

## Approved v2

*Typographical error amended in para 54 to correct the number and title of form therein.*

### Minutes of the Civil Procedure Rule Committee

Friday 7<sup>th</sup> July 2023, conducted in a hybrid format, namely, at The Rolls Building (Royal Courts of Justice), Fetter Lane, London and via Video Conference.

#### Members attending

Lord Justice Birss, Deputy Head of Civil Justice (Chair)

Mr Justice Trower

Master Cook (until Item 7)

His Honour Judge Jarman KC

His Honour Judge Bird

District Judge Clarke

Isabel Hitching KC

David Marshall

Ben Roe

Ian Curtis-Nye

Elisabetta Sciallis

#### Apologies

Members: Mr Justice Kerr (sitting); Dr Anja Lansbergen-Mills (maternity leave); Virginia Jones (annual leave); Tom Montagu-Smith KC (unwell). Officials: Rosemary Rand, HM Courts & Tribunals Service (annual leave).

#### Item 1 Welcome and Introductory Remarks

1. In welcoming everyone to the meeting, whether in person or joining remotely, the Chair observed the following:
  - **New member representing the lay advice and consumer affairs sector.** The Chair was pleased to welcome and introduce Elisabetta Sciallis, who joins the CPRC as a second member representing the lay advice and consumer affairs sector. Ms Sciallis has wide ranging experience and expertise. Currently, she is the Principal Policy Advisor in Consumer Rights for “Which?” Ms Sciallis is also a member of the Law Society’s civil justice committee and a mediator. Prior to that, she worked as an executive for the UK European Consumer Centre at the Chartered Trading Standards Institute and, as a qualified, non-practicing lawyer, she also lectures in consumer law at Brunel University.
  - **Valedictory for Mr Justice Kerr.** As the Master of the Rolls noted at the May open meeting, Kerr J has made an outstanding contribution to CPRC business, since 2016. Such was the benefit of his contributions, that his term of office was extended for a further year, beyond the usual maximum six years, to 31<sup>st</sup> August 2023. The Chair highlighted Kerr J’s work leading the open justice reforms to CPR Part 39; the scale of the Brexit preparations; the wholesale reform of the rules on Contempt; his rapid work in response to and during, the Pandemic and, over the past couple of years, his drive and determination chairing the s.2(7) Sub-Committee, working to simplify the CPR. Kerr J has also deputised for the Chair. His involvement as a member of the committee will be very much missed.
  - **Visit to the County Court at Burnley.** In his capacity as Deputy Head of Civil Justice, the Chair was pleased to have visited DJ Clarke and the team at Burnley County Court recently. **THANKS** were extended to all concerned.

2. **Minutes:** The minutes of the meeting on 9<sup>th</sup> June 2023 were **AGREED** subject to two modest typographical amendments in paragraph 43 and 48 respectively.
3. **Action Log and Matters Arising:** The action log was duly **NOTED** and specific reference made to the following:

- **AL(22)121 Court Documents Sub-Committee: Cape -v- Dring**

The Chair reiterated that at the CPRC meeting on 12<sup>th</sup> May 2023 and following internal consultation, it was resolved to form a cross-jurisdictional sub-committee to consider the UKSC judgment in Cape Holdings -v- Dring and a related point from another judgment (HRH The Duchess of Sussex v Associated Newspapers Limited [2020] EWHC 2160 (Ch)) as identified by the Lacuna Sub-Committee. The sub-committee is chaired by Lord Justice Bean, with representation from all jurisdictions, Judicial Office, MoJ and HMCTS. District Judge Clarke is the CPRC member.

The minutes of the sub-committee's inaugural meeting, on 19<sup>th</sup> June 2023, were duly **NOTED**.

The draft terms of reference were also reviewed and **RATIFIED**.

The indicative plan is for the sub-committee to present its report / recommendations at the December 2023 CPRC meeting. **Action:** In consultation with the sub-committee, the Secretariat is to programme in time at the December meeting.

- **Inaugural meeting of the Online Procedure Rule Committee (OPRC)**

It was **NOTED** that the first OPRC meeting took place on 26<sup>th</sup> June, now that the three public appointments are in place. One of whom is Brett Dixon, a former CPRC member. A second meeting is due before summer recess, at which the structure of sub-committees should be established. Regular reports on OPRC activity will be provided to all (civil, family and tribunals) procedure rule committees on an ongoing basis.

His Honour Judge Jarman KC remarked that he had been asked to enquire as to whether a Welsh member would be appointed to the OPRC. **Action:** the Chair will relay this to the MR and make enquiries out-of-committee.

### **Item 3 Domestic Abuse Protection Orders (DAPO) Pilot Scheme**

4. David Hamilton and Maja Vojnovic (MoJ) were welcomed to the meeting.
5. The Chair provided some introductory remarks, reiterating that the civil membership of the working group comprises, District Judge Byass (appointed in light of the DJ vacancy on the CPRC), His Honour Judge Robinson, His Honour Judge Moradifar and Ian Curtis-Nye, to whom **THANKS** were conveyed for their continued assistance.
6. David Hamilton presented the matter and sought a steer as to the form of drafting the pilot PD with the view that it can be tabled once the FPRC has settled the family PD. Implementation is not expected before June 2023.
7. It was explained that, in agreement with the FPRC and CPRC, the FPRC launched a limited stakeholder consultation on the draft DAPO Pilot PD. The consultation ran from 5<sup>th</sup> April to 8<sup>th</sup> June. MoJ have received a good response, with 23 responses spread across

judicial and legal practitioner organisations, domestic abuse sector and some piloting police forces.

8. The DAPO Cross-Jurisdictional Working Group met on 26<sup>th</sup> June to consider the first tranche of responses and a further meeting is planned for 17<sup>th</sup> July. The aim is to revert to the October FPRC meeting with a full analysis of consultation responses and a revised version of the PD. The draft civil PD to be tabled before the November CPRC meeting.
9. In terms of civil procedure, in accordance with the CPRC's mandate, the Group has been considering the best approach to the drafting of civil provisions. The Group proposes to create a separate standalone civil PD, which would mirror all the family PD provisions that also apply to civil and will retain the overall structure and paragraph numbering of the family PD. There will be a small number of provisions which do not apply to civil, and the Group proposes to leave those paragraphs blank, in order to preserve the paragraph numbering. There will also be some provisions where relatively minor tweaks will have to be made to adopt family provisions, such as to substitute family cross-references with civil ones. This was discussed. Mr Curtis-Nye highlighted the users' perspective and Isabel Hitching KC added that the PD would benefit from a short explanatory note at the start to explain the context of the drafting style adopted.
10. It was **RESOLVED** to agree the form of drafting (as explained above at para 9) in principle; matter to return to the November 2023 CPRC meeting.
11. The Chair advised that the model form of civil order/s (principally in consequence of the registration process under the qualified legal representatives process) should also be settled soon. This is not expected to be a mandatory, prescribed CPR form, but serves to support the new scheme.
12. **Action:** In consultation with the Secretariat, MoJ to provide the draft civil PD and supporting paper by 20<sup>th</sup> October 2023.

#### **Item 4 Fixed Recoverable Costs in Clinical Negligence CPR(23)37**

13. Stephen Rippon and Laurent Viac (Department of Health and Social Care (DHSC)) along with Helen Keefe, (DHSC Legal) were welcomed to the meeting. Additionally, Robert Wright (Ministry of Justice Costs Policy) joined remotely.
14. The Chair gave some introductory remarks, observing that the proposed timescale of finalising anticipated amendments by the December meeting was particularly ambitious. It was inevitable that drafting would need to pass through various iterations before being settled and committee resources were currently limited; a District Judge member vacancy was also pending.
15. Mr Rippon acknowledged the Chair's points and emphasised that officials were keen to work with the committee. In summary, it was explained that this policy is specific to low value clinical negligence claims and only to pre-action costs. The policy is led by DHSC and development of the proposals has been informed by the recent (MoJ) extension of fixed recoverable costs (FRC) in civil cases.
16. The government's 2022 consultation proposals on this topic were closely modelled on the Civil Justice Council's (CJC) report in 2019. The government's response to the 2022 consultation will be published in due course. A focused consultation on disbursements is also planned in order to provide additional clarity to inform drafting proposals.
17. The policy intent is to enable more low value claims to be resolved more quickly, and more cost-effectively in the pre-issue stage; providing predictability and proportionality to costs for this group of claims, at levels appropriate to the complexity of clinical negligence

claims. This means all parties can better plan and manage these claims more effectively in the pre-issue phase, without affecting parties' rights to pursue litigation subsequently. Current thinking indicates that the division of claims are to be divided into two sub tracks, each with clear processes and deadlines: a 'light track' for claims where there is an early admission of liability; and a 'standard track' for claims where liability and quantum remain in dispute. A suite of amendments to Part 45 (Fixed Costs) are envisaged, as is a new Pre-action Protocol (PAP). Additions to Part 45 are likely to be limited to features of the protocol around the fixed costs themselves, treatment of disbursements, costs of early neutral evaluation and the relevant sanctions and exclusions from the scheme. Where possible, any changes will mirror, and work within the structures and solutions within, the recent extension of FRC.

18. A discussion ensued and covered various topics, including the scope of "legal disbursements", the extent to which a holistic approach can be taken when drafting; the preference being to avoid having separate and discrete sections in the rules for particular types of case – this was not seen as being in line with the simplification work being carried out by the s.2(7) sub-committee. In response to question, Mr Rippon advised that there are not any plans to extend the scheme to other bands of claims. David Marshall and Master Cook served on the CJC's 2019 working group and spoke of their experiences. The challenging timetable was reiterated. Overall, it was considered sensible that the scheme is to be limited to pre-action, but Mr Marshall urged officials to also consider cases that do not settle pre-action. It was highlighted that there has been much change since the CJC's original work in 2019 and the Chair drew out the need to carefully consider the interaction with mediation (early neutral evaluation) within the proposals.
19. It was **RESOLVED** to appoint **Master Cook, David Marshall and Ian Curtis-Nye** as contacts with whom DHSC officials can engage, out-of-committee, but with a view to establish a sub-committee when the matter returns (at which point, it is anticipated that the existing member vacancies will have been filled).
20. **Actions:** (i) MoJ (Robert Wright) to facilitate introductions between DHSC and the above named CPRC members (ii) Secretariat to provisionally allocate time in the CPRC programme from October to December (iii) DHSC to provide the Secretariat with any papers for the October CPRC by 22<sup>nd</sup> September (iv) Chair to raise the proposals concerning early neutral evaluation with Lady Justice Asplin (judicial lead for Alternative Dispute Resolution).

#### **Item 5 Retained EU Law (Revocation and Reform) Act: implications for court procedure rules CPR(23)38**

21. Oliver Lendrum (Department for Business and Trade) was welcomed to the meeting.
22. The Chair provided some introductory remarks and advised that he had drawn this matter to the attention of Lord Justice Baker in the Family Division and this was duly **NOTED**.
23. Mr Lendrum explained that he was also in liaison with the other jurisdictional rule committees (Family, Tribunals and Crime). The purpose of the Act is to give the Government the powers to make it easier to amend, revoke or replace retained EU law (REUL) and to remove its special status in domestic law. The Act was introduced in Parliament in September 2022 and received Royal Assent on 29<sup>th</sup> June 2023. It was suggested the Committee may also wish to consult on any proposed changes to the CPR.
24. Principally, the Act contains two Sections (s.6 and s.8) which relate to court procedure and which it is considered necessary for rule committees to review. Potentially new rules/practice directions, or amendments to existing procedures, are needed in order to facilitate the following; examples of existing similar measures and procedures were **NOTED:**

- Higher courts' ability to depart from retained EU case law and retained domestic case law.
  - Reference by a lower court or tribunal of points of law relating to retained caselaw to a higher court.
  - References and interventions on retained case law by the law officers.
  - The making of incompatibility orders.
  - Appeals in relation to any of the above.
25. Isabel Hitching KC highlighted that the new power for law officers to refer a theoretical issue to clarify the law and set a precedent for future cases was novel within the civil jurisdiction. The question was asked as to whether the Attorney General was intended to act as a filter to allay fears of private parties, to whom the option of referral was seemingly not available. The Chair remarked that the closest equivalent in civil proceedings is a provision within the Financial List, which may provide a precedent. However, this point will require very careful consideration. The Chair urged officials to work closely with MoJ legal and at least one member of the CPRC in advance of the matter returning to consider any necessary drafting proposals, in the autumn.
26. It was also reiterated that the purpose of the new power was to clarify the law and is not a means to change the outcome of the individual case. It is based on a similar power which the Attorney General has to refer a point of (criminal) law to the Court of Appeal following an acquittal (section 36 of the Criminal Justice Act 1972).
27. It was **RESOLVED** to appoint **His Honour Judge Jarman KC** to provide some initial input to frame the drafting proposals, out-of-committee. Should a fuller sub-committee be required, it can be revisited when the matter returns (at which point, it is anticipated that the existing member vacancies will have been filled).
28. **Actions:** (i) HHJ Jarman to hold preliminary meeting, out-of-committee, with the Chair. (ii) subject to that, engagement with officials is to take place to inform drafting proposals (iii) Secretariat to provisionally allocate time at the October meeting (iv) In consultation with the Secretariat, papers to be submitted (by Oliver Lendrum) no later than 22<sup>nd</sup> September 2023.

#### **Item 6 Section 2(7) Sub-Committee**

29. This item has two elements, as follows.

#### **Future work of the sub-committee: outline plan CPR(23)40**

30. The Chair reiterated his appreciation to Kerr J for his unrelenting drive and focus leading this project to date. The way in which he has prepared the handover is characteristically impressive. A view shared, unanimously, by the committee.
31. Isabel Hitching KC presented the report on behalf of Kerr J. It was explained that, to date, the sub-committee has addressed CPR Parts 1 to 24 (and 38 and 49), with Parts 25 to 30 left to complete phase one of the project.
32. The proposed second phase covers Parts 31 to 37 and 40 to 42, inclusive. Part 43 (scope of costs rules and definitions) has been revoked and Parts 44 to 48 were substituted. Part 39 (miscellaneous provisions about hearings) is not expressly included because it was amended substantially in around 2018 and there may be wider implications in response to the government's call for evidence on open justice, due to close on 7<sup>th</sup> September.

33. Parts 44 to 48 have recently been made to some provisions in those Parts due to the imminent extension of the FRC regime. Accordingly, they are not considered a priority. However, at some point, they will require consideration from the perspective of s.2(7).
34. Reference was made to the unnumbered (judicially issued) PDs. It was noted that their location in the printed rules is a matter for the editors of legal texts (such as the White Book). However, as these PDs are judicially issued PDs rather than CPRC derived PDs, they could be regarded as outside the remit of the CPRC in any event. One possible approach to address the issue may be to consult on a unification and modernisation process, which Kerr J had described as “eliminating archaic, arcane or obsolete texts and replacing them with much shorter up to date provisions in rules.”
35. The Chair acknowledged that advancing the next phase of the project at the same pace as the first, was hampered by current resource issues. He was keen for additional members to join the sub-committee once the outstanding vacancies on the main committee were filled. This natural interval did, however, present the opportunity for a modest pause, to take stock and carry out a strategic review before moving to the second phase.
36. A discussion ensued. Options as to approach were ventilated and included consideration as to whether it was advantageous to identify, “quick wins” to be advanced first. This would inevitably mean, CPR Parts would be reviewed and reformed Parts introduced, out of sequence. Alternatively, was it preferable to consider the second phase more holistically, with the potential to consider developments, from across the civil jurisdiction more widely, within the ambit of the project.
37. It was **RESOLVED** to:
- **NOTE** the report with thanks to Kerr J.
  - **APPROVE IN PRINCIPLE** the concept of re-prioritisation, whereby more rapid changes were approached first, notwithstanding that this would mean the project departs from its current practice of considering CPR Parts sequentially.
  - **DIRECT** the sub-committee to consolidate the report into a higher level future strategy and to return to the CPRC to consider in due course (in the autumn).
  - **REVISIT** membership when vacancies on the full committee are filled. In the interim, **APPOINT** Isabel Hitching KC, as sub-committee Chair, pro tem.
38. **Actions:** (i) Isabel Hitching KC and Ben Roe to produce a higher level strategy and return when ready (ii) Any members wishing to submit ideas to inform phase two planning, to relay to Ms Hitching by 8<sup>th</sup> September (iii) Secretariat to provisionally allocate time throughout October to December.

#### **Part 25 (Interim Remedies and Security for Costs) proposals: pre-consultation CPR(23)39**

39. Ben Roe explained that CPR Part 25 is currently supplemented by two PDs. Under the reforms, the PDs are, in effect, dispensed with and it is proposed that one new, much shorter PD, be introduced.
40. The existing PD 25A is lengthy and includes two model orders: a model freezing injunction and model search order. The reforms propose that these model orders become standalone/prescribed forms (with the text in the PD replaced by a hyper link to the forms). This is in line with an earlier revision last year, whereby the CPRC introduced the draft imaging order.

41. It is intended to consult on the proposed revisions using a clean copy version only, due to the extent of the proposed revisions. This being in recognition of the view that the structure of the current rule and PDs under Part 25 are complex and not universally seen as particularly logical. However, consideration should be aided by a destination table, which the committee found to be useful. It was **NOTED** that the proposals had been shared in advance with HMCTS and MoJ drafting lawyers; HMCTS had not raised any concerns. Drafting lawyers observed that the essential structure and content appeared sound and provided other modest drafting points, which were duly considered and adopted where appropriate.

42. The draft proposals were reviewed and discussed in detail. In summary, the points noted comprise the following, which were **AGREED**:

- the draft reformed r.25.3 (applications and evidence) should contain a sign post to Part 23 (general rules about applications and court orders) to assist lay users;
- under r.25.7 (evidence) it was **NOTED** that the reason why no notice was given is a material fact and an obligation already exists, without the need for it to be expressly provided for in the rules;
- the supervising solicitor provision under r.25.17 (service, timing and individuals involved) is to be redrafted;
- form numbers should be replaced with, “approved form”;
- various other drafting revisions as noted by the Secretariat, to be adopted for further review and resolution, prior to consultation;
- the consultation should flag the context of the draft proposed amendment to r.25.29 (conditions to be satisfied), namely the Lacuna Sub-Committee’s report (LSC2023/03) to the June meeting viz the Hague Convention on Choice of Court Agreements 2005;
- the remaining provisions within the PDs, that are not adopted within the draft reformed rules, could be removed altogether because (i) the reference to out of hours contact details can be done by a signpost and appropriate web information, (ii) the reference to finding a Supervising Solicitor from the Law Society or London Solicitors Litigation Association can be removed, because it is in relevant Court Guides, (iii) the statement about privilege is a statement of the law and does not need to be repeated in a PD in this way and (iv) the statement that applications for interim remedies in IP cases ought to go to the Chancery Division does not need to be made here because that is the effect of the relevant rules already.
- **Post Meeting Note:** para 25.1(1)(p) (the reference to continuations subject to guarantees under Art 9 of Directive 2004/48/EC) can be removed, because it is unnecessary; the remedy is available in the courts irrespective of its being listed in that rule in that way and the reference to the Directive is potentially confusing.

43. It was **RESOLVED to:**

44. **AGREE IN PRINCIPLE**, subject to final drafting and approval in committee, prior to consultation:

- the structural reforms to CPR Part 25 (including the revocation of PD 25A and PD 25B);

- revised draft suite of proposed amendments to return, when ready.

45. **AGREE IN PRINCIPLE**, subject to final drafting:

- the model freezing injunction and model search order currently annexed to PD 25A be produced as standalone prescribed forms.

46. **REVIEW**, in consultation with the Forms Sub-Committee, any consequential changes to court forms, specifically to forms N244 Application notice; N16A Application for injunction; N361 Notice of application for relief in pending action; PF43 Application for security for costs; PF44 Order for security for costs.

47. **Actions:** (i) Ben Roe and the sub-committee to (a) produce revised draft version of the proposed reformed Part 25 by 22<sup>nd</sup> September 2023 if returning to October meeting (b) conduct a review of any consequential form changes (ii) Secretariat to provisionally allocate time at the October meeting (iii) In liaison with the HMCTS Forms Team, the Secretariat to facilitate draft versions of the model orders currently annexed to PD 25A and refer to the Forms Sub-Committee for approval in the usual way.

**Item 7 Civil Procedure (Amendment No. 2) Rules 2023: Joint Committee on Statutory Instruments' (JCSI) Report and MoJ's response**

48. Alasdair Wallace (MoJ Legal) advised that the JCSI had raised a few modest drafting points when they scrutinised the recent Fixed Recoverable Costs (FRC) SI. One has been formally reported upon (to Parliament).

49. In consultation with Trower J, MoJ's response explained that the provision to correct the error is being included in the CPRC's imminent, summer SI, to come into force on 1st October, so that the rule will be in the correct form at the time the FRC reforms SI enters into force. This was duly **NOTED** and sincere **THANKS** were expressed to lawyers, in particular, Andrew Currans, for his extensive drafting work, throughout the FRC project. **Post meeting note:** the [Forty-Third Report \(parliament.uk\)](https://www.parliament.uk/jcsi/40th-report) of the JCSI and MoJ response can be seen via this link.

**Item 8 Any Other Business & Close**

50. **Register of Member Interests: annual review.** All members were requested to complete a fresh declaration of interest form (including nil returns) and return them to the Secretariat before the end of term. **Action:** Members, by 31<sup>st</sup> July 2023.

51. **Submitting and distribution of papers.** The Chair explained that this issue follows feedback during the one to one meetings he is holding with members. The aim is that papers are to be finalised and circulated in the week preceding the CPRC meeting (to allow for reading time over the weekend). Currently, the papers tend to be circulated on the Monday in the week of the CPRC. The Chair reiterated the importance of not submitting papers late and that any late papers will only be included at the discretion of the Chair. The plan from October is to distribute the agenda pack on the Friday of the proceeding week. This will be kept under review. **Action:** All (filing deadline for papers for the October meeting is 22<sup>nd</sup> September).

52. **Date of next meeting.** With no urgent business identified, the provisional meeting slot of 8<sup>th</sup> September is vacated. The next, mainstream meeting, will take place on 6<sup>th</sup> October as scheduled. **Action:** Secretariat.

53. **Items of possible future business: Lacuna Sub-Committee.** Master Dagnall drew the following judgments to the committee's attention, which were duly **NOTED**.



54. George Major (by his litigation friend Katherine Gee -v- Kalaivani Jaipal Kirishana [2023] EWHC 1593 (KB) by Mr Justice Cotter. It concerns a lacuna in the current provisions concerning litigation friends arising through the removal of the PD (paragraph 152 of the judgment refers) and the interaction of form N235 (certificate of suitability of litigation friend) and other possible wider issues.
55. It was **RESOLVED** to **REFER** the matter to the Civil Justice Council for consideration as part of their work regarding litigation friends.
56. **Action:** Chair/Judicial Office to request that the CJC consider the above.
57. Varsha Gohil -v- Bhadresh Babulal Gohil & Others [2023] EWHC 1567 (Fam) in which Mr Justice Mostyn directed (paragraph 25 of the judgment refers) that a copy of this judgment be sent to each of the CPRC, the FPRC and the CrimPRC with a view to rules of court being harmonised in regard to dissemination of default judgments and the confidentiality wordings which should appear within them.
58. It was **NOTED** that CPR PD 40E has provided for the correct procedure and law. It does not appear, therefore, that the judgment suggests that the CPR are deficient. However, this Committee stands ready to assist others, should an approach be made.
59. **Action:** Secretariat to update the FPRC and CrimPRC Secretariats accordingly. **Post Meeting Note:** The Lord Chief Justice prefers to review, with the other Heads of Division, the provision made by practice directions for civil, family and criminal cases rather than asking each procedure rule committee to devise its own provision.

C B POOLE  
July 2023

**Attendees:**

Carl Poole, Rule Committee Secretary  
Master Dagnall, Chair, Lacuna Sub-Committee  
Nicola Critchley, Civil Justice Council  
Alasdair Wallace, Government Legal Department  
Andrew Currans, Government Legal Department  
Katie Fowkes, Government Legal Department  
Amrita Dhaliwal, Ministry of Justice  
Andy Caton, Judicial Office  
Terry McGuinness, Judicial Office  
David Hamilton, Ministry of Justice, Civil Courts and Procedure Policy (Item 3)  
Maja Vojnovic, Ministry of Justice, Domestic Abuse Policy (Item 3)  
Laurent Viac, Department of Health and Social Care (Item 4)  
Stephen Rippon, Department of Health and Social Care (Item 4)  
Helen Keefe, Department of Health and Social Care (Legal) (Item 4)  
Oliver Lendrum, Department for Business and Trade (Item 5)