

**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, either to facilitate the making of the Family Procedure Rules 2010 (“the Rules”), or in consequence of the coming into force of the Rules on 6 April 2011. The Rules 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 facilitate the making of the Rules, it is necessary to make amendments to other legislation. In addition, amendments to other legislation are required in consequence of the 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.”

## 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 to facilitate the making of the Rules. For example, article 12 of the Order inserts into the Magistrates' Courts Act 1980 a new section 68A ensuring that magistrates' courts are able to order disclosure of documents in family proceedings on a similar basis to other courts dealing with such proceedings. This will align the powers of the magistrates' courts in this regard with the existing powers of the High Court and county courts. This then facilitates the making of a single set of rules which apply to all three courts, relating to the practice and procedure to be followed on an application for disclosure of documents. Similarly, articles 3 and 10 make amendments to facilitate 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 amendments required as a consequence of the coming into force of the 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 to ensure consistency with the operation of the transitional provisions of the new Rules.

- *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 consultation on the changes included in this Order as these are predominantly minor changes arising from the policy approaches embodied in the Rules, or simply made in consequence of the coming into force of the Rules.

## **9. Guidance**

9.1 The Rules have been published on the Ministry of Justice website, three months prior to implementation, with supporting Practice Directions. 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 The 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 CAFCASS 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**

Philip Dear at the Ministry of Justice Tel: 202 3334 3125 or email: [philip.dear@justice.gsi.gov.uk](mailto:philip.dear@justice.gsi.gov.uk) can answer any queries regarding the instrument.