

Consultation on the new draft Part of the Family Procedure Rules 2010 (Part 3A: Children and Vulnerable Persons: Participation in proceedings and giving evidence).

FJC Response

1. 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?

Yes it does adequately reflect the obligations of Article 12 CRC.

(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?

Yes. The flexibility that the word “involve” invokes is to be recommended. It may be helpful for the definition of “involve” to include any child witness who is a witness of fact. e.g. violence, drug dealing, sexual or physical abuse.

(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.

Please see above. There should be a specific reference to child witnesses. This could be dealt with in Para 3A.5.

2. 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?

There is no need to amend the overriding objective as (c) of the overriding objective already provides for “Ensuring all parties are on an equal footing”. This will of course include children who are parties.

(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?

Yes, the overriding objective is sufficiently dealt with in the Rule as drafted.

3. 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)?

The concern about special measures for vulnerable parties and /or witnesses not tying up resources and/or causing delay is a valid concern. The best way to ensure that it is properly managed is for there to be a robust evidential base for the need for special measures which informs a judicial decision for special measures. The judiciary are the best gatekeepers in this respect as they will be able to balance the need for special measures to achieve a fair and just hearing against the scarcity of HMCTS resources. A practical step to ensure this is set out as a response to question 6.

(a)The phrase “likely to be diminished” is a good test and still gives the judiciary the flexibility and discretion required.

(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?

It may be useful for the definition of “likely to be diminished” in the Rule to be expanded to include a party who is a vulnerable person whose participation in proceedings is affected/reduced by, for example, a lack of understanding of the evidence being given by other witnesses or what is said by advocates and/or the judiciary during the course of a

hearing. i.e a party with a learning disability who finds the stress of a court hearing such that they are unable to understand or to communicate properly in that context. Further, there may be circumstances that a litigant in person may wish to call as a witness of fact, a vulnerable witness whose communication may be impaired by reason of their vulnerability and the rules should anticipate this.

4. 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?

Case management decisions that are likely to have a profound effect on Court resources which are not limited to the cost of the special measures but the length of hearing and the layout of courts should be made by a DFJ or an experienced circuit judge.

(b) In particular, should there be a further test before a party or vulnerable witness is eligible for assistance from intermediaries?

The level of special measures in a case, including the issue of whether an intermediary is required, should not be subject to a test set out in the rules but should be a matter of evidence.

(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?

There should of course be open communication between the judiciary and HMCTS about the availability of special measures, particularly those in 3A.7(1) . However once the Court is satisfied that special measures are required for justice to be done and the overriding objective to be satisfied, it is incumbent upon HMCTS to make "reasonable adjustments" and the required special measures to be made available to ensure justice is done.

5. 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?

It is unlikely that a factor relevant to a party or witness's employment would be relevant to the issue of special measures in a way that was not already to be considered arising out of the other factors already provided for in 3A.6.

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

It may be helpful for the Rule to reflect the thinking of Baker J in Re A [2014] 2 FLR 610 where he envisaged that there would be an expert report to assist the Court to determine the nature and extent to which the witness/party's participation would be diminished and identifying what special measures are required to alleviate that diminution.

Any order for the provision for special measures should be a judicial decision, which by its nature is subject to the checks and balances of all judicial decisions, as to the steps required to ensure that a case is dealt with expeditiously and fairly whilst allocating it with an appropriate share of the court's resources (as provided by the overriding objective).

This judicial decision should be made at a "Ground Rules Hearing". The nature of the special measure required in a case should be made at a "Ground Rules Hearing" when, in addition to special measures, the nature of cross examination, court room layout etc could be taken. The Rule currently drafted does not mention a specific "Ground Rules Hearing" and given the steps that are likely to be needed to have been taken before a judicial decision on any special measures can be made, it would be useful for a Ground Rules Hearing to be timetabled into the Rule, perhaps as part of Rule 3A.8.

Family Justice Council

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