

Draft Amendments to Family Procedure Rules

New draft Part 3A of the Family Procedure Rules 2010.

(Children and Vulnerable Persons: Participation in proceedings and giving evidence)

Introduction and background

1. Annexed to this paper is a new draft Part of the Family Procedure Rules 2010. (Part 3A:Children and Vulnerable Persons: Participation in proceedings and giving evidence) The new rules follow the work undertaken by the Children and Vulnerable Witnesses Working Group jointly chaired by Russell J and Hayden J.
2. In June 2014, the Children and Vulnerable Witnesses Working Group (The CVWWG) was established by Sir James Munby, President of the Family Division, to review judicial guidance for judges meeting children, including consideration of how the voices of children and young people could be brought further to the fore in the family courts. The Group was also asked to consider and address the wider issue of children and vulnerable people giving evidence in family proceedings.
3. The CVWWG published an interim report with initial recommendations in August 2014. The interim report was subject to extensive consultation across the family justice system and received comments and written evidence from professional bodies, individuals and members of the family judiciary. In addition the CVWWG considered practice in Wales with the Joint Chair of the CVWWG, Russell J, attending a stakeholder event held in Llandudno on 29 January 2015 which provided valuable input from a Welsh perspective.
4. The consultation responses informed the final report of the CVWWG which was published on 17 March 2015 and which is available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/03/vwcwg-report-march-2015.pdf>.
5. The context as described in the CVWWG report is that a complete scheme now exists to enable and facilitate evidence being given by children and vulnerable witnesses in the criminal justice system (see for example, the special measures provisions in the Youth Justice and Criminal Evidence Act 1999 and associated Criminal Procedure Rules, the Criminal Practice Directions [2014] EWCA Crim 1569, CPD 3D-3G and the relevant 'toolkits' on 'The Advocate's Gateway', funded and promoted by the Advocacy Training Council: www.theadvocatesgateway.org/toolkits). This includes comprehensive standards for advocates and training materials in support of the same for practitioners and the judiciary
6. Although it has been the case that good practice in family proceedings has involved consideration of the same issues and such measures as are available these are not available systematically – in contrast to the experience in the criminal court.
7. In addition, there is a very clear message from young people through the Family Justice Young People's Board and other routes, specialist practitioners and judiciary alike that urgent steps need to be taken to improve the participation of children and vulnerable persons in proceedings which concern them.

8. Against this context the final report recommended new rules in relation to how a child can participate in proceedings and provision for the identification of vulnerable witnesses and the arrangements which will need to be put in place. The report included a set of draft model rules and asked the Family Procedure Rules Committee to consider urgently whether, and if so how, the recommendation and draft rules could be implemented.
9. The Family Procedure Rule Committee (The Committee) is grateful for the work of the CVWWG and has given the report and the recommendations urgent attention. A sub-group of the Committee was put together at its meeting on 18th May and that group supported the implementation of the CVWWG proposals by means of a high level rule designed to emphasise the importance of participation of children and vulnerable persons at all stages of family proceedings, but in particular during early case management.
10. The Committee acknowledges that court rules cannot provide a requirement or entitlement to funding as this is within the competence of Parliament. In addition the Committee has had some general advice from the MoJ and HMCTS as to what provisions are available. In relation to eligibility the rules have been drafted to avoid situations where a child or vulnerable party/witness does not get assistance as a result of being outside a more tightly drawn set of criteria. However, in relation to the provision of the special measures listed at 3A.7(1) and case management directions to assist the child, other party or vulnerable witness, the court must have regard to the factors set out in rule 3A.6 and only make the provision if satisfied that it is necessary to do so. This ensures that the rules comply with the overriding objective. In addition Rule 3A.7 (4) has been inserted to clarify that the court cannot make a direction requiring public funding to be available for a measure.
11. The recommendation of the sub-group and a revised draft rule were discussed at a meeting of the full Committee on 15 June. At that meeting it was agreed that, before making any new rules, the Committee should undertake a consultation in accordance with the provisions of section 79(1) (a) of the Courts Act 2003. The Committee, therefore, seeks your views on the draft rule itself (attached at Annex A) and on some specific questions detailed below (see questions 1 – 5 on pages 3 and 4 of this document).
12. This consultation is published on behalf of the Family Procedure Rule Committee and without prejudice to future Ministerial decisions. The Committee has agreed to include specific questions in the consultation at the request of the Ministry of Justice and HMCTS relating to the use of the special measures (see Q4 of the consultation questions).
13. Practical detail of the courts' consideration of the rule and of the proposed measures will be addressed in a practice direction, which will be formulated by the President of the Family Division and is not the subject of consultation here.
14. The attached draft rule only covers the particular points in relation to the issues regarding children and vulnerable parties. The Committee have been considering, and will continue to consider, amendments to other provisions in the Rules, which are purely consequential on the creation of the new Part 3A. For example, in FPR 12.12 (Directions in children proceedings), provisions should be added referring to giving directions under FPR Part 3A relating to a child or other party or witness who the

court considers needs assistance to participate in the proceedings or to give good quality evidence.

Consultation

The questions we would like you to address are set out below. The Committee is happy to consider alternative forms of wording where appropriate, supported by a short explanation of the intended effect.

Consultation questions

Q1. There is a need to reflect Article 12 UNCRC and the right of a child to express a view if he or she wishes and is old enough (and see ZH (Tanzania) v SSHD [2011] UKSC 4). The Committee recalls there is provision in children proceedings for the court to consider the attendance of the child under rule 12.14 FPR 2010.

(a) Does rule 3A.1 identify with sufficient clarity and robustness, the circumstances when the court should be considering ensuring that children are able to participate appropriately in the proceedings in the light of Article 12 UNCRC?

(b) Draft rule 3A.1 refers to 'where proceedings involve a child'. Is the use of the word involve sufficiently clear about which children are covered by the rule?

(c) Draft rule 3A.2 (1) provides that the court must consider whether a child should participate in the proceedings by reason of meeting one of the conditions in paragraph (2). Do you consider that these conditions are appropriate? If not please give reasons.

Q2. The overriding objective of the Family Procedure Rules.

The overriding objective of the rules is to enable the court to deal with cases justly having regard to any welfare issues involved. Dealing with a case justly includes so far as practicable -

(a) Ensuring that it is dealt with expeditiously and fairly;

(b) Dealing with the case in ways which are proportionate to the nature importance and complexity of the issues;

(c) Ensuring that the parties are on an equal footing;

(d) Saving expense; and

(e) Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

The Committee recognises that, as currently drafted, the overarching objective (rule 1.1) does not refer to children. Some committee members have raised concerns that this is an omission and would like to see the overriding objective updated to reflect the need to consider children within proceedings.

(a) Should the overriding objective be amended so as to emphasise consideration by the court of participation by children in proceedings?

(b) Is the overriding objective sufficiently dealt with in the draft rule, as it appears at sub paragraph (3) in each of 3A.3, 3A.4 and 3A.5 taking account of the court's duty under rule 1.2 to give effect to the objective whenever it exercises any power given to it by the rules or interprets any rule?

Q3. Eligibility. The Committee has considered how best to establish when this rule applies. In particular the current rule sets out that the court has discretion to make directions where a vulnerable witness/party's participation in proceedings is 'likely to be diminished'. The Committee has considered further criteria but, on balance, felt that a more high level description was required to make sure that the court has control and can make decisions on eligibility without being restricted by any specific criteria. The committee would welcome your comments, in particular how we can make sure the measures are not used unnecessarily tying up resources and causing delay.

- (a) Do you agree with the use of the phrase "is likely to be diminished" to define the persons other than children to whom the rules apply and who may be eligible for assistance (see the following rules 3A.1 (1) (b) and (c), 3A.4 (1), 3A.5 (1), 3A. 9 (1) (a) and (b)?
- (b) Do you think that the proposed rule, which is intentionally drafted at a high level, provides sufficient clarity for judges, practitioners, parties and court staff to be clear about the specific circumstances in which it should be applied?

Q4. In addition to eligibility the special measures in 3A.7 (1) must be used appropriately in order to make sure the court complies with the overriding objective and makes best use of available resources. For example the current provision of intermediaries at court in family proceedings is at the discretion of the judiciary and requires agreement from HMCTS before funding is provided. Consequently, new rules need to reflect this arrangement and support the most appropriate use of such a provision.

The current draft at 3A.5 states that the court must consider whether the quality of evidence given by a party or witness is likely to be diminished and, if so whether it is necessary to make one or more of the directions in order to assist the party or witness give evidence. Rule 3A.6 sets out a list of factors which the court must have regard to. Rules 3A.6(j), 3A.7(4) and 3A.11(2) deal with the availability of measures. Current draft rule 3A.4 makes similar provision about a party's participation in proceedings. We would welcome views on whether additional safeguards are required to make sure that the measures are used appropriately and in accordance with available resources. For example;

- (a) Should certain measures in 3A.7 (1) be subject to an enhanced level of agreement from a senior judge?
- (b) In particular, should there be a further test before a party or vulnerable witness is eligible for assistance from intermediaries?
- (c) Should some measures be subject to availability, or should there be express provision for discussion between the judge and HMCTS staff on the availability of a measure before a direction is made

Q5. Factors the court is to have regard to

The Committee noted that reference to a party or witness's employment is not contained in the list of factors the court is to have regard to in draft rule 3A.6(G). Would a party or witnesses employment status be relevant to the consideration? If so, should a reference to employment be included in the list of factors.

Q6. Do you have any other comments on the draft rule?

Please send your comments to the address below **by 5pm on 25 September 2015.**

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