

EXPLANATORY MEMORANDUM TO
THE FAMILY PROCEDURE (MODIFICATION OF ENACTMENTS) ORDER
2011

2011 No. [XXXX]

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

2. **Purpose of the instrument**

2.1 The Family Procedure (Modification of Enactments) Order 2011 (“the Order”) amends various provisions in primary and secondary legislation in relation to provision in the Family Procedure Rules 2010 (“the Rules”), ensuring that those Rules, and the amended legislation, operate consistently. The Rules, which will come into force on 6 April 2011, will provide a comprehensive set of court rules for all types of family proceedings in the High Court, the county court and the magistrates’ courts (family proceedings courts).

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

3.1 To the extent that it amends primary legislation, the Order has been approved by Parliamentary Counsel.

4. **Legislative Context**

4.1 Sections 75 to 81 of the Courts Act 2003 provide for a Family Procedure Rule Committee of 17 members to make rules (Family Procedure Rules) governing the practice and procedure to be followed in family proceedings in the High Court, county courts and magistrates’ courts.

4.2 In order to ensure that the Rules operate appropriately as a single code for all three levels of court, it is necessary to make amendments to other legislation governing procedural powers, together with amendments to terminology and references to rules in consequence of the replacement of the terminology and the rules referred to by the new Rules. These matters are addressed in the Order.

5. **Territorial Extent and Application**

5.1 This instrument applies to England and Wales.

6. **European Convention on Human Rights**

6.1 The Parliamentary Under Secretary of State for Justice, Mr Jonathan Djanogly MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Family Procedure (Modification of Enactments) Order 2011 are compatible with the Convention rights.”

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7. Policy background

- *What is being done and why*

7.1 The Rules fulfil the policy intention of the Courts Act 2003 to provide one set of Rules for all types of family proceedings in all types of court. Rules and procedure underpin the effective operation of the family justice system. They set out the detail of how the system works and are fundamental in ensuring that it works well. There is a high level of public interest in family proceedings, with over 100,000 private law Children Act applications, over 11,000 applications for care orders for children and over 128,000 petitions for divorce issued in 2008.

7.2 The Order makes amendments to other enactments in relation to certain procedural powers of magistrates' courts, to ensure that they are aligned with the new Rules and that the new Rules will accordingly operate appropriately for all levels of court. For example, article 12 of the Order inserts into the Magistrates' Courts Act 1980 a new section 68A making it clear that magistrates' courts are able to order disclosure of documents in family proceedings on a similar basis to county courts and the High Court when dealing with such proceedings, which ensures that the single set of rules relating to the practice and procedure to be followed on an application for disclosure of documents will operate in the same way for all three courts,. Similarly, articles 3 and 10 make amendments in relation to the consistent application across all tiers of court of rules relating to costs; and articles 5 to 9 (save the new section 54(3) of the Magistrates' Courts Act inserted by article 6(b)), 11 and 14 make amendments to ensure that consistency of procedure begun by application across the different tiers of courts dealing with family proceedings is not affected by provisions of the Magistrates' Courts Act 1980 which provide for specific procedure where proceedings are begun by complaint.

7.3 The Order also makes other amendments required as a result of provision in the new Rules on 6 April 2011. For example, article 2 makes amendments consequential on the adoption by the Rules of new terminology in relation to proceedings for financial remedies, and articles 15 to 38 amend references to or in relation to existing rules replaced by the new Rules, so that they refer appropriately to the new Rules or to the provisions under which the new Rules are made.

7.4 In addition, article 39 of the Order makes transitional provision which ensures that amendments made by the Order which would affect the way existing rules would operate do not apply where, by virtue of the

transitional provision in the new Rules, the new Rules do not apply and the existing rules will apply for transitional purposes. For example, article 20 of the Order amends the Civil Procedure Rules 1998 to replace a reference to the Family Proceedings Rules 1991 with a reference to the Rules. The transitional provision in article 39 of the Order will ensure that where the transitional provision in the Rules mean that the Rules do not apply to a given case, the Civil Procedure Rules 1998 will apply as if the amendment made by article 20 of the Order had not been made, that is, as if the reference to the Family Proceedings Rules 1991 remained.

- ***Consolidation***

7.5 The Order makes predominantly minor amendments to other enactments and it is not intended to embark on this account on consolidation of the enactments being amended.

8. Consultation outcome

8.1 As required by section 79 of the Courts Act 2003, the Family Procedure Rule Committee carried out a public consultation on the policy behind the Rules from August to December 2006. A total of 45 responses were received to this consultation and a summary of the responses was published in February 2008. Overall, the majority of specific proposals were supported.

8.2 The extent of support varied according to the area, for example the strongest level of support lay in the proposed changes to the process and route of appeal.

8.3 The consultation and the summary of responses can be found at the following link:

<http://www.justice.gov.uk/consultations/cp1906.htm>

8.4 The Family Procedure Rule Committee carried out a further public consultation on the text of the draft Rules between 28 November 2008 and 27 February 2009. The Committee then considered all the comments on specific rules and amended the draft Rules as appropriate. The consultation paper can be found at the following link:

<http://www.justice.gov.uk/news/announcement281108a.htm>

8.5 The Government has not carried out a separate public consultation on the changes included in this Order as these are predominantly technical changes arising from the policy approaches embodied in the Rules, or simply made in consequence of the coming into force of the Rules. The President of the Family Division (who has been nominated for this purpose by the Lord Chief Justice) has been consulted on the Order and has confirmed that he is content.

9. Guidance

- 9.1 The Rules, with the supporting Practice Directions, will be published on the Ministry of Justice website prior to their coming into effect. All forms required by applicants will be published with the Rules and will be available to be downloaded from the same website.
- 9.2 Training for court staff, the judiciary, magistrates and magistrates' legal advisers will be provided in the run up to implementation (including, where necessary, in relation to the amendments made by the Order, for example the powers given to magistrates' courts to make orders for disclosure and to issue witness summonses in any family proceedings.)

10. Impact

- 10.1 There will be some impact as a result of the Rules on business, charities and voluntary bodies involved in family proceedings, for example solicitors and barristers and children's charities, in that they will have to familiarise themselves with the Rules. This will be mitigated by the instructions and guidance issued by HM Courts Service. The Family Procedure Rule Committee and the Ministry of Justice will also carry out work in the period up to implementation to raise awareness of the Rules among practitioners and court users.
- 10.2 The impact on the public sector involves HM Courts Service and Cafcass (Children and Family Courts Advisory and Support Service) and CAF/CASS CYMRU, as these organisations all support family proceedings in court. It is not anticipated that additional resources will be required, as none of the underlying legal provisions for family proceedings is being changed and no additional cases will arise from the new Rules; nor, for the same reasons, is it anticipated that there will be any impact in respect of legal aid.
- 10.3 An Impact Assessment was prepared for the Courts Bill, including the provisions for the Rules.
- 10.4 It is not anticipated that the changes included in the Order will have any additional effects to those of the Rules themselves.

11. Regulating small business

- 11.1 The legislation applies to small business, in particular to legal practitioners.
- 11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to provide guidance for court users on the new procedures and to carry out work to raise awareness of the implementation and major effects of the Rules and supporting instruments to assist solicitors and barristers prepare for the new procedures.

12. Monitoring & review

- 12.1 The Family Procedure Rule Committee will take forward an ongoing programme of amendments to the Rules and will consider the operation of the Rules and the need to amend the provisions both in the light of their own experience as practitioners and in the light of representations from court users, legal and other professionals and major stakeholders. This programme will cover both the provisions of the Rules themselves and amendments to other enactments made by the Order.

13. Contact

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