

EXPLANATORY MEMORANDUM TO

THE FAMILY PROCEDURE (AMENDMENT NO. 2) RULES 2021

2021 No. 875 (L. 13)

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 amend the Family Procedure Rules 2010 (“FPR”) which, with supporting Practice Directions, set out the practice and procedure to be followed in family proceedings in the High Court and the family court.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

Not applicable.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The FPR, and amendments to them, are made by the Family Procedure Rule Committee (“the FPR Committee”) under section 75 of the Courts Act 2003 (section 76 of which makes further provision about the scope of Family Procedure Rules) and formally allowed by the Lord Chancellor under section 79 of that Act. Section 79(1) of the Courts Act 2003 requires the FPR Committee before making rules to meet (unless inexpedient to do so) and consult such persons as they consider appropriate. The FPR Committee meets 9 times a year and except in very rare circumstances considers any proposed matters for inclusion in the FPR in at least one meeting or in correspondence out of the FPR Committee (as it did for the matters in these Rules). Consultation is addressed in section 10 of this memorandum.

7. Policy background

What is being done and why?

- 7.1 The FPR are amended from time to time, to reflect legislative changes or to improve the efficiency of the procedure and practice of family proceedings within the family court and High Court: these Rules make amendments for both purposes and specifically make the following amendments:
- 7.2 Firstly, Part 3A of the FPR is amended so that where a party or witness is, or is at risk of being, a victim of domestic abuse (which has been carried out by another party, the relative of another party or a witness), then the court will assume that the quality of the person's evidence, or the ability of a person to participate in proceedings, is diminished. This assumption will apply for the purposes of the court determining whether a participation direction to assist with the person's appearance in court is required. A participation direction could involve, for example, the court putting in place measures to prevent a party or witness from seeing another party or witness, or allowing a person to give evidence by live link rather than having to be physically present in the court room.
- 7.3 Section 63 of the Domestic Abuse Act 2021 requires these amendments to Part 3A FPR to be made.
- 7.4 Secondly, Part 10 of the FPR is amended. The amendments to rules 10.3 and 10.6 FPR clarify that the court may direct a means of service other than personal service for a Part 4 Family Law Act 1996 application or order. These provisions have already been piloted via provision in a pilot practice direction, which was put in place in August 2020 in recognition of the risk that Covid-19 related guidance and rules may impact the availability of court bailiffs or others to personally hand court papers to parties, and an acknowledgement that, in any event, flexibility over the means of making respondents aware of an order may help safeguard vulnerable applicants. Mrs Justice Theis issued judicial practice guidance in July 2020 on the service of Part 4 Family Law Act 1996 applications and orders, to be considered alongside the pilot practice direction.
- 7.5 This clarification that courts do not have to always require these applications and orders to be personally served has meant courts are more willing and able to direct a means of service other than personal service, where there is good reason to do so. Making permanent provision for this in the FPR will mean that the most appropriate method of ensuring a respondent is aware of an application or order can be used in each case. For example, the court could direct that service by post or email would suffice.

Linked to the changes to rules 10.3 and 10.6, rule 10.10 FPR is amended to clarify that the court officer must notify the police of certain orders made under Part 4 of the Family Law Act 1996 where the court is to effect service of such an order in accordance with rule 10.6(2) of the FPR.

Thirdly, rule 27.11 FPR is amended to make provision to allow what are often referred to as "legal bloggers" access to certain family court proceedings that are held in private, in the same way that accredited media representatives can attend such proceedings. Legal bloggers are defined as being 'duly authorised lawyers attending for journalistic, research or public legal educational purposes'.

The amendments to rule 27.11 FPR, and the associated practice direction, have been piloted, via a pilot practice direction, since October 2018 with no major concerns being raised. There are various existing restrictions on the ability of anyone to publish information from family proceedings that are held in private. These restrictions will not be altered by these amendments to the FPR.

Fourthly, rule 29.6 FPR is amended. The rule requires documents relating to gender recognition to be held in special security by the court. While Her Majesty's Courts and Tribunals Service has confirmed that all documents relating to gender recognition are already held in special security (in a locked cabinet, accessible by limited staff members), it has been noted that there is an omission in that rule as it does not currently cover proceedings brought under section 50(1)(d) or (e) of the Civil Partnership Act 2004 (civil partnerships void or voidable on grounds that a gender recognition certificate has been issued to one of the civil partners), even though it does refer to the equivalent provisions under the Matrimonial Causes Act 1973. The amendments close this gap.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 The FPR provide a unified set of rules for all types of family proceedings. There are currently no plans to undertake a consolidation exercise, instead the FPR as amended by these Rules will be published on the Family Procedure Rules website at the following link: https://www.justice.gov.uk/courts/procedure-rules/family/rules_pd_menu.

10. Consultation outcome

- 10.1 The FPR Committee must, before making Family Procedure Rules, consult such persons as they consider appropriate (section 79(1)(a) of the Courts Act 2003).
- 10.2 The FPR Committee does not always undertake a formal public consultation on proposed amendments to the FPR.
- 10.3 Given that section 63 of the Domestic Abuse Act 2021 requires the FPR Committee to make the amendments these Rules make to Part 3A FPR, the FPR Committee did not consult in relation to these amendments. However, the provision and the principle behind section 63 was considered in detail in Parliament during the passage of the Domestic Abuse Act 2021.
- 10.4 In relation to the amendments on service of Part 4 Family Law Act 1996 applications and orders, the FPR Committee received feedback from Her Majesty's Courts and Tribunals Service on the use and success of the piloting of these amendments. The Crown Prosecution Service indicated to the FPR Committee that it was supportive of making permanent provision in the FPR. FPR Committee members, including legal practitioners, also commented positively on the pilot. That being the case, the FPR Committee did not consider it necessary to consult further on the proposed rule amendments.
- 10.5 The amendments made to rule 27.11 FPR, regarding making permanent provision for 'legal bloggers', were subject to consultation with the FPR Committee's core

stakeholders in March 2020, while the pilot scheme was in place. Forty-two stakeholders were contacted, and eight responses were received. Of those who did respond there was a clear majority who supported the pilot. Those expressing positive views about the pilot considered the safeguards over accessibility to hearings and the subsequent reporting of proceedings to be appropriate and adequate. Where suggestions for improvements were received, they tended to focus on enhancing the effectiveness of the pilot arrangements around training and awareness-raising, rather than the specific provisions introduced through the pilot practice direction.

- 10.6 In light of the feedback on the pilot, the FPR Committee did not consider it necessary to consult further before proceeding with the amendments in these Rules.
- 10.7 The amendments to rule 29.6 FPR are minor and technical, and are being made to close a gap in the Rules and to reflect the reality of how documents relating to gender recognition are already held by the courts. That being the case, the FPR Committee did not consider it necessary to consult in relation to these amendments.

11. Guidance

- 11.1 Amendments to the FPR are drawn to the attention of participants, to members of the judiciary, to other relevant representative bodies (for example the Law Society, Bar Council, advice sector) and to the editors of relevant legal publications by the FPR Committee secretariat; as well as by publicity within Her Majesty's Courts and Tribunals Service. News of changes affecting the family jurisdiction are published on the Ministry of Justice website referred to in paragraph 9.1.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because no, or no, significant, impact on the private, public or voluntary sectors is foreseen.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is for the amendments to form part of the FPR which are kept under continuous review by the FPR Committee, and may be subject to amendment accordingly.

15. Contact

- 15.1 Simon Qasim at the Ministry of Justice. Direct email: Simon.Qasim3@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Neal Barcoe, Deputy Director for Family Justice Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Lord Wolfson at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.