

EXPLANATORY MEMORANDUM TO

THE FAMILY PROCEEDINGS (AMENDMENT) (No. 2) RULES 2009 2009 No. 857 (L.8)

THE FAMILY PROCEEDINGS COURTS (MISCELLANEOUS AMENDMENTS) RULES 2009 2009 No. 858 (L.9)

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 instruments**
 - 2.1 These instruments make changes to rules of court which are needed as a consequence of policy changes which arise out of the Ministry of Justice consultation *Confidence and confidentiality: openness in family courts – a new approach* (Cm 7131) and are outlined in the response to consultation *Family Justice in View* (Cm 7502). The amendments concern the attendance of persons, in particular representatives of the media, during family proceedings, and the communication of information relating to proceedings concerning children.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Context**
 - 4.1 Different rules of court apply in family proceedings, depending on whether they are in county courts or the High Court, or in family proceedings courts (magistrates' courts). For county courts and the High Court, the relevant rules are the Family Proceedings Rules 1991 ("FPR 1991"); and for family proceedings courts, the relevant rules are the Family Proceedings Courts (Children Act 1989) Rules 1991 ("the FPC(CA)R 1991"). It is frequently necessary to make amendments to both sets of rules at the same time, as is done with the two present instruments.
 - 4.2 The Family Proceedings (Amendment) (No. 2) Rules 2009 ("the FPR (Amendment) Rules" amend the FPR 1991, and the Family Proceedings Courts (Miscellaneous Amendments) Rules 2009 ("the FPC (Miscellaneous Amendments) Rules") amend the FPC(CA89)R 1991 and the Family Proceedings Courts (Child Support Act 1991) Rules 1993 ("the 1993 Rules"). The amendment to the 1993 Rules is consequential on the amendments to the FPC(CA89)R 1991.
5. **Territorial Extent and Application**
 - 5.1 These instruments apply to England and Wales.

6. **European Convention on Human Rights**

As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. **Policy background**

7.1 The outcome of consultation exercises carried out in 2006 and 2007, and a report by the then Constitutional Affairs Select Committee in 2005, is that action is needed to improve confidence, necessary to ensure that parties to proceedings and the public more widely have trust in the system. A package of measures was set out in 'Family Justice in View'. There are three inter-related principles underpinning the overall package:

- Improve confidence
- Protect the interests of children and vulnerable adults
- Enable more access to support.

7.2 Media access addresses, in part, the first principle. The second principle, relating to protecting children and vulnerable adults, is dealt with in relation to media access by giving the courts discretion to exclude the media in certain circumstances. Currently the media have a right to attend family proceedings (except placement and adoption) in magistrates' courts. The new provisions aim to provide a consistent approach across all tiers of court courts.

7.3 The new provisions governing communication of information relating to proceedings deal in part with the third principle of more access to support. Following amendments to the current rules in 2005, it is clear that the existing provisions still cause confusion and make it hard for parties to seek the help they need. The new provisions remove many of the restrictions about to whom information can be communicated by parties, focusing more instead on the purpose for which it is communicated. There are also changes relation to the extent to which further onward communication may be permitted.

7.4 Other aspects of the package of measures (reporting restrictions, and media attendance in relation to placement and adoption) require amendments to primary legislation and are not discussed further in this memorandum.

Amendments made by the FPR (Amendment) Rules

7.5 The FPR (Amendment) Rules amend the FPR 1991 in two ways: a new rule is inserted dealing with attendance; and the existing rule dealing with communication of information is revoked and replaced by a new Part (this approach having been adopted to make more comprehensible what would otherwise have become a very long and complex rule).

7.6 As to attendance, rule 4 inserts into the 1991 Rules a new rule 10.28, which makes provision governing who may be present during a hearing in proceedings which are held in private ("in private" meaning when the general public have no right to be present: it is to be noted that because proceedings are in private, reporting restrictions will apply by virtue of section 12 of the Administration of

Justice Act 1960 in addition to the restrictions which will apply by virtue of section 97(2) of the Children Act 1989 where the proceedings concern children). The new rule in particular allows for duly accredited media representatives to be present, subject to a power for the court to direct their exclusion for all or a part of the proceedings for one of the reasons specified in paragraph (4) of the new rule. Paragraph (8) of the new rule explains “duly accredited” as meaning those who are accredited in accordance with an administrative scheme for accreditation which the Lord Chancellor has approved (as opposed to being accredited by the Lord Chancellor or in accordance with a scheme established by the Lord Chancellor). Paragraph (6) of the new rule provides for certain persons (who are persons entitled themselves to be present) to be able at any stage of the proceedings to make representations for restricting attendance by media representatives, and paragraph (5) allows for the court to exercise the power to direct exclusion either in response to such representations or of its own motion. The court must, before exercising the power to direct exclusion of media representatives, give to any media representatives present the opportunity to make their own representations.

- 7.7 As to communication of information, rule 5 inserts into the 1991 Rules a new Part XI, which replaces rule 10.20A of the 1991 Rules, dealing with the communication of information relating to proceedings relating to children. New rule 11.1 defines the proceedings in relation to which the new rules apply, new rule 11.9 provides for interpretation of terms used in the new rules, and new rules 11.2 to 11.8 provide for communication of information. New rule 11.2 lists when it is permissible for the purposes of the law relating to contempt of court to communicate information: communication is allowed as a general rule to parties and their legal representatives and certain associated officers and professionals; or in more specific instances where the court gives permission, or (subject to any direction of the court) in accordance with rules 11.4 to 11.8. Paragraph (2) establishes that general publication, to the public at large or any section of the public, is not permitted by these rules; and paragraph (3) that where an unapproved draft judgment is handed down by a court, rules 11.4 to 11.8 do not allow for its disclosure.
- 7.8 New rule 11.3 prohibits use of the rules so as to instruct an expert without the leave of the court and bars use without such leave of any evidence arising out of unauthorised instruction. New rule 11.4 makes provision permitting communication of information by a party or party’s legal representative on the party’s instructions for specified purposes: not only may communication be to any person (although, because of rule 11.2(2), not to the public at large or any section of the public), but also onward communication by the person receiving the information, and by any subsequent recipient, is permitted, provided that each time the party who initially communicated the information consents to the further communication *and* the further communication is made *only* for the same purposes as the original communication. There is an exception for communication for the purpose in rule 11.4(1)(a), which is limited to a single communication by the party or party’s legal representative, with no onward communication permitted.
- 7.9 New rules 11.5 to 11.7 provide for more specific instances of communication. New rule 11.5 provides for communication by a party or certain other persons, to specified persons or bodies, for specified purposes; new rule 11.6 provides for disclosure by Cafcass or CAFCASS CYMRU officers for purposes of the effective functioning of those organisations; and new rule 11.7 provides for

communication to and between Ministers for purposes relating to proceedings before the European Court of Human Rights or of inter-Ministerial discussion.

- 7.10 New rule 11.8 provides for a person or body to whom information is communicated for one of the specific purposes in rules 11.5 to 11.7 to be able to communicate that information either for the same purpose for which that person or body received it, or for the purpose of professional development or training (provided in the latter case that no person involved in the proceedings is thereby identified without his or her consent). There is, however, no provision for further onward communication under rules 11.5 to 11.7.

Amendments made by the FPC (Miscellaneous Amendments) Rules

- 7.11 The FPC (Miscellaneous Amendments) Rules amend the FPC(CA89)R 1991 to achieve, so far as possible, consistency between proceedings in family proceedings courts and those in county courts and the High Court. There are, however, some differences arising out of the structure of the governing statutory framework and of the rules being amended.
- 7.12 As to attendance, rule 5 of the FPC (Miscellaneous Amendments) Rules inserts a new rule 16A into the FPC(CA89)R 1991, reflecting new rule 10.28 of the FPR. Rule 16(7) (which provides for power to exclude media representatives from children proceedings) is deleted, and rule 16 in consequence becomes a rule relating solely to attendance of parties, and is retitled accordingly. The new rule is more limited in scope than the FPR 1991 equivalent, since it relates only to “relevant proceedings”, which has the meaning assigned to it by section 93 of the Children Act 1989 (which may be summarised as covering private law and public law children proceedings) but also (by virtue of rule 21B of the existing rules) covers proceedings for parental orders under the Human Fertilisation and Embryology Act 1990 s.30. No corresponding change is made for non-children proceedings in magistrates’ courts (governed by the Family Proceedings Courts (Matrimonial Proceedings, etc.) Rules 1991), for which attendance will remain as provided for in section 69 of the Magistrates’ Courts Act 1980.
- 7.13 As to communication of information relating to proceedings, rule 6 of the FPC (Miscellaneous Amendments) Rules inserts a new Part IIC into the FPC(CA89)R 1991. The significant difference from the equivalent Part XI inserted into the FPR 1991 is again scope, with Part IIC applying (as with the attendance rule) only to “relevant proceedings” (see rule 21Q). Thus only maintenance cases coming under the definition of relevant proceedings will be caught – essentially applications under Schedule 1 to the Children Act 1989. This approach has been adopted because of the complexity of introducing the equivalent of Part IIC into all rules applicable in the FPCs which might cover a child maintenance claim. The current situation is that such proceedings are not covered by the present rule 23A of the FPC(CA89)R, and it was felt that to try to introduce the rules to all such proceedings would not only be a large undertaking, but could introduce considerable confusion for litigants. In addition, there is no equivalent reference to disclosure of unapproved judgments (compare the new Part XI FPR 1991 at rule 11.2(3)), since this was thought to be unnecessary for family proceedings courts. The reference in Part XI of the FPR 1991 is to take account of the practice in the higher courts whereby the judge will release an unapproved draft judgment early to enable errors to be corrected and lawyers to consider any necessary consequential applications (see further Practice Statement 22nd April 1998 and 25th November 1998, at [1998] 1

FLR 1102, [1999] 1 FLR 314 respectively); and there is no equivalent in the family proceedings courts.

- 7.14 Rule 9 of the FPC (Miscellaneous Amendments) Rules makes a consequential amendment to a cross-reference in the 1993 Rules, reflecting the replacement in the 1991 Rules of rule 23A by the new Part IIC.

- **Consolidation**

- 7.15 The statutory instruments referred to in this Memorandum amend existing Rules. Work is currently ongoing to produce a new, single set of Family Procedure Rules which will apply to all levels of family courts. This is a large-scale project which is currently projected for completion and implementation not before October 2010.

8. Consultation outcome

- 8.1 There have been two consultation papers. The first, titled **Confidence and confidentiality: Improving transparency and privacy in family courts** was published by the Department for Constitutional Affairs in July 2006. The second, **Confidence and Confidentiality: Openness in family courts - a new approach**, was published by the Ministry of Justice on 20 June 2007, both via the Department's website and directly to 165 key stakeholders, and interested organisations and individuals who had been engaged with the transparency programme previously, with a total of 112 responses being received. The consultations can be found at:

<http://www.dca.gov.uk/consult/courttransparency1106/cp1106.htm> and
<http://www.justice.gov.uk/publications/cp1007.htm>

- 8.2 On *media attendance*, the first consultation asked: "Should the media be allowed to attend family proceedings as of right, with judicial discretion to exclude where appropriate?" 100% of media representatives who responded agreed with the proposition; 72% of members of the public and 54% of voluntary sector (charities for children, adults or others) organisations that replied also agreed; while 73% of judicial responses, 77% of responses from local and devolved government and Non-Departmental Public Bodies (NDPBs) and 78% of responses from legal practitioners or bodies representing them did not agree. The second consultation paper argued that improving confidence should be achieved by increasing the information coming out of family courts, and that allowing the media in to the family courts as of right would not be consistent with the principle that children must come first. Since that consultation, however, over 200 letters were received from individuals, MPs and constituents (more than the total number of responses to the second consultation paper itself, but consistent with the views expressed by the general public in responding to the consultation paper) expressing the view that the family courts are not being run with the child's best interests at heart and should be opened up.
- 8.3 On *communication of information relating to proceedings*, the second consultation paper proposed wider disclosure of information by parties so that it would be easier for people to discuss their case and get timely and appropriate

advice and support. The proposal that there should be some relaxation in the disclosure rules was widely supported (particularly by individuals/members of the public), as was allowing disclosure for a purpose rather than to specified persons; and the question whether unlimited onward disclosure should be permitted had a more mixed response, with a small majority opposed. Concerns were expressed about protecting the identity of the children and parties involved, and whether any restrictions would offer sufficient protection for those involved.

9. Guidance

9.1 The guidance being prepared for stakeholders includes:

- For court users – a new leaflet about the media attendance provisions, and a revised version of an existing leaflet about disclosure; CAFCASS is also developing a leaflet specifically for children about the media attendance provisions
- For court users and legal professionals – information on the new rules for media attendance and disclosure on the HMCS website
- For court staff – a revised guide on working with the media (this covers all proceedings, not only family proceedings)
- For the media – a guide on the new provisions for media attendance at family proceedings
- For MPs – revised guidance on their responsibilities in cases where constituents are involved in family proceedings, including the new disclosure provisions

9.2 We are also working with a range of stakeholders from the legal professions and media groups and are exploring other options for publicising the new provisions, for example placing articles in relevant external publications.

10. Impact

10.1 An interim impact assessment was published on 16 December 2008, alongside ‘Family Justice in View’. Impacts are small – possible small increases in litigation arising from decisions in relation to media access and a reduction in court costs from fewer applications for authority to disclose. In addition media attendance will give rise to additional court costs in relation to security, and small costs for media representatives wishing to attend but not accredited in accordance with the designated scheme. The designated scheme will be the existing UK Press Card Scheme. The impact assessment can be seen at:

<http://www.justice.gov.uk/publications/cp1007.htm>

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 A post implementation review will be completed 3 years after all elements of the overall transparency package have been implemented. Some elements of the package (not part of this memorandum) require amendments to primary legislation for which there is currently no implementation date.

13. Contact

13.1 Mara Broome
Ministry of Justice
2.07 Petty France
London SW1H 9AJ
Tel: 020 334 3113
Email: mara.broome@justice.gos.gov.uk