

EXPLANATORY MEMORANDUM TO
THE FAMILY PROCEDURE (AMENDMENT) RULES 2022

2022 No. 44 (L. 1)

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 The Family Procedure (Amendment) Rules 2022 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.

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 (“the 2003 Act”). Section 76 of the 2003 Act makes further provision about the scope of the FPR, including stating at sub-section (8) that the FPR “may, instead of providing for any matter, refer to provision made or to be made about that matter by directions”. The FPR are formally allowed by the Lord Chancellor under section 79 of the 2003 Act. Section 79(1) of the 2003 Act 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 this instrument). 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: this instrument makes amendments for both purposes and specifically makes the following amendments to the FPR:

- 7.2 Firstly, a new “enabling” rule is inserted in Part 3A of the FPR so that provision about the automatic prohibition of cross-examination in person can be made in a Practice Direction. Section 65 of the Domestic Abuse Act 2021 introduces a new Part 4B into the Matrimonial and Family Proceedings Act 1984, automatically prohibiting cross-examination in person in family proceedings in limited, specified circumstances, and providing for the appointment of a qualified legal representative by the court to conduct the cross-examination if it is in the interests of justice. The Practice Direction will set out the practice and procedure that courts should adopt in relation to these new legislative provisions.
- 7.3 Secondly, a new “enabling” rule is inserted in Part 5 of the FPR so that provision in relation to the bulk scanning of documents can be made in a Practice Direction. This new rule is being inserted to reflect the fact that Her Majesty’s Courts and Tribunals Service have put in place arrangements so that parties can, in specified circumstances, send documents in relation to court proceedings to a specified bulk scanning company, rather than to the court. The company then scans the documents and makes an electronic version available to the court. This facilitates more efficient working in the courts, with electronic file systems being used rather than paper-based systems.
- 7.4 Bulk scanning has been piloted in relation to various types of application since 2018, underpinned by pilot Practice Directions made under rule 36.2 of the FPR, which modify existing rules and Practice Directions to reflect the fact that court users will send documents to a third-party company rather than to the court. The pilot schemes have proved successful and it is intended to continue their use. The new rule will enable “permanent” Practice Directions to be made to underpin the use of bulk scanning in the future.
- 7.5 Thirdly, new procedural rules must be brought in to reflect the legislative reform brought about by the Divorce, Dissolution and Separation Act 2020. Amendments are primarily made to Part 6 (Service) and a new Part 7 (Procedure for Applications in Matrimonial and Civil Partnership Proceedings), in addition to wider consequential amendments across the FPR. The key changes include:
 - (a) Amendments to service provisions in Part 6 as follows:
 - i) Amendments to rule 6.5 so that the Court may serve the application, save where the applicant requests to serve, or where the party to be served is out of the jurisdiction, a child or a protected party. Rule 6.6A introduces a time limit, where the applicant serves the application within the jurisdiction, for the applicant to have completed the relevant step depending upon the method of service chosen. Rule 6.6B enables an applicant to apply for an order extending time. New rules 6.41A and 6.41B set out provision for the time for service, and applications to extend time, when serving an application out of the jurisdiction.
 - ii) Email service in accordance with rule 6.7A is introduced as an option. Email service, with postal notification, on the respondent is permitted when serving within the jurisdiction (and in Scotland or Northern Ireland). Rule 6.7A provides that where an application is served by email it must be sent to the respondent’s usual email address (or an email address provided by the respondent for service)

and a notice confirming such service must be sent to the respondent's postal address. Rule 6.8 has been amended so that the court will serve by email (with postal notification) save where an email address for service is not provided or the applicant does not seek email service on the respondent.

- (b) A revised and re-structured Part 7 to reflect the new procedure for matrimonial and civil partnership proceedings, specifically:
- i) A definition of disputed proceedings, to reflect the limited grounds on which matrimonial or civil partnership proceedings, save for nullity proceedings, may be disputed. This amendment reflects provisions in the Divorce, Dissolution and Separation Act 2020 which means that respondents can no longer dispute a divorce application except on extremely limited grounds. An answer may still be filed disputing the validity or subsistence of the marriage or civil partnership or the jurisdiction of the court to entertain the proceedings.
 - ii) Introducing a new 'minimum period' of 20 weeks for divorce and dissolution from the date on which the court issues the application before application for conditional order. The purpose of this period, introduced through the Divorce, Dissolution and Separation Act 2020, is to allow sufficient time to ensure certainty around the intention of divorce, and greater opportunity for couples to agree practical arrangements for the future where reconciliation is not possible, and divorce is inevitable.
 - iii) Setting out the procedure for new joint applications (including how a notice of proceedings should be sent to both parties, how such applications are able to progress as sole applications at conditional and final order stage and the notice period required for continuing a joint application as a sole applicant at final order stage). The Divorce, Dissolution and Separation Act 2020 introduced joint applications for the first time.
 - iv) Set out that in relation to costs, in a disputed case any party to matrimonial or civil partnership proceedings may be heard on any question as to costs at the hearing of the proceedings, and in standard case, any application for costs should be made using the Part 18 procedure).
 - v) Wider consequential amendments are made to Part 2, 9, 24 and 25 to reflect the changed procedure and terminology in Part 7 and to reflect the updated terminology, including updating of legal language used for divorce. For example, 'Petition' will become 'Application', 'Petitioner' will become 'Applicant', 'Decree Nisi' will become 'Conditional Order', 'Decree Absolute' will become 'Final Order', decree of nullity will become nullity of marriage order and decree of judicial separation will become judicial separation order. Terminology has been updated in the Divorce Act to align it with the modernised language present in the Civil Partnerships Act 2004. This will ensure simplicity and accessibility of language for citizens wishing to make their own applications unsupported by legal professionals.

7.6 Fourthly, amendments to rules 30.3(3)(a), 30.4(2)(a) and 30.5(4)(a) to address, for the FPR, the issue highlighted in McDonald v Rose [2019] EWCA Civ 4 in relation to the corresponding provisions of the Civil Procedure Rules, that they were open to being interpreted as meaning that if the lower court hands down judgment and then adjourns to a later date, it is not possible to make an application for permission to appeal to the lower court at the resumed hearing on that later date, because the “hearing at which the decision to be appealed was made” was the hearing at which judgment was handed down. The relevant rules are accordingly amended so that they refer to “the hearing at which the decision to be appealed was made or, if the hearing is adjourned to a later date, the hearing on that date”.

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 this instrument 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 Committee consults, as it considers appropriate to the rules or amendments to rules in question, in a number of ways of differing degrees of formality, including specific correspondence with bodies considered appropriate to be consulted; involving representatives of interested organisations in reviewing particular aspects of the rules; inviting and reviewing suggestions and observations solicited by its members from among the groups from which each is drawn; and inviting and reviewing suggestions from relevant Government Departments and other authorities affected by rules of family procedure.

10.3 The measures in this instrument arising from the Divorce, Dissolution and Separation Act 2020 were the subject of formal consultation which opened on 16 December 2020 and closed on 2 March 2021 (the consultation document and draft rule amendments can be found at <https://www.gov.uk/government/consultations/draft-changes-to-the-family-procedure-rules-arising-from-planned-implementation-of-the-divorce-dissolution-and-separation-act-2020>). Technical changes were made to the draft rules following the consultation, particularly in relation to service of documents.

10.4 Consultation on the other measures in this instrument was of the less formal nature described above, involving in particular seeking the views of Her Majesty’s Courts and Tribunals Service (including input from the pilot scheme) and input from members of the judiciary involved in giving effect to the proposals.

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 significant impact on business, charities or voluntary bodies.
- 12.2 There is no significant impact on the public sector.
- 12.3 A full 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 Tom Pursglove at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.