

## EXPLANATORY MEMORANDUM TO

### THE FAMILY PROCEDURE (AMENDMENT No. 3) RULES 2017

2017 No. 1033 (L. 14)

#### 1. Introduction

- 1.1 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 These Rules insert a new Part 3A into the Family Procedure Rules 2010 (“the 2010 Rules”). The purpose of the new Part 3A is to set out the court’s duties and powers in relation to assisting parties whose ability to participate in family proceedings may be diminished by reason of their vulnerability, and in relation to assisting parties and witnesses in family proceedings where the quality of their evidence is likely to be diminished by reason of their vulnerability.
- 2.2 The new Part 3A of the 2010 Rules will be supplemented by a new Practice Direction 3AA: *Vulnerable Persons: Participation in Proceedings and Giving Evidence* which provides guidance to the court on matters of practice and procedure under the new Part 3A.

#### 3. Matters of special interest to Parliament

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

- 3.1 None.

##### *Other matters of interest to the House of Commons*

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

#### 4. Legislative Context

- 4.1 Family Procedure Rules are made by the Family Procedure Rule Committee (“the Committee”) and allowed by the Lord Chancellor in accordance with section 79 of the Courts Act 2003. The Family Procedure (Amendment No.3) Rules 2017 come into force on 27 November 2017.
- 4.2 The 2010 Rules set out the practice and procedure to be followed in the High Court and the family court when dealing with family proceedings in England and Wales. These Rules amend the 2010 Rules to insert a new Part 3A. The new Part 3A of the 2010 Rules and the supplementing Practice Direction 3AA apply to adults and children in relation to the giving of evidence in family proceedings, and to adults in relation to participation in family proceedings other than by way of giving evidence.

#### 5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is 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**

### *What is being done and why*

- 7.1 These changes to the 2010 Rules are intended to improve the treatment of vulnerable witnesses and parties in family proceedings. They were informed by a 2015 report of the judicially-led Vulnerable Witnesses and Children Working Group, established by the President of the Family Division. The 2015 report found that the family justice system lagged behind the criminal justice system in its procedures for taking evidence from vulnerable witnesses. It recommended, among other things, a new rule, to be supplemented by a practice direction, to improve support and protections for vulnerable witnesses when giving evidence. The full report can be viewed here: <https://www.judiciary.gov.uk/wp-content/uploads/2015/03/vwewg-report-march-2015.pdf>
- 7.2 The Ministry of Justice has acknowledged the need to improve support and protections for vulnerable witnesses in family proceedings, and is drawing on the lessons learnt in criminal justice. The department was supportive of the Working Group's recommendation to draft these Rules and the supplementary Practice Direction 3AA, and has been working with the Committee to prepare them. This should be viewed as part of wider work the Ministry of Justice is doing to improve the treatment of vulnerable court users, which includes developing fresh training on these issues for court staff and investing in the court estate to improve facilities. A further practice direction, which deals with the wider participation of children in family proceedings other than by giving evidence, is proceeding to a separate timetable.
- 7.3 The new Part 3A of the 2010 Rules sets out the court's duties to consider whether a party's participation in family proceedings is likely to be diminished by reason of vulnerability, and whether the quality of evidence of a party or witness in such proceedings is likely to be diminished by reason of vulnerability.
- 7.4 If so, the court must consider whether to make "participation directions" for the purpose of assisting such a party or witness, or to give the party or witness the assistance of one or more specified "measures". A participation direction may be either a general case management direction, or a direction that a party or witness should have the assistance of one or more of the measures listed in new rule 3A.8.
- 7.5 The new Part 3A sets out the matters which the court must have particular regard to when deciding whether to make participation directions. These are specified in new rule 3A.7 and include matters such as the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of any other party to the proceedings, and whether the party or witness suffers from mental disorder or has a physical disability.
- 7.6 The measures which the court could direct be put in place are set out in rule 3A.8 and include, for example, measures to prevent a party from seeing another party. The court will determine how best to achieve this. For example, the court could direct

measures such as protective screens to prevent a party or witness from seeing another party or witness, participation or giving of evidence from outside the courtroom by video link, and appointment of an intermediary to assist a party or witness with problems of communication or understanding.

- 7.7 The same duties and powers of the court apply in relation to someone who is a protected party, meaning a party who lacks capacity within the meaning of the Mental Capacity Act 2005 to conduct proceedings.
- 7.8 The new Part 3A makes clear that when deciding whether to make a participation direction the court must have regard to the measures available to the court and the cost of any available measures. The new rules do not give the court power to direct that public funding be made available to provide a measure and that they do not enable the court to direct that an officer of the Children and Family Court Advisory and Support Service (known as Cafcass) or of CAFCASS Cymru should perform any new functions.

### *Consolidation*

- 7.9 The 2010 Rules provide a consolidated unified set of rules for all types of family proceedings. These Rules amend the 2010 Rules. There are currently no plans to undertake a consolidation exercise. The 2010 Rules as amended will be published on the Justice website at the following link:

[https://www.justice.gov.uk/courts/procedure-rules/family/rules\\_pd\\_menu](https://www.justice.gov.uk/courts/procedure-rules/family/rules_pd_menu)

## **8. Consultation outcome**

- 8.1 The Committee must, before making Family Procedure Rules, consult such persons as they consider appropriate (section 79(1) (a) of the Courts Act 2003).
- 8.2 The Committee conducted a targeted consultation on draft rules with representative bodies from the legal professions, voluntary and third sector organisations, Cafcass and the judiciary between August and September 2015, which can be viewed here:  
<https://consult.justice.gov.uk/digital-communications/draft-amendments-to-family-procedure-rules/>
- 8.3 There were 24 responses to the consultation, which were generally supportive save for two comments which resulted in discussion in the Committee and decisions to improve the drafting around the use of the word “diminished” and of the provision referring to characteristics of a party (now rule 3A.7(j)). The majority of comments dealt with the participation of children in proceedings, which is now anticipated to be the subject of a separate practice direction and rules to come into force at a later date.
- 8.4 The Committee subsequently conducted a targeted consultation on Practice Direction 3AA in February 2017, which can be viewed here:  
<https://www.gov.uk/government/consultations/vulnerable-witnesses-practice-direction>
- 8.5 A total of 21 responses were received which were discussed in detail by a working group of the Committee, and a number of minor drafting amendments were made to the Practice Direction as a result.

## **9. Guidance**

- 9.1 The 2010 Rules as amended by these Rules will be available to the public and legal practitioners on the website referred to in paragraph 7.9 above. Guidance and refreshed training for court staff on the operational practicalities of arranging measures for use within proceedings will be provided by Her Majesty's Courts and Tribunals Service ("HMCTS").

## **10. Impact**

- 10.1 These Rules will have a small impact on business, charities or voluntary bodies, in that those providing legal advice, such as solicitors and barristers, will need to be aware of the amendments made by these Rules and how to apply them.
- 10.2 These Rules have no impact on the public sector, save that HMCTS staff will need to be aware of the amendments made by these Rules and take appropriate steps to facilitate delivery of any measures ordered by courts.
- 10.3 An Impact Assessment has therefore not been prepared for this instrument.

## **11. Regulating small business**

- 11.1 The legislation does not apply to activities that are undertaken by small businesses other than as set out at paragraph 10.1 above.

## **12. Monitoring & review**

- 12.1 HMCTS will monitor the use of those measures which may impact on local court budgets following introduction.
- 12.2 The Committee will monitor the effects of these amendments as part of its ongoing consideration of the 2010 Rules.

## **13. Contact**

- 13.1 Joanna Furlong at the Ministry of Justice, telephone: 020 3334 3123 or email: [Joanna.Furlong@justice.gov.uk](mailto:Joanna.Furlong@justice.gov.uk) can answer any queries regarding the instrument.