

EXPLANATORY MEMORANDUM TO
THE ACCESS TO JUSTICE ACT 1999 (DESTINATION OF APPEALS) (FAMILY
PROCEEDINGS) ORDER 2009

2009 No.

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

- 1.1 This memorandum contains information for the Joint Committee on Statutory Instruments

2. Purpose of the instrument

- 2.1. The draft Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2009 (“the New Order”) changes the current destination of appeals from decisions of magistrates’ courts in so far as family and related proceedings are concerned, by providing that appeals shall lie to a county court instead of to the High Court. The aim is to make more efficient use of available judicial resources by re-routing appeals to a lower court so as to reduce pressure on the High Court bench and to clarify and simplify the appeals process by removing the different processes. This should contribute to Government’s commitment to deliver Fair and Simple Routes to Access to Justice

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

- 3.1. An interesting *vires* point arises relating to the re-routing of applications by way of case stated to a county court.
- 3.2. There are two methods of appealing against a decision of a magistrates’ court. First, where there is a specific statutory right of appeal to the High Court. The statutory rights of this kind in family proceedings include the right of appeal in section 94 of the Children Act 1989 against decisions of the magistrates’ court in proceedings under the 1989 Act.
- 3.3. Secondly, where there are no statutory rights of appeal against a decision of a magistrates’ court, the means of challenging that decision (other than by judicial review) is by an application to have a case stated for the opinion of the High Court under section 111 of the Magistrates’ Courts Act 1980 (“the 1980 Act”).¹
- 3.4. By virtue of section 56(7) of the Access to Justice Act 1999 (“the 1999 Act”) an application to have a case stated for the opinion of the High Court is said to be an “appeal” for the purposes of section 56 of that Act. The New Order extends to these

¹ Section 111 of the Magistrates’ Courts Act 1980 permits any person who was a party to any proceedings before a magistrates court or is aggrieved by an order, determination or other proceedings of the court to question the proceeding on the ground that it is wrong in law or in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved. But a person cannot make an application under section 111 of the 1980 Act in respect of a decision if-

(a) the person has a right of appeal to the High Court against the decision, or

(b) the decision is final by virtue of any enactment passed after 31st December 1879.

applications in so far as family proceedings are concerned. Family proceedings are defined for those purposes as—

- proceedings which, by virtue of section 65 of the 1980 Act, are (or may be treated as)² family proceedings for the purposes of that Act; and
- proceedings under the Child Support Act 1991.

- 3.5. The current procedure whereby the opinion of the High Court is obtained under section 111 of the 1980 Act is that once an application to have a case stated has been made to the magistrates' court questioning the proceeding on the ground that it is wrong in law or in excess of jurisdiction, the magistrates' draw up a document which records the facts they have found, the submissions of the parties and the magistrates' opinion which led to the decision. This document is then submitted to the High Court for its opinion.
- 3.6. By virtue of the new section 111A of the 1980 Act in article 4(3) of the New Order, an application to have a case stated under section 111 of the 1980 Act in relation to family proceedings will be replaced by a regular appeal to a county court on restricted grounds that the decision was wrong in law or in excess of jurisdiction. It is a county court which will decide whether or not the decision of the magistrates' court is wrong in law or in excess of jurisdiction. The two stage process which exists at the moment whereby an application is first made to the magistrates' court and then that court submits the document to the High Court will be replaced by one notice of appeal outlining the restricted grounds of appeal to a county court.
- 3.7. Section 56 of the 1999 Act permits the Lord Chancellor, to provide, by order, that appeals which lie to (a) a county court, (b) the High Court, or (c) the Court of Appeal shall lie instead to another of those courts, as specified in the Order. By virtue of section 56(7), for the purposes of this section, an application to have a case stated for the opinion of the High Court constitutes an appeal. The Ministry of Justice considers that the reference to an application to have a case stated in subsection (7) is to the whole case stated procedure and not only to the application to the magistrates' court. Therefore it is open to the Lord Chancellor to make an order providing that appeals by way of case stated from the magistrates' court shall lie to a county court instead of the High Court.
- 3.8. Appeals by way of case stated are an example of the supervisory jurisdiction of the High Court over inferior courts. A county court is an inferior court and it would therefore not be appropriate for an appeal to a county court to be by way of case stated. As section 56 specifically permits appeals by way of case stated to be moved from the High Court to a county court, the view of the Ministry of Justice is that it would be a proper exercise of the section 56 power to provide that the application to have a case stated should be a regular appeal but on the restricted grounds referred to in the new section 111A of the 1980 Act in article 4(3) of the New Order. Re-routing of appeals by way of case stated to the next tier of court -a county court -would otherwise not be possible.

4. Legislative Context

² Proceedings for an order altering a maintenance agreement under section 65 of the Matrimonial Causes Act 1973 are an example of family proceedings listed in section 65 of the 1980 Act. Proceedings to vary such an order are an example of proceedings which may be treated as family proceedings under section 65 of the 1980 Act.

- 4.1. The New Order is made by the Lord Chancellor, under the powers conferred in section 56 of the 1999 Act, after consulting the following Heads of Judicial Divisions as required by section 56(4):
- (a) The Lord Chief Justice,
 - (b) The Master of the Rolls,
 - (c) The President of the Queen’s Bench Division,
 - (d) The President of the Family Division, and
 - (e) The Chancellor of the High Court.
- 4.2. The Lord Chancellor has consulted the Heads of Judicial Divisions listed at paragraph 4.1 and they have indicated that they are content with the provisions of the New Order.
- 4.3. The intention is that the President of the Family Division (“the President”), on whom the power to specify the type and level of judge who may hear appeals in family proceedings in county courts is conferred, will be invited to make directions under section 9 of the Courts and Legal Services Act 1990 allocating the appeals from the magistrates’ court which are re-routed to a county court by the New Order to a circuit judge.
- 4.4. The Family Proceedings Rule Committee is planning to make amendments to the Family Proceedings Rules 1991 under section 40 of the Matrimonial and Family Proceedings Act 1984 to ensure that the rules relating to appeals will be able to better accommodate the new appeals coming from the magistrates’ court to a county court as a result of the New Order. The Rule Committee has considered draft rule amendments in this regard and the intention is that those amendments will be made in sufficient time for them to come into force on 6th April.

5. Territorial Extent and Application

- 5.1. This instrument applies to England and Wales.

6. European Convention on Human Rights

- 6.1. Bridget Prentice, Parliamentary Under Secretary of State, Ministry of Justice has made the following statement regarding Human Rights:

“In my view the provisions of the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2009 are compatible with the Convention rights”.

7. Policy background

- *What is being done and why?*

Public consultation

- 7.1. The New Order seeks to implement policy proposals, which were consulted on and agreed following twelve-week public consultation by Her Majesty’s Court Service (HMCS) in the paper “*Family Procedure Rules*” published in August 2006. The consultation paper highlighted that the rules relating to appeals from family

proceedings courts (“FPCs”)³ are complex because appeals are currently required to be commenced in a variety of ways (by way of case stated, by way of notice of appeal, and by way of notice of motion), with a variety of time limits.

7.2. The consultation paper therefore proposed that there should be a single process of appeal from decisions of FPCs; that appeals by way of case stated in family proceedings should be abolished; and that appeal from a decision of an FPC should lie to a county court, instead of the High Court as now.

7.3 The aim of these proposals is to:

- provide more efficient use of available judicial resources by re-routing appeals to a lower court (helping in particular to reduce pressure on the High Court bench); and
- to clarify and simplify the appeals process (in particular, by removing the need to follow the onerous case stated procedure).

7.4 These should contribute to Government’s commitment to deliver Fair and Simple Routes to Access to Justice.

7.5 The following questions were posed in the appeals section of the 2006 consultation paper:

Question 41: Do you agree that a single form of appeal notice should initiate all appeals from decisions of magistrates’ courts in family proceedings?

Question 42: Do you agree that appeals from decisions of magistrates’ courts in family proceedings should lie to a county court?

Question 43: Do you agree with the proposal that appeals by way of case stated from FPCs should be abolished?

- ***Consolidation***

7.6 The New Order makes only small amendments to primary and secondary legislation and the Department has no plans to consolidate the legislation as a result of those amendments.

8. Consultation outcome

8.1. The consultation lasted for twelve-weeks (30 August 2006 to 01 December 2006) and copies of the consultation paper were sent to:

- **Judicial and legal bodies** including the Senior Judiciary, the Council of HM Circuit Judges, the Association of District Judges, the Magistrates’ Association, the Family Justice Council, The Law Society, The Bar Council, Justices’ Clerks’ Society, Family Law Bar Association, and the Institute of Legal Executives.

³ “Family proceedings courts” are magistrates’ courts which—

(a) are specially constituted (for example, a justice of the peace is only qualified to sit as a member of a family proceedings court to hear family proceedings if authorised to do so by the Lord Chief Justice or the judicial office holder nominated for this purpose by the Lord Chief Justice); and

(b) sit for the purpose of hearing family proceedings (Magistrates’ Courts Act 1980, s.67).

- **Consumer bodies and business organisations** for example Resolution, Association of Lawyers for Children, Lesbian and Gay Lawyers Association, Citizens Advice, Consumers' Association, British and Irish Association of Law Librarians and leading publishers of rules.
 - **Government Departments and agencies** for example the Department for Works and Pensions, the Legal Services Commission and CAFCASS.
- 8.2. Responses were welcomed from anyone with an interest or views on the proposals. Responses from individual practitioners, academics or members of the public were also sought.
- 8.3. A copy of the consultation paper and the response document are at: <http://www.justice.gov.uk/publications/cp1906.htm>
- 8.4. Of the 45 responses received, 34 directly answered question 41. Of those 34, an overwhelming majority (97 per cent), agreed that there should be a single form of appeal notice from the magistrates' courts; one (3 per cent) was undecided. Of those that expressed a reason, the majority argument was one of simplicity, For example one respondent pointed out that "*a single form of appeal notice simplifies matters and makes the procedure easy to understand*". Another respondent agreed on the basis that it would reduce complexity and make it easier for clients to understand the appeals process and suggested prioritising and fast-tracking matters involving children where contact and residence matters are involved.
- 8.5. 33 respondents directly answered question 42 on which route of appeal should be followed. A high majority (94%) agreed that appeals from the decisions of FPCs should lie to a county court, while two respondents (6%) disagreed. Of those respondents who agreed with the proposal some emphasised that the appeal should lie to a circuit judge (not a district judge). One respondent agreed on the basis that there would be a review of the levels of judicial resource to ensure any increase on demands on hearing time in county court is met. CAFCASS agreed in principle that appeals should lie to a county court but noted that the proposal could have a detrimental effect on the capacity of county courts as they are already under pressure. The Ministry of Justice considers that re-routing appeals from decisions of FPCs to the county courts is unlikely to significantly increase the workload of the county courts because statistics indicates that the number of appeals from FPCs is low. Furthermore the Family Law Allocation and Transfer of Proceedings Order 2008 which came into force on 25 November 2008 is designed to reduce the current workload of the county courts. If this reduction of workload is achieved, additional county court capacity would be created to hear appeals from decisions of FPCs.
- 8.6. 31 respondents answered question 43 relating to case stated appeals. A clear majority (90 per cent) agreed that case stated appeals from FPCs should be abolished, while three (10 per cent) were undecided. One respondent, in particular, argued that "it is important that appeal procedures be aligned and made more consistent if at all possible".

Stakeholder Consultation

- 8.7. As the policy underlying the proposals had been agreed and settled in the 2006 consultation, a limited consultation exercise on the Draft Destination of Appeals Order,

aimed at stakeholders, was carried out between December 2008 and January 2009. The consultation paper was not published but copies were sent to approximately 200 stakeholders, which included judicial bodies and the senior judiciary, legal professional bodies, the Family Procedure Rule Committee, consumer and representative bodies, charity organisations, and other government departments.

- 8.8. In addition to seeking stakeholders' views on the details of the Draft Order, the stakeholder consultation paper proposed extending the scope of the Draft Order to cover appeals from decisions in FPCs, which are related to family proceedings (or child support).
- 8.9. The paper also highlighted that appeals by way of case stated under section 111 of the Magistrates' Court Act 1980 will no longer apply in family proceedings.
- 8.10. The paper pointed out that the practical effect of the Draft Order will be that the justices will no longer be required to state a case and the document recording the magistrates' opinion will not be available. However, in relation to certain types of family proceedings, current rules of court do require the justices' clerk in consultation with the justice or justices to give written reasons for the court's decision and for the justices' clerk to keep a written note of the substance of oral evidence given at a hearing.⁴ In addition, the paper noted the Ministry of Justice's understanding that in practice FPCs give informal reasons for any decision, and in most cases will give written reasons for decisions in line with the requirements of current rules even where the case in question falls outside the scope of the requirements of the rules of court. It is therefore very unlikely that the county court considering an appeal from the decision of a magistrates' court on the ground that the decision is wrong in law or in excess of jurisdiction would have to cope with a situation where there was no information about the reasons for that decision.
- 8.11. The paper further drew stakeholders' attention to the draft new Family Procedure Rules which went out for consultation on 28th November 2008 and which contain a draft rule (rule 26.2) requiring the court to give written reasons for its decisions in all family proceedings. However, as current rules of court do not actually require written reasons to be prepared in relation to all family proceedings and any new draft rule will not be in force for the coming into force of the Draft Order, the paper proposed to invite the President of the Family Division to issue a Practice Direction emphasising the importance of justices' giving reasons for their decisions and retaining notes of evidence. The stakeholder consultation paper therefore posed the following questions:
- **Question 1:** Do you agree that the scope of the Order should be extended to cover appeals from decisions in FPCs, which are related to family proceedings (or child support)?
 - **Question 2:** Should a Practice Direction be issued to place an obligation on the magistrates' court to give reasons for its decision and retain notes of evidence?
 - **Question 3:** Does the Order as drafted achieve the objective of diverting all appeals from family proceedings in magistrates' courts to the county courts?
- 8.12. The Ministry of Justice received an overall favourable response from 18 respondents.

⁴ The Family Proceedings Courts (Matrimonial Proceedings etc.) Rules 1991 (rules 11 and 12) and the Family Proceedings Courts (Children Act 1989) Rules 1991 (rules 20 and 21).

- 8.13 A majority of respondents agreed that the Draft Order should be extended to cover appeals from decisions in magistrates' courts which are related to family proceedings or child support. The New Order accordingly includes amendments re-routing appeals under section 4(7) of the Maintenance Orders Act 1958 and sections 10 (1)(a) and 13 (1) of the Crime and Disorder Act 1998 from the High Court to a county court. In addition, the new section 111A of the Magistrates' Courts Act 1980 (in article 4 (3) of the New Order), which provides that a person may appeal to a county court on the ground that a decision is wrong in law and in excess of jurisdiction, applies to proceedings which may be treated as family proceedings under section 65 of the Magistrates' Courts Act 1980. The new section 111A also applies to proceedings under the Child Support Act 1991. As a result the new section 111A does not only apply to those proceedings which are within the definition of family proceedings in section 65(1) of the 1980 Act.
- 8.14 A majority of respondents also agreed that a Practice Direction should be issued to place an obligation on magistrates' courts to give reasons for its decisions and retain notes of evidence particularly as the New Order is scheduled to come into force before the new draft Family Procedure Rules. One respondent commented that until the draft Family Procedure Rules are finalised, a Practice Direction would better represent relevant case law and existing practice: the Ministry of Justice agrees and will invite the President to make such a Practice Direction to coincide with the New Order.
- 8.15 There were some helpful comments in relation to question 3. For example one respondent suggested that the Principal Registry of the Family Division (PRFD) should be defined more clearly in the Order. As a result of this comment, the Ministry of Justice amended the New Order to make consequential amendments to the Allocation and Transfer of Proceedings Order 2008 to provide that the PRFD be treated as if it were a county court for purposes of appeals from decisions of magistrates' courts in family proceedings under section 94 of the Children Act 1989 and section 61 of the Family Law Act 1996.
- 8.16 The policy proposals underlying the New Order were developed following recommendations from the Family Procedure Rule Committee in 2005. The committee was therefore kept closely informed of developments.

9. Guidance

- 9.1. Information about the New Order will be published on the judicial website when the New Order is laid alerting the Judiciary that the Order is being considered in both Houses of Parliament. Information will also be placed on the HMCS website informing legal advisers and court staff of the impending changes if the Order is approved.

10. Impact

- 10.1 An Impact Assessment has not been prepared for this instrument because it has no impact on businesses, charities or voluntary bodies.
- 10.2 This instrument has no impact on the public sector.

11. Regulating small business

- 11.1. The legislation does not apply to small business.

12. Monitoring & review

- 12.1. We do not envisage that the New Order will create significant additional workload for county courts. Recent statistics suggest that the number of appeals currently made from FPCs to the High Court is low.
- 12.2. The Family Law Allocation and Transfer of Proceedings Order 2008 which came into force on 25 November 2008 is designed to reduce the current workload of the county courts. This should provide additional county court capacity to hear appeals from decisions of FPCs. However, following implementation of this New Order, we will monitor the number of appeals to the county court to ensure that there is no significant increase in their workload.

13. Contact

- 13.1. Any enquiries about the contents of this memorandum should be addressed to:
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