

EXPLANATORY MEMORANDUM TO
THE FAMILY PROCEDURE (AMENDMENT) (NO. 5) RULES 2012

2012 No. 3061

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 The Family Procedure Rules 2010 (“the 2010 Rules”) set out the practice and procedure to be followed in the High Court, county courts and magistrates’ courts in family proceedings. The Family Procedure (Amendment) (No 5) Rules (“the 2012 Rules”) amend the 2010 Rules to insert some new procedural provisions relating to the court’s control on expert evidence in family proceedings.

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

- 3.1 There are two matters of special interest to the joint committee.
- 3.2 First, the Government published draft family justice legislation on 3 September 2012 which contains a clause on expert evidence in children proceedings (Command Paper 8437, www.official-documents.gov.uk/document/cm84/8437/8437.asp). The provisions in the proposed primary legislation would, if enacted, replace some of the 2012 Rules in so far as children proceedings are concerned. Further information is provided in the Impact Assessment which is annexed to this Memorandum. The intention is that the 2010 Rules will be amended if the draft provisions are enacted.
- 3.3 Secondly, in the light of comments on the use in rules of court of the expression “will” in the Committee’s 31st and 41st reports of the 2010-2012 session of Parliament, the Committee’s attention is drawn to the Schedule to the 2012 Rules which inserts in the 2010 Rules rules 25.1, 25.8(1)(a) and (b) and (2) (a) and (b), 25.9(2) and 25.20(4)(a), where the expression “will” is used. The new Part 25 in the Schedule is largely a consolidation of the existing rules relating to experts in the 2010 Rules and the new rules 25.1, 25.5 to 25.8 and 25.18 and 25.19 and other rule amendments relating to experts but Rules 25.1 and 25.8 in the Schedule are fresh instances of the expression “will”, indicating in the former instance a general injunction not to entertain expert evidence beyond that which in the opinion of the court is necessary to assist the court to resolve the proceedings, and in the latter instance matters which the court will address as part of its management of the evidence. This reflects the approach explained previously of referring,

in relation to the functions of the court, to what the court “will” do, rather than what it “must” do.

4. Legislative Context

4.1 The 2010 Rules are made by the Family Procedure Rule Committee and allowed by the Lord Chancellor. The Family Procedure Rule Committee intends to amend the 2010 Rules over time as necessary in the light of legislative changes, representations by practitioners and stakeholders and their own proposals for improvements. The 2012 Rules are being made in response to recommendations made by the Family Justice Review in its final report published in November 2011. The report is available on the Ministry of Justice website at www.justice.gov.uk/publications/policy/moj/family-justice-review-response.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 In its response to the Family Justice Review, published in February 2012, the Government accepted the following recommendations requiring legislative change:

- Primary legislation should reinforce that in commissioning an expert’s report regard must be had to the impact of delay on the welfare of the child. It should also assert that expert testimony should be commissioned only where necessary to resolve the case;
- The court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved;
- Judges should direct the process of agreeing and instructing expert witnesses as a fundamental part of their responsibility for case management. Judges should set out in the order giving permission for the commissioning of the expert witness the questions on which the expert witness should focus.

7.2 The Review highlighted problems associated with the duration of cases in the family courts, with care and supervision applications then taking an average of 55 weeks to be concluded and consequent uncertainty and distress for children and their families. The Review raised concern that expert evidence was being commissioned too frequently,

including when it added little to the court's understanding of the case, and that this was contributing to delay.

7.3 As well as amending the 2010 Rules to implement the specific recommendations of the Review, the Family Procedure Rule Committee agreed some further changes reflected in the 2012 Rules which are designed to support more effective and proportionate use of expert evidence. This includes specifying additional factors that the court must consider when deciding whether to permit expert evidence to be obtained or used in children proceedings, and amending some provisions relating to expert evidence in proceedings not relating to children such as financial remedy matters. The amendments also elevate parts of the Practice Direction guidance on experts to the rules, specify that the court's duty to further the overriding objective in rule 1.1 of the 2010 Rules by actively managing cases includes controlling the use of expert evidence and alter the order of matters included in active case management placing timetables and controlling the progress of the case first on the list.

- Consolidation

7.4 The 2010 Rules provide a consolidated unified set of rules for all types of family proceedings. The 2012 Rules amend the 2010 Rules. The new Part 25 in the Schedule to the 2012 Rules is largely a consolidation of the existing rules relating to experts in the 2010 Rules and the new rules referred to in paragraph 3.3. The 2010 Rules as amended will be published on the Family Procedure Rules website at the following link:
www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/family/index.htm.

8. Consultation outcome

8.1 In June 2010, the Family Justice Review panel issued a call for evidence to which over 700 individuals and organisations responded. The Review panel met a wide-range of stakeholder groups and undertook visits across the UK and overseas. In March 2011, the Review panel published an Interim Report, in which they sought views on a series of proposals for reform of the family justice system. The consultation closed in June 2011, and received over 600 responses. The Review panel considered the consultation responses, and on 3 November 2011 published their Final Report. As set out in the Final Report, there was broad support for the panel's proposals to reduce unnecessary use of expert reports although opinion was more mixed on whether this could best be achieved through primary legislation, amendments to the 2010 Rules, or guidance and training for the judiciary. The Review panel made some other adjustments to its initial proposals in light of responses to the consultation which are described in more detail in Chapter 3, paragraphs 3.124-3.138 of the Final Report.

8.2 The Family Procedure Rule Committee conducted a further targeted consultation with representative bodies for the legal profession, expert witnesses and the judiciary in August and September 2012. A full 12 week consultation was not undertaken because of the extensive consultation already conducted as part of the Family Justice Review and the fairly contained nature of the changes which in the main concern one part of the FPR. The

consultation focused on proposed changes affecting financial remedy proceedings and other proceedings not relating to children, as these types of proceedings were not the focus of the Family Justice Review which was primarily concerned with the impact on children arising from the use of expert evidence. Twelve responses were received. Most respondents were broadly supportive of the proposed amendments and commented only on matters of detail. However, three respondents representing the legal profession did not support the need for changes in financial remedy proceedings. The Committee considered these points carefully. It concluded that the proposed changes to the rules should be retained as it was important to have a single, consistent threshold for expert evidence across all family proceedings, but some adjustments were made to the relevant Practice Directions in response to these and other points made by respondents. Points were also raised in relation to the need for expert evidence to determine a party's capacity to conduct proceedings. The draft Practice Direction relating to protected parties and expert evidence is being revised in the light of the comments of the Official Solicitor (Draft Practice Direction 15B, *Adults Who May Be Protected Parties and Children Who May Become Protected Parties in Family Proceedings*) with the intention that this draft Practice Direction should be made and brought into force on 31st January 2013.

- 8.3 Given the fairly technical nature of the amendments and the limited nature of the consultation, no response to consultation was published. Replies were sent to the twelve respondents informing them of the outcome.

9. Guidance

- 9.1 The 2010 Rules as amended, and the associated Practice Directions, will be available to the public and to practitioners on the Family Procedure Rules website. In addition, the Ministry will write to the main representative bodies for the legal profession, experts and the judiciary to draw their attention to the changes made by the 2012 Rules.

10. Impact

- 10.1 The changes will have an impact on experts, some of whom may be self-employed or employed by a charity or voluntary body, and consultancies that employ experts. The changes will also affect legal professionals working in family justice, some of whom may be employed by a charity or voluntary body. Experts may experience a fall in income as fewer reports may be commissioned, but we cannot quantify the effect as the proposals are subject to judicial discretion in each case. Reducing the number and scope of expert reports could lead to shorter cases. This may reduce uncertainties for the families and children involved and may help to reduce the negative outcomes for children in care and supervision cases associated with spending a long time in transitional arrangements. Legal professionals working in family justice may also experience a fall in income if the number of hearings and preparation associated with hearings is reduced because fewer experts are commissioned.
- 10.2 The changes will have an impact on the courts service, local authorities, Cafcass/CAFCASS CYMRU and the Legal Services Commission (LSC). Fewer reports

should lead to savings for local authorities and the LSC who share the costs in publicly funded cases. There may also be savings for these agencies and for the courts service and Cafcass/CAFCASS CYMRU if fewer reports lead to shorter or fewer hearings. In addition, local authority social workers may be required to complete more work in some cases if a social work assessment has not been completed already and the court decides to ask them to provide such an assessment rather than commissioning an expert such as an independent social worker.

- 10.3 There will also be some familiarisation costs for the judiciary, court staff, legal practitioners and experts relating to reading about and understanding the new procedures but we do not expect these to be significant.
- 10.4 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

- 11.1 The legislation applies to small business. This is most likely to be small firms of solicitors dealing with family proceedings and consultancies that employ experts.
- 11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to provide information so that legal practitioners and experts will be able to operate the provisions of the 2010 Rules as amended by the 2012 Rules with minimal impact.
- 11.3 The basis for the final decision on what action to take to assist small business is that these amendments will not add significantly to the existing requirements of the 2010 Rules.

12. Monitoring and review

- 12.1 The Family Procedure Rule Committee will consider the effects of the amendments made to the 2010 Rules by the 2012 Rules in the context of the ongoing consideration of the operation of the 2010 Rules. The Ministry of Justice also intends to undertake an initial review of the impact during 2013. If the proposed draft clause relating to the control of expert evidence is enacted, consequential amendments to the rules relating to experts will be needed.
- 12.2 While the measures are expected to lead to a reduction in the volume of expert reports overall, there is no specific target, since decisions on whether to permit expert evidence are subject to judicial discretion, which must take into account the facts of each case.
- 12.3 Information recorded by HM Courts and Tribunal Service should provide an indication of the success of the policy, alongside other initiatives to reduce delay arising from the recommendation of the Family Justice Review. The Government has established a Family Justice Board with overall responsibility for driving improvements in the family justice system, with a particular focus on reducing delay in public law cases. It will be supported

by a performance sub-group, with a remit to analyse performance information and establish priorities for action to improve performance and national and local level.

13. Contact

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Joanne.Willows@justice.gsi.gov.uk can answer any queries regarding the instrument.