

EXPLANATORY MEMORANDUM TO
THE ALLOCATION AND TRANSFER OF PROCEEDINGS ORDER 2008
2008 No. 2836 (L.18)

1. This explanatory memorandum has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1. The new Order makes provision for the allocation and transfer of proceedings between courts in the family jurisdiction namely the High Court, county courts, and the magistrates' Family Proceedings Courts (FPCs).
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1. None.
4. **Legislative Context**
 - 4.1. The new Order revokes the Children (Allocation of Proceedings) Order 1991, The Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, and the Children (Allocation of Proceedings) (Appeals) Order 1991.
 - 4.2. The new Order is made by the Lord Chancellor, after consulting the Lord Chief Justice, under the powers in section 92(9) and (10) and 94(10) of, and Part 1 of Schedule 11 to, the Children Act 1989 and section 57 of the Family Law Act 1996.
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**

Public consultation

- 7.1. The new Order seeks to implement policy proposals, which were consulted on and agreed following Her Majesty's Court Service (HMCS) twelve-week public consultation *focusing judicial resources appropriately* published in October 2005. The policy proposals were aimed at managing growing demands on the High Court bench in all jurisdictions.
- 7.2. So far as the family jurisdiction is concerned, the consultation paper identified the main issue as the balance of work between the FPCs and the county courts in relation to proceedings under the Children Act 1989 and Part IV of the Family Law Act 1996. The growth in the number of Children Act private law proceedings issued in the county

court in particular has resulted in a disproportionate number of private law Children Act applications being dealt with in the county courts as against the FPCs. Cases transferred from the FPC to the county court on the grounds of complexity are not being transferred back to the FPC when they are no longer complex so as to merit continued county court hearing.

- 7.3. The main recommendation in the 2005 consultation paper, which formed the basis for reviewing the current family allocation and transfer process, is:

“That the relevant legislation and guidance governing the allocation of cases to the judiciary should be reviewed and revised to reflect the proposed three features of work that, exceptionally, require to be dealt with at High Court level”. This was followed by the question:

- Do you agree that the proposed High Court features are appropriate?

This question applied to the civil, family and criminal jurisdictions and the proposed High Court features referred to were **complexity, public impact, importance and significance and precedent setting**. Of the 156 responses received, 96 answered this question. A majority agreed some of who commented that the proposal was an appropriate way of distinguishing work fit for the High Court. It is important to ensure the High Court bench continues to be of the highest quality and deployed in the most effective way possible. However, some of these respondents felt that the public importance criterion would capture cases involving high profile litigants. They argued that this suggested that the rich and famous would receive special treatment. The Ministry of Justice therefore revised this criterion to reflect the importance of the outcome of the case, not the parties involved.

- 7.4. Following that consultation, revisions to the current Allocation Orders were required to implement the policy. In line with the Ministry of Justice strategic objective to deliver fair and simple routes to access to justice, we have taken the opportunity to combine the three existing Orders into this single Order, making the process and procedure more easily understood and accessible. The existing Orders are the Children (Allocation of Proceedings) Order 1991, the Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997 and the Children (Allocation of Proceedings) (Appeals) Order 1991.

- **Consolidation**

- 7.5. The new Order does not amend any existing legislation.

8. Consultation outcome

- 8.1. The consultation lasted for twelve-weeks (October 2005 to 20 January 2006). Copies of the consultation paper were sent to:

- **Judicial and legal bodies** including the senior judiciary, the Council of Circuit Judges, the Association of District Judges, the Council on Tribunals, the Bar Council, the Law Society, other professional bodies and court users' associations.
- **Consumer bodies and business organisations** for example the National Association of Citizens' Advice Bureaux, the National Consumer Council, the Confederation of British Industry and the Federation of Small Businesses.
- **Other Government Departments** for example the Cabinet Office, the then Department of Trade and Industry (now Department for Business, Enterprise &

Regulatory Reform), the Department for Works and Pensions, and the then Office of the Deputy Prime Minister (Department of Communities and Local Government), and

- **The Constitutional Affairs Committee.**

8.2. A copy of the consultation paper is published on the Department's website at: http://www.dca.gov.uk/consult/focus/focus_cp2505.htm, and the response document is at: http://www.dca.gov.uk/consult/focus/focus_cp2505.htm.]

8.3. Overall a total of 156 responses were received.

Stakeholder Consultation

8.4. Given that the policy underlying the proposals had been agreed and settled in the 2005 consultation, a limited consultation exercise on the new Order, aimed at stakeholders, was carried out between March and June 2008. The consultation paper was not published but copies were sent to judicial bodies and the senior judiciary, legal professional bodies, consumer and representative bodies, charity organisations, and other government departments.

8.5. The stakeholder consultation invited comments on the contents and drafting techniques of the new Order. The Ministry of Justice received an overall favourable response from 40 respondents. However, a few suggestions were made which informed the final draft of the new Order attached to this explanatory memorandum. For example, stakeholders had suggested that before a case is transferred under article 14, the courts should have regard to the practicalities for the parties involved for example travelling implications particularly for the child. Articles 14 and 17 were amended to include convenience of the child who is subject of the proceedings.

8.6. One respondent commented that Article 15(1)(c) (conflict of evidence of two or more experts) is a major reason for transfer from magistrates' courts to county courts and is usually put forward at the start of proceedings even before any party actually knows there is such a conflict. The respondent commented that more often than not it is potential for conflict than actual conflict that is the issue. Article 15(1)(c) was therefore amended so that cases may be transferred from the magistrates court to the county court if there is a real possibility of a conflict in the evidence of two or more experts.

8.7. There were some reservations about article 15(1)(b) to the effect that the word "may" seem inappropriate in contrast with "will" in (a); "is" in (c) and (d); and "real possibility" in (f), (g), and (h). The Ministry of Justice amended article 15(1)(b) and amended the provision to read "there is a real possibility of difficulty in resolving conflict in the evidence of witnesses". The reason for the amendment was to ensure that a difficulty is looming rather than being speculative.

9. Guidance

9.1. Information about the new Order will be published on the judicial website when the Order is laid. The Judicial Studies Board will provide training materials for judges, magistrates, and legal advisers on how family work will be allocated and transferred between their courts when the new Order comes into force. Training for court staff commenced in October 2008.

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

Success criteria

- 12.1. Following implementation of the new Order, the Ministry of Justice will monitor volumes of cases issued in the FPCs and the transfer of family proceedings from county courts to FPCs for a period of 12 months at the end of which a full evaluation will be carried out to assess impact and success. Success will be assessed by the proportion of work distribution between FPCs and county courts and by the number of cases transferred to FPCs and the capacity such transfers has generated in the county courts to take on more cases currently being heard by the High Court.

Benefits and projected outcomes

- 12.2. The new Order should ensure that cases are heard at the lowest most appropriate level of court commensurate with complexity. This should ease work pressures on the High Court and county court; to achieve a more rational distribution of cases between courts that have concurrent jurisdiction; to make best use of under-utilised family magistrates'; and to reduce delays.
- 12.3. Under the new Order more family proceedings would be transferred to the FPCs paving the way for county court district judges to hear more cases currently being heard by circuit judges who would in turn have more capacity to hear more cases currently being heard by High Court Judges.
- 12.4. Many FPCs have the capacity to hear more cases. Magistrates would benefit from undertaking more cases that would enable them to enhance their expertise in the family jurisdiction. Many more District Judges may now hear full care and supervision cases and these proposals would free up district judge time to take on those more complex cases.
- 12.5. The outcome would be that the High Court bench would be deployed on cases that truly require it. All levels of judiciary would, as far as possible, exercise their full jurisdiction, ensuring that the diet of work at each level of court is sufficiently stimulating to provide job satisfaction so that optimum use is made of our valuable judicial resources. This should reduce delays, particularly in the county court, ensuring that, children and their families receive a system of family justice where cases involving them are resolved within a reasonable timeframe.

13. Contact

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