

[Sent by email to clive.buckley@justice.gsi.gov.uk]

Legal Services Commission response to Family Procedure Rule Committee Consultation Paper – Family Procedure Rules – An invitation to comment on the Draft Rules, Practice Directions and Forms

The Legal Services Commission is responsible for the administration of the Community Legal Service Fund. It has a direct interest in changes to court procedures and processes that serve to reduce costs to the limited Fund through the provision of public funding (legal aid). Such changes can be by way of rationalisation, clarification or streamlining of processes or by other changes which serve to make family justice and the family courts more modern and user friendly, thus reducing legal costs and facilitating access by clients.

The Legal Services Commission also has a role to play through the indirect provision of legal services and information which empower clients, in particular CLA Direct can provide user friendly information on legal topics and processes as well as signposting clients to legal advisers. Currently a telephone helpline is being introduced in the area of family work – this follows on from a successful pilot.

It is against that background that the Family Policy Team (part of the Civil Policy Team at the Commission) welcomes the establishment of the Family Procedure Rule Committee and the ongoing work which is being undertaken to create new Rules which will be simple and simply expressed, securing that the family justice system is accessible, fair and efficient (in accordance with section 75(5) Courts Act 2003).

The four principles of modernisation of language, harmonisation with the Civil Procedure Rules, the creation of a single unified code of practice and alignment of the procedures in all levels of court are entirely appropriate and welcome. They will support the overall aims of the new Rules and should serve to increase clarity and user satisfaction. The Commission responded previously to HMCS consultation CP19/06 on the principles of the proposed changes.

Questionnaire

Question 1: What are your views on the content of those forms set out in Annex C?

We welcome the clear tick box format of the forms. We consider that this will assist applicants in completing forms fully and appropriately.

We have some concerns about the length of notes supporting the application and acknowledgement for divorce and separation and consider it appropriate that the notes are contained in a separate document.

Careful consideration will need to be given to how parties will access the particular forms applicable to their case – both so as to keep the process as

simple and streamlined as possible but also to minimise the use of resources. We anticipate that use will be made of modern technology as far as possible.

We shall be happy to work with the Committee and its representatives on the detailed drafting of the forms as they go forward. Our interests would be to ensure forms are as user friendly as possible and also to ensure that there are appropriate, up-to-date references to public funding issues, including publicly funded mediation. Currently the forms do not refer to the information and assistance available from CLA Direct.

Question 2: Is the overriding objective as drafted, appropriate for family proceedings generally?

Yes. Although family proceedings clearly have a particular background and context it is entirely appropriate that they be managed in such a way as to achieve the most appropriate outcome with the minimum of time and expense, maximising finite resources within the family justice system.

We welcome the details provided in Rule 1.4(2), in particular the subparagraphs dealing with the early identification of issues, the encouragement and facilitation of alternative dispute resolution procedures, the consideration of likely benefits as against costs and the encouragement of efficiency around non-attendances, modern technology and the use of directions.

It will be important to ensure that the objective is actively encouraged and promoted at local level and that where good practices can be identified these are consistently applied within the system.

Question 3: Are the general Parts of the rules modelled on the CPR appropriate for family proceedings in magistrates' courts?

Question 4: Have any difficulties been encountered in adoption and placement proceedings in magistrates' courts when applying the Parts of the Family Procedure (Adoption) Rules that are modelled on the CPR?

We consider that it is important for there to be standard rules, practice directions and forms applied across all levels of court subject to disapplication only where the methods of working within a level of court make the general application inappropriate or impossible. We cannot see why the general Parts should not be applied in family proceedings courts although other respondents may highlight issues, in particular from the perspective of legal practitioners.

The Legal Services Commission is not a direct provider of legal services but rather is the funding body for the provision of legal services by contracted providers. Against that background we are not aware of any difficulties around the application of the Family Procedure (Adoption) Rules but again practitioners may be able to identify such issues.

Question 5: What are your views on the content of the glossary and the index of defined expressions?

We anticipate that a glossary has been included to assist those parties who do not have the benefit of legal representation. This may be helpful as a

concept but we consider that the drafting of the wording as to scope in both the rules and the glossary should be simplified.

We are not clear on what basis the expressions which are included have been selected. It is likely that those without legal training or support would benefit from other words also being defined.

In addition if a glossary is to be included it is important not only that it is helpful in content but also that it is easily identified and located.

We consider that the index of defined expressions is useful as it will clearly assist those using the rules in locating the particular rules which define expressions as well as confirming the extent of their application.

Question 6: Do you consider the CPR provisions on electronic service should be departed from for family proceedings? If so, in what way?

Clearly it is a question of achieving an appropriate balance between the advantages and disadvantages of the use of modern technology, taking into account the particular nature and context of family proceedings. As the use and sophistication of modern technology moves forward we can see the arguments in favour of a greater use of electronic service than applies in the Civil Procedure Rules and the current draft.

We consider it important that issues of confidentiality and proof of service should be addressed but consider that the CPR restrictions may become unreasonable in the context of the conduct of litigation in the 21st century.

We are moving to an increased reliance on the use of modern technology in the delivery of our own services and in our relationships with contracted providers who undertake legally aided/publicly funded work. Over time we would see the issue as being one of excluding the use of modern technology in inappropriate cases/circumstances – as opposed to allowing for the use of modern technology in certain circumstances. The use of modern technology can obviously both reduce delay and increase efficiency.

Question 7: What is your view on the proposal relating to service in children's proceedings set out in paragraph 34 above?

We welcome the proposal that documents/notices should, subject to a contrary direction, be provided to those who have a clear and specified role in the proceedings on behalf of/related to the child. This requirement would ensure the appropriate sharing of information without delay although, subject to the use of modern technology, costs could be increased through the production of additional copies of bulky documents. This could be controlled by the court in individual cases or alternatively the proposals could be restricted – in particular to children's guardians.

Question 8: What are your views on those proposals relating to matrimonial and civil partnership proceedings outlined in paragraph 39 above?

Question 9: Should a statement of truth be required to verify both the application for a matrimonial/civil partnership order and the application for a conditional order?

Question 10: Should a statement of truth to verify an application for a matrimonial/civil partnership order be made by the applicant only or should it be permissible for the statement of truth to be given by the applicant's solicitor?

In relation to paragraph 39 we particularly welcome the changes around not naming those alleged to have committed adultery and also in relation to nullity proceedings. Both these changes should serve to reduce delay and costs. We also welcome the improvement of the statement of arrangements for the children.

We are not convinced of the need for an attendance to deal with the issue of costs – this requirement would appear likely to reduce the number of costs orders made and we have not been aware of any particular difficulties in this area.

We appreciate that the making of an application by the respondent is contentious. We consider that it will be particularly important to make the position entirely clear to respondents and it may be that the bar on separate applications may, although achieving certainty, produce unfairness.

So far as question 10 is concerned we can see the benefits arising from the applicant's solicitor being permitted to verify the statement of truth. However, the statement is of significance and if this proposal goes ahead – with its potential for reduction in delay and costs – we consider it important that solicitors take appropriate steps to ensure the accuracy of the statements being made.

Question 11: Are there any other applications under the Child Abduction and Custody Act 1985 which should be mentioned specifically in this Practice Direction?

We cannot identify any other applications which should be specifically mentioned in the Practice Direction although other respondents may be able to do so.

Question 12: What are your views on the specific questions on paragraphs 68 and 69 relating to the Practice Direction Supplementing Part 12?

We do not have any views – it is unlikely that these proceedings would be legally aided/publicly funded given the parties and subject matter.

Question 13: How many days before the hearing or directions appointments should the documents referred to in the Table in paragraph 1.1 of that practice direction be served?

Question 14: Is one day appropriate as the minimum number of days before the hearing or directions appointment for the service of the documents?

The draft Practice Direction requires service a minimum of one day before the hearing or directions appointment in the cases referred to in the consultation.

We consider it reasonable to treat these applications as urgent and for the period of service to be kept to a minimum having regard to the consequences of the orders made and which the applicant would be seeking to vary or discharge.

Question 15: What are your views on the list of documents identified as requiring verification by statement of truth (Rule 16.2)?

We welcome the savings in delay and cost which would be likely to be achieved through the introduction of statements of truth although we consider it important that opportunities are taken to reinforce the consequences of the making of a false statement.

We agree with the list of documents contained in the draft and note the catch-all provision under Rule 16.2(h).

Question 16: Should rules provide that an application under section 91(14) Children Act 1989 (no application may be made without leave) may be refused on paper?

Yes. Subject to appropriate safeguards the possible refusal of applications on paper can produce an appropriate outcome with the minimum of delay and cost.

Question 17: Are there any provisions contained in Parts 31 to 34 of the CPR that have not been replicated, with or without modification, that might be required in family proceedings?

Not so far as we are aware although practitioners may be able to identify omissions.

Question 18: Are any additional general rules needed?

We have not identified any omissions although practitioners may do so.

Question 19: Do you consider the rule (32.3) achieves the Committee's intention?

We consider that the draft rule achieves the Committee's intention because although the notice of application may specify the method of enforcement, applicants for enforcement will be able to choose to apply within Rule 32.3(2)(b) so that the court can apply the most appropriate method of enforcement in the circumstances of the particular case.

About you

Please use this section to tell us about yourself

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If you are representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.