird has offered to serve thereon.
It was **NOTED** that the Home Office and MoJ were in discussion on the related policy. **Action:** Secretary to write to all members setting out sub-committee vacancies and seek volunteers.

MR Designate - Introductory Comments from The Rt Hon Sir Geoffrey Vos

4. Sir Geoffrey Vos was pleased to attend the CPRC and have the opportunity to provide some introductory comments in advance of officially taking up office as the new Master of the Rolls, in January 2021. In setting out his views and vision for the future of civil justice generally, he explained that he has been busy meeting Designated Civil Judges from across the country and is very much looking forward to serving as the new Head of Civil Justice.

Item 2 Unspecified Claims

5. Sir Geoffrey Vos briefly set out the associated reform agenda and explained that the plan was to create a larger CPRC sub-committee, with HHJ Bird as the link between the CPRC and the Working Group led by a High Court Judge and operating under the guidance of the Deputy Head of Civil Justice. The importance of developing this and other digital projects in a way that supports the common-components programme was emphasised.
6. HHJ Bird added that the existing Private Beta under PD51S for unspecified claims and which was expanded in response to the pandemic, continues to provide a mechanism for firms to issue claims digitally. To date around 16,300 claims have been issued and further development is progressing with the expectation of providing a first draft of the screens to the sub-committee in early December. The future state plan is that multiple digital services can operate effectively by way of an application programming interface.
7. The Chair observed that the new sub-committee is expected to operate akin to the current OCMC (the pilot scheme for specified claims under PD51R) sub-committee. The governance of which allows for the CPRC to delegate wide powers to the sub-committee, because it is, "impossible" for the full rule committee to deal with every issue or development that arises and as such, regular updates are provided to the CPRC by the sub-committee Chair.
8. **Actions:** HMCTS/Secretary to programme in a paper to the CPRC regarding timeframes and working practices of the new sub-committee, should a steer be required.

Item 3 Lacuna Sub-Committee (LSC) Report CPR(20)43

9. Master Dagnall introduced the item by explaining that item LSC2020/17 will be deferred as Masood Ahmed is no longer able to be present.
10. Currently the LSC has circa 54 matters before it, some of which only relate to minor points of wording or updating. This month there are 10 items on which to report, and each was presented and discussed in detail. The following was **AGREED, subject to final drafting:**
 - **LSC2020/22** relates to Default Judgments in the Admiralty Court. CPR61.9 was probably overlooked when CPR12.3 was amended and there seems to be no reason for CPR61.9 not to be amended in the same way as was CPR12.3. The same policy considerations apply and the relevant Judiciary and Users' Committee all support the change to avoid uncertainty. Accordingly, the words "*at the date on which judgment is entered*" should be inserted after the word "*if*" in CPR61.9(i)(a), 61.9(i)(b) and 61.9(2).
Action: In consultation with the LSC, out-of-committee, Drafting Lawyers and Secretariat to include in the next available SI, as part of the common-commencement date updates, due to come into force in April 2021.
 - **LSC2020/14** relates to small claims recoverable expert fees and whether to correct PD27 Appendix C where it cites £200 rather than £750, otherwise it is inconsistent with paragraph 7.3 of the PD. Additionally, paragraph 7.3 of the PD is introduced by the words

“The amounts which a party may be ordered to pay under rule 27.14(3)(c) (loss of earnings and (d) (expert’s fees) are...” These references are incorrect and should be rule 27.14(2)(e) and (f) respectively.

Action: In consultation with the LSC, out-of-committee, Drafting Lawyers and Secretariat to include in the next available SI/PD Update, as part of the common-commencement date updates, due to come into force in April 2021.

- **LSC2020/15** relates to small claims loss of income whereby the costs provisions and limits are inconsistent, in that PD27 paragraph 7.3 provides for loss of income costs in small claims to be a maximum of £95 but PD45 provides for loss of income in exiting of Protocol claims to be a maximum of £90. The Chair sought clarification on whether such cost considerations were within the CPRC’s vires. Alasdair Wallace confirmed they were. It was agreed to equalise the amounts at £95 and refer to the Costs Sub-Committee the question of whether any increase should be proposed. Master Cook also raised a structural point on the way in which the Tables etc were constructed and this was **NOTED** although no action would be taken at this stage.

Actions: (i) In consultation with the LSC, out-of-committee, Drafting Lawyers and Secretariat to include in the next available SI, as part of the common-commencement date updates, due to come into force in April 2021 (ii) Costs Sub-Committee to consider amounts.

- **LSC2020/16** was referred to the LSC by District Judge Iyer and relates to fees for Small Claims Disposals without Hearings and CPR27.10 permitting small claims to be disposed of without a hearing, but that practices by the courts vary as to whether a fee is charged. HHJ Bird added the context of paper hearings and thus the relationship with local listing decisions. It was **AGREED** to ask the MoJ/HMCTS for clarity on its position and with a view to there being a consistent practice across the courts.

Action: Secretary to refer to the appropriate official/s to consider and report back in due course.

- **LSC2020/19** was referred to the LSC by (D)DJ Hovington and relates to CPR 83.19(4)(b) which suspends the issue of certificates of judgment in some CPR situations of applications to set aside the underlying judgment but not in others, and this may lack logic and coherence, in particular in relation to small claims. It was agreed to amend 83.19.(4)(b) to make it more extensive and provide a cross-reference in CPR40.14A.

Action: In consultation with the LSC, out-of-committee, Drafting Lawyers and Secretariat to include in the next available SI, as part of the common-commencement date updates, due to come into force in April 2021

- **LSC2020/20** was raised in consequence of Official Receiver -v- Skeene 2020 EWHC 1252 (Ch) and by Insolvency & Companies Court Judge Kyriakides. CPR32.12 prevents collateral use of witness statements outside the proceedings in which they are served, but there is no equivalent for affidavits. It was agreed to amend CPR32.12 in the interests of consistency to also apply to affidavits.

Actions: In consultation with the LSC, out-of-committee, Drafting Lawyers and Secretariat to include in the next available SI, as part of the common-commencement date updates, due to come into force in April 2021

- **LSC2020/21** relates to Company restorations and whether insurers should be notified. Mr Justice Martin Spencer’s comments in Holmes -v- S & B Concrete [2020] EWHC 2277 were reviewed. Responses from Judges of the County Court at Central London and the Chief Insolvency and Companies Court Judge were also considered and who had set out

in detail why they did not consider any rule changes necessary to require that notice be given to insurers where an application is made for restoration for the purposes of bringing a claim against the insured company. It was **RESOLVED TO TAKE NO ACTION and leave the position as it is.**

- **LSC2020/4** relates to CPR70 as to its interaction with Judgments Regulation enforcements and CPR71.2(2)(b) Making applications to Orders to Obtain Information from Judgment Debtors – Foreign Judgments. In Shefenacker -v- Horvat 2020 EWHC 506 questions arose as to whether and how CPR71 applied to foreign judgments, and while a solution was reached, the CPR wording appeared to raise “an oddity” and what was said to be its apparent meaning was departed from. It was agreed that Master Cook and Master Dagnall will liaise with Senior Master Fontaine and then consider the matter further. **Action:** Master Cook and Master Dagnall (as above).
 - Items LSC2020/5 (amend reference to “judgement debtor” to “person ordered to attend court”) and LSC2020/17 (re costs where a party has chosen not to seek a fee remission - consider whether to invite MoJ to review) are deferred due to lack of committee time. **Action:** Secretary/LSC to carry over for consideration at the December CPRC.
 - A District Judge member shall be assigned to the LSC, given a trend of county court matters being referred and this appointment can be finalised out-of-committee. **Action:** Secretary.
11. The Chair closed the item with thanks for the significant amount of work undertaken by sub-committee members on such a variety of topics.

Item 4 Contempt Consequentials CPR(20)44

12. Mr Justice Kerr introduced the matter by explaining that the various consequentials for consideration were made up of the balance of the proposals from the last meeting and two further, “fine-tuning” proposals, which were not raised during the consultation, but made to the sub-committee from within the judiciary as a result of publicity given to the new Part 81.
13. Thanks were recorded for DJ Parker’s contribution and report relating to the issues concerning Part 89 on Attachment of Earnings, which, it was noted, contains some separate points outside the ambit of contempt which may require further consideration at a later date. Thanks were also expressed for Katie Fowkes’ advice and assistance.
14. The proposals concerned amendments to: rule 65.45; PD 70 para 1.2; rule 71.2(7); rule 71.8; PD 71 para 7; PD 71 para 8; rule 74.40; rule 74.48; rule 81.8(2); rule 81.10; revocation of rule 83.2A and revocation of the transitional saving provision; new sub-rule 83.1(3); addition of new rule 83.14A and new sub-paragraph (g) to the list in rule 83.2(3)(a)-(f) of instances where the court’s permission is required; rule 83.27; amendment to heading above rule 89.1 and amendment to rule 89.1. Each proposal was considered and discussed in turn:
15. Part 65, within it, rule 65.47 includes (with reference to the Policing and Crime Act 2009 and the Anti-Social Behaviour, Crime and Policing Act 2014) outdated terminology. An “order of committal” is now, in Part 81, defined as “the imposition of a sentence of imprisonment (whether immediate or suspended) for contempt of court...” (see rule 81.2). Accordingly, to bring rule 65.47 into line with the new Part 81, it was **AGREED to:**
- replace rule 65.47(4) with the following “(4) *A contempt application may be issued even if the arrested person is not dealt with within the period in sub-paragraph (3)(a).*”

- remove 65.47(5)

16. PD70 concerns General Rules about Enforcement of Judgments and Orders. PD70 includes references to, “sequestration” which has been removed from Part 81 on the ground that it is difficult for unrepresented parties to understand. Sequestration as a punishment for contempt (“contempt sequestration”) is now expressed in the phrase “confiscation of assets” (see rule 81.2). The sub-committee have considered whether it was suitable to dispense with the word “sequestration” throughout the CPR, but as it is a term which appears in various statutes, not only the Debtors Act 1869 s.8 as amended, but in modern statutes as well, it was concluded that this is not practical. However, it is appropriate to remove the obsolete reference to the old rule. It was **AGREED** to replace paragraph 1.2 of PD 70 with the following:

“In addition the court may make the following orders against a judgment debtor-
(1) an order in contempt proceedings under Part 81, but only if the debtor is found in contempt of court; and
(2) in the High Court, a writ of sequestration in an application under Part 83.”

17. Part 71 & PD71 relates to Orders to Obtain Information. This consequential relates to Penal Notices. The sub-committee maintain the view that it is not appropriate that all penal notices in all contexts should be changed. However, in this instance, any contempt proceedings arising from non-compliance with an order to attend court will be governed by rule 71.8 and Part 81. It was **AGREED** to adopt the same wording as in the generic definition of a penal notice in r.81.2. To do so, it requires replacing, in rule 71.2(7), the words “*imprisoned or fined, or your assets may be seized*” with the words “*punished by a fine, imprisonment, confiscation of assets or other punishment under the law*”.

18. Katie Fowkes highlighted the proposed use of the phrase, “*or other punishment under the law*” as putting the CPRC at risk of being reported by the Joint Committee on Statutory Instruments (JSCI) as part of the Parliamentary scrutiny process, because the JCSI had reported the FPRC on it previously; this was discussed and duly **NOTED**.

19. Kerr J explained that this text was used in the October SI which introduced the substantive changes to Part 81 and no such reporting was made then. Indeed, the words “*under the law*” were chosen to provide reassurance, should it be needed, that there was no attempt to legislate by expanding the range of available punishments beyond those the law permits and by doing so it should serve to assist users of the rules by including it in the main rule. It was **AGREED** to amend rule 71.2(7) as follows:

“(7) An order under this rule will contain a notice in the following terms, or in terms to substantially the same effect—

‘If you the within-named [] do not comply with this order you may be held to be in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law.’”

20. It followed that it was deemed appropriate to update the language of rule 71.8 so that it is consistent with the new Part 81. In particular, the phrase “committal order” should no longer be used as an “order of committal” is now confined by rule 81.2 to a sentence of imprisonment for contempt of court (suspended or immediate). Accordingly, amendments to rule 71.8(2)-(4) were **AGREED as drafted** so as to align the language of rule 71.8 with the new Part 81.

21. By the same reasoning, amendments to PD71 were **AGREED as drafted**, being corresponding changes at paragraphs 7.1 and 7.2 and 8.1 - 8.6, which are, in part, repetitious of what is in the rules.

22. Part 74 relates to Reciprocal Enforcement and was recently revisited due to Brexit. The position is uncertain in the event of a “no deal” outcome. However, the sub-committee have considered points in relation to service and certification under Article 6. The amendment to rule 74.40 was **AGREED as drafted**, but on the basis that the amendment will only be needed if r.74.40 survives the withdrawal negotiation process. Similarly, amendment to rule 74.48 was **AGREED as drafted subject to** the withdrawal negotiation process.

23. Part 83 relates to enforcing judgments of various kinds. Of particular consideration, has been the need to decouple contempt sequestration, which is now contained exclusively within the phrase “confiscation of assets” of the reformed Part 81, and non-contempt sequestration, which needs to be brought back within what is now Part 83. The following was agreed:

- revocation of rule 83.2A and revocation of the transitional saving provision were **AGREED**;
- a new sub-rule 83.1(3) was **AGREED as drafted, subject to** deleting the words “in contempt proceedings under Part 81”;
- the addition of new rule 83.14A was **AGREED as drafted**;
- DJ Parker raised an additional point regarding instances where the court’s permission is required, whereupon it was **AGREED, subject to final drafting to** add a new sub-paragraph (g) to the list in rule 83.2(3)(a)-(f) of instances where the court’s permission is required.

Post Meeting Note: it was agreed out-of-committee that the new (g) should read: “an application is made for a writ of sequestration under rule 83.14A”.

- amendment to rule 83.27 **AGREED as drafted, subject to** the addition of, “under Part 81” being added at the end.

24. Part 89 concerns Attachment of Earnings (AE), which are not contempt proceedings, however, as the AE procedure includes a risk of imprisonment where a debtor’s earnings are sought to be attached there is a corresponding need for procedural safeguards similar to those needed in contempt proceedings. Part 89 may therefore benefit from further consideration, more broadly, with a view to strengthen procedural safeguards where a debtor is at risk of imprisonment. However, that exercise is not directly consequential on the recasting of Part 81, but some minor amendments now, will make clear in Part 89 that proceedings under that Part are not contempt proceedings. The following was **AGREED**:

- that rule 89.1 should be amended by changing the heading, renumbering the existing text as sub-rule (2) and adding a new sub-rule (1) to state that, “*Part 81 does not apply to proceedings under this Part.*”
- reform of Part 89 can be addressed as a separate exercise in due course.
Action: In consultation with the Chair and DJ Parker, the Secretariat is to timetable the matter into the CPRC programme.

25. The proposals relating to Part 81 concerning Robing, at r.81.8(2) and Civil Restraint Orders within r.81.10, were **NOT AGREED**, because it was considered best to allow the reformed Part 81 to bed in and review the issues in future if required.

26. **Action:** Drafting Lawyers and Secretariat to include all agreed contempt consequential in the next available SI/PD Update, as part of the common-commencement date updates, due to come into force in April 2021

27. Implications for Court Forms were also reviewed. Specific issues were raised in relation to the High Court Form N67 (template for a writ of sequestration in contempt proceedings); Form PF87 (template for a request for a writ of sequestration) which appears not to be confined to non-contempt sequestration, as it should now be; Form 210C, which refers to “Part 81, Section 4” in the context of certain orders that can be made under the Charities Act 2011 s.336, by the Charity Commission, breach of which is treated as a contempt of court and this outdated reference to the old Part 81 no longer has effect.
28. It was **RESOLVED** to mandate the Forms Sub-Committee to conduct a review of said forms and to conduct a wider trawl of court forms more generally as that might unearth other examples of forms that similarly need updating to catch up with the replacement of the old Part 81 with the new. **Action:** HMCTS and Secretariat to refer matters to the Forms Sub-Committee in the usual way.

Item 5 Covid-19 & Court Recovery:

Provision for Emergency Rule/PDs CPR(20)45

29. Alasdair Wallace set out the rationale for the proposal to provide an express provision within the CPR to enable rules and PDs to be modified by PD where it is necessary to deal with a public emergency. The Court of Appeal’s judgment in *Arkin -v- Marshall* provided reassurance in relation to the vires under the piloting provisions, but a new rule would give the CPRC an alternative to “piloting” which may be more appropriate in certain circumstances. The intention is that a mirroring provision will be made within the Family Procedure Rules.
30. Preliminary drafting was before the CPRC which proposed a short new rule 51.3 and this was discussed. Kerr J also raised whether it was appropriate and opportune to revoke rule 51.1 and the 19 redundant paragraphs of PD 51A (Transitional Arrangements). It was **AGREED subject to final drafting to:**
- introduce a new rule 51.3 to deal with public emergencies.
 - revoke r51.1 and PD51A
31. **Actions:** (i) Drafting Lawyers and Secretariat to include in the next available SI, as part of the common-commencement date updates, due to come into force in April 2021. (ii) Secretary to liaise with FPRC Secretariat as regards a mirroring provision.

PD51ZA Extensions of Time Limits

32. The Chair noted that various enquiries from publishers and practitioners, including the Law Society have been raised via the secretariat as to whether this PD, which expired on 30 October 2020, will be extended. The views of Designated Civil Judges have also been canvassed, but there is no appetite for further extensions. As such, it was **AGREED NOT TO EXTEND PD51ZA.**

Item 6 RTA Sub-Committee and the Whiplash Reform Programme CPR(20)46 & CPR(20)47

33. This matter was last before the CPRC at the October meeting, when various points of principle were discussed.
34. The Chair opened the item by explaining that the views to be expressed are preliminary at this stage, because not all the screens are yet available. Detailed points are still being considered and an opportunity for debate on the wider points of principle may still be required but are not for now.

35. HHJ Bird began by providing a brief update on progress since the last meeting. The position being that, overall, the sub-committee and MoJ continue to work together constructively, but there is much still to do.
36. A draft PAP was before the committee and **NOTED**, as were the respective reports from the MoJ and Sub-Committee, within which it was also **NOTED with thanks** that Lizzie Iron (Lay Advice Sector representative) is now involved in providing input to MoJ in addition to the work of the Sub-Committee.
37. A detailed debate followed. Jayne Bowman (senior MoJ policy official) along with the programme's principal drafting lawyers, contributed to the discussion. A summary of the points aired and on which a steer was provided is as follows:
- **Medical reports and pre medical offers** – the CPRC stressed the importance of clarity within the drafting and alignment of the portal design to ensure that users were not misled.
 - **The circumstances in which a Claimant Litigant in Person (LiP) is entitled to obtain a second medical report** – HHJ Bird was interested in whether and how this point was ventilated during the course of the CPRC's debate/s in relation to the present (2013) portal at para.7.8B of the PAP for Low Value PI Claims in Road Traffic Accidents, which refers to the need for a claimant to serve a copy of a first medical report if they want to rely on a second medical report. The Chair questioned the helpfulness of past minutes on this point because the present portal is for use by legal representatives and not LiP, thus, the design considerations were probably different. Nonetheless, the Secretary undertook to investigate and report back to HHJ Bird.
 - **Statement of Truth** and whether a compensator's offer should be confirmed by a Statement of Truth and if so, how and when that takes place – the CPRC concluded that given the CPR's Overriding Objective provides for each party to be treated the same, by ensuring they are on an equal footing, that that must be the fundamental consideration when addressing this issue.
 - **Transfer of claims from the present (2013) RTA Portal to the new RTA Small Claims Portal** - the CPRC concluded that the current drafting at para 5.2 of the draft PAP required recasting.
38. The Chair closed with thanks for the considerable amount of work being undertaken at sub-committee level and reiterated the view of the MR Designate regarding the reform agenda for digitalising the county court in the context that any new online provision should be compatible with other IT developments, and this was noted.
39. **Actions:** (i) Matter to be scheduled in to return (ii) Secretary to provide HHJ Bird with past minutes (if any) relating to the above point concerning the provision of a second medical report.

Item 7 Costs Sub-Committee

40. This item was presented in two parts and each was discussed in turn:

Part 36 Offers & Interest CPR(20)48

41. Richard Viney explained that these issues were referrals on recommendation of the LSC and endorsed by the CPRC in March. The March CPRC concluded that there are some inconsistencies in case law, so the Costs Sub-Committee undertook to review and report back. The referrals considered two Court of Appeal judgments. The first being King v City

of London [2019] EWCA Civ 2266 (LSC2020/02) where Arnold LJ felt that the CPRC should look at whether Part 36 offers should be capable of being made exclusive of interest. The costs sub-committee concluded that a Part 36 offer should not be permitted to exclude interest and presented a proposed drafting solution by way of an amended paragraph 19 within PD47 and this was **AGREED**.

42. **Action:** Drafting Lawyers and Secretariat to include in the next available SI, as part of the common-commencement date updates, due to come into force in April 2021
43. The next issue discussed relates to Calonne v Dawnus [2019] EWCA Civ 754 (LSC2020/01) in which it was considered whether Part 36 Offers should be made with provisions for interest following expiry of the “relevant period” for acceptance. The sub-committee presented two potential solutions with preliminary drafting which were discussed. The debate highlighted the desire to make the drafting as clear as possible, particularly with a litigant in person in mind. It was **AGREED** to:

- amend CPR 36.5(5) thus:

“Part 36 offer to accept a sum of money may make provision for accrual of interest on such sum after the date specified in rule 36.5(4). If such an offer does not make any such provision it is treated as inclusive of all interest up to the date of acceptance.”

- not to change CPR 36.13(8) at this stage.

Rule 3.17(3) CPR(20)49 and PD3E CPR(20)50

44. Master Cook explained that following the last suite of costs changes, in which previous rules/PD/Guidance had been rationalised/consolidated, some essentially minor consequentialia had been identified, but required consideration to avoid unintended consequences.
45. The first issue is that some out of date Guidance text was inadvertently imported into r.3.17 and thus an amendment to r.3.17 which puts it into the form it was meant to be was proposed; it was **AGREED to amend r.3.17 as follows:**

*“(3) Subject to rule 3.15A, the court (a) may not approve costs incurred **up to and including before** the date of any costs management hearing; but (b) may record its comments on those costs and take those costs into account when considering the reasonableness and proportionality of all budgeted costs.”*

46. Two other matters were raised for the record because a question arose over the summer whether they had been left out of the reforms by accident or due to a change in policy; they were neither. The two items deliberately left out were old PD3E paragraph 3 and old Guidance 10. The former was an encouragement to parties to consider costs budgeting at an early stage. It was left out because it was felt that while it will have had a value when costs management started, it was now redundant. The latter was a definition of budgeted and incurred costs. This was left out because the reforms mean there is now a rule which makes the relevant provision. No changes were, therefore, proposed and this was duly **NOTED**.
47. The second issue was put forward following commentary in *Civil Procedure News*, and raises three amendments to PD3E which are minor but should be made for the sake of clarity and consistency with other rules and PDs. Following discussion, it was **AGREED to amend PD3E as follows:**

- paragraph 4 (b) of PD3E to replace the word, “*budgeted*” with, “*total costs (incurred and estimated)*”.
- paragraph 10 (a) of PD3E to replace the word, “*Interlocutory*” with, “*interim*”.
- the Disclosure section of the Table in section D of PD3E to replace, “*third party disclosure*” with, “*non-party disclosure*”.

48. The item was closed with thanks to Birss J who had chaired the sub-committee during his term on the CPRC. Given that these residual matters were now concluded (and the decision to await the Supreme Court’s judgment on QOCS), it was an appropriate time to officially stand down. Richard Viney is to stay involved pro tem. Birss J paid tribute to all sub-committee members past (including Andrew Underwood), intermediate (Richard Viney), and present (HHJ Lethem, Master Cook and David Marshall).

Item 8 Vulnerable Witnesses and Parties in Civil Proceedings CPR(20)51

49. DJ Cohen opened the item by setting out the background, in that it was last before the CPRC substantively at the May open meeting and it stems from the Civil Justice Council’s (CJC) February 2020 report in which suggested wording for rule and PD amendments were included.

50. The proposals formed a suite of changes and each was discussed in turn.

51. The first being a proposed amendment to the CPR’s Overriding Objective by way of adding, “*and can participate fully in proceedings, and that parties and witnesses can give their best evidence;*” at the end of CPR 1.1(2)(a). A new CPR 1.6 entitled, “Participation of vulnerable parties or witnesses” was also proposed, in order to introduce a new, bespoke, PD. The Chair supported that approach and had no issues with the proposed drafting to amend r.1.1(2)(a). However, when reviewing the draft PD, views were ventilated from across the committee in relation to the drafting and specifically at paragraph 2 in its use of the phrase, “*practicable*” rather than, “*proportionate*”. It was **AGREED to:**

- amend rule 1.1 (the Overriding Objective) as drafted
- introduce a new rule 1.6 (to provide for a new, bespoke, PD) as drafted
- introduce a new Practice Direction, PD 1A, subject to final drafting to recast paragraphs 2 & 7 respectively:

2. *Vulnerability of a party or witness may impede participation and also diminish the quality of evidence. ~~and~~ The court should take all ~~practicable~~ proportionate measures to address these issues in every case.*

7. *If the court decides that a party’s or witness’s ability to participate fully and/or give best evidence is likely to be diminished by reason of vulnerability, the court ~~will~~ may identify the nature of the vulnerability in an order and may order appropriate provisions to be made to further the overriding objective.*

52. In terms of costs and proportionality, the CJC suggested a form of wording by way of amendment to CPR 44.3. DJ Cohen emphasised that this is the rule which regulates the basis of assessment of costs; it is not part of the fixed costs regime. The proposed amendment to CPR 44.3 relates to the question of proportionality. CPR 44(2)(a) states that where costs are to be assessed on the standard basis, the court will only allow costs which are *proportionate* to the matters in issue. CPR 44(5) states that costs are proportionate if they bear a reasonable relationship to certain factors listed there. The CJC

report suggested that an additional factor be added, by way of adding (f) to r. 44.3(5) to address the issue of vulnerability. The CJC's suggested form of words has been adopted in its entirety by the sub-committee and this was **AGREED as drafted**.

53. A discussion ensued as to the purpose and value of consulting on the changes before they enter into force. DJ Cohen explained that there was no firm recommendation from the sub-committee. It was conscious that as the CJC had already consulted widely the actions of the CPRC would not be a surprise because they are based on the recommendations of the CJC. Amrita Dhaliwal explained that the MoJ's position was that the issues are particularly far reaching, related as they are to wider work on, for example, the Domestic Abuse Bill which will, in due course require the involvement of the CPRC; as such there is merit in consulting further in case of potential unintended consequences. The discussion concluded with a decision not to consult any further on the resolutions from today, save for the MR Designate's views on the matter.
54. However, there may be merit in further consultation as proposals in relation to any changes to the Fixed Recoverable Costs (FRC) regime are advanced and on the wider point concerning relevant clauses within the Domestic Abuse Bill.
55. It was **RESOLVED** that the sub-committee continue to liaise with the MoJ (i) as part of their consideration of possible rule amendments concerning discretionary increases in fixed, scale and capped costs to reflect extra work caused by a vulnerability issue (ii) concerning the Domestic Abuse Bill.
56. A letter from FOIL (Forum of Insurance Lawyers) which essentially focused on implications of and changes to the FRC regime and which has been copied to the responsible policy lead at the MoJ, was duly **NOTED**. As work is still ongoing, a definitive timetable was not yet known as to when any related consultation would be undertaken, nor when MoJ would be reporting to the CPRC.
57. The Chair observed that the work on FRC was reasonably urgent and did not want it to take a year to come to fruition.
58. The CJC's current review of PAPs was also **NOTED** and it was **AGREED** to:
- write to the CJC flagging the vulnerability issues in the PAPs as part of their preliminary survey
 - await the outcome of the CJC review before considering vulnerability and PAPs in any further detail
59. The item closed with thanks to the sub-committee and to Alasdair Wallace.
60. **Action:** DJ Cohen/Secretariat to write to (i) the MR Designate setting out the CPRC's resolutions and seeking any comments to the contrary and subject to that, including said reforms in the next mainstream SI/PD Update (ii) the CJC to highlight the CPRC's work and ask that the Council consider including vulnerability within the terms of reference being compiled as part of their preliminary survey in readiness of its substantive review of PAPs and to note that the CPRC's sub-committee will await the outcome of the CJC's review before considering vulnerability and PAPs in any further detail.

Item 9 Competition-related PD Changes post Brexit CPR(20)52

61. Mr Justice Kerr explained that in October the CPRC were asked to consider changes to the competition related Warrants PD and which were ultimately agreed out-of-committee. The Department for Business, Energy and Industrial Strategy (BEIS) have also contacted the MoJ concerning this additional suite of proposed changes which concern other

competition-related amendments, but which also need to be made to the 107th PD Update. The 107th PD being part of a package of Brexit related measures, including the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 and timed to enter into force on 31st December 2020 i.e. Implementation (IP) Completion Day.

62. Essentially, they amount to uncontentious minor changes consequential on (i.e. to ensure alignment with) the Withdrawal Agreement to reflect changes to substantive competition law made and to be made by two further, Brexit related, SIs.
63. The Brexit Sub-Committee have reviewed the proposals and Kerr J set out the various proposed amendments in detail; they relate to PD52D, PD-Competition Law, PD – Applications for a warrant under the Competition Act 1998 and three further, less intractable amendments to the 107th PD Update which relate to PD31C and to update contact details to reflect the Competition and Markets Authority's correct postal address. All the amendments were **AGREED**.
64. **Action:** Drafting Lawyers and Secretariat to include in a standalone "Brexit related" PD Update, to come into force by/on IP Completion Day.

Item 10 Possible Items for Future Business & Any Other Business:

65. **Exchange of information between the Criminal and Civil Courts.** The Secretary drew members' attention to the letter from the Criminal Procedure Rule Committee & accompanying Annex, which was duly **NOTED** and it was **RESOLVED** not to take any further action at this point, given that the matter is not urgent and the current rules already allow for information about criminal cases, required by parties to civil proceedings, to be obtained. It may also be something that needs to be considered within the context of the wider vulnerability work.
66. **Civil Justice Council's Review of PAPs.** The Chair reiterated the Civil Justice Council's review of Pre-Action Protocols (PAPs) in which they are seeking preliminary views from interested parties on the purpose and operation of PAPs and what, if any, reforms are needed. The survey closes on Friday 18th December 2020 and members were encouraged to respond. It can be accessed here: <https://www.surveymonkey.co.uk/r/CJCPAPSURVEY>

C B POOLE
November 2020

Attendees:

Nicola Critchley, Civil Justice Council
Carl Poole, Rule Committee Secretary
Amrita Dhaliwal, Ministry of Justice
Alasdair Wallace, Government Legal Department
Katie Fowkes, Government Legal Department
Andy Currans, Government Legal Department
Andy Caton, Judicial Office
Kim Webb, Judicial Office
Alana Evans, HM Courts & Tribunals Service
Emily Wickens, HM Courts & Tribunals Service
His Honour Judge Lethem
Master Dagnall
The Chancellor (Items 1 & 2)
Mr Justice Birss (Items 1 & 2)
Sam Allan (Judicial Office) (Items 1 & 2)
David Hamilton, Ministry of Justice
Jayne Bowman, Ministry of Justice (Item 6)

Andrew Parker, Beachcroft Legal (Item 6)
Jonathan Scarsbrook, Irwin Mitchell (Item 6)
Andrew Underwood (Item 6)
Richard Viney (Item 7)
Helen LeMottee, Government Legal Department (Item 6)
Thomas David, Department for Business, Energy and Industrial Strategy Legal (Item 9)