

Family Procedure Rules

A new procedural code for family proceedings

Consultation Paper

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This consultation will end on 01/12/2006

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part of the Department for Constitutional Affairs.**

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Executive summary

Rules and procedure underpin the effective operation of the family justice system. They set out the detail of how the system works and are fundamental in ensuring that it works well.

The current procedural system for family justice is ripe for review. Compared with criminal and civil procedure, family procedure is difficult to use. It is not in one place, much of the language appears outdated and it differs for different levels of the court.

Her Majesty's Courts Service and the Family Procedure Rule Committee, a statutory¹, non-departmental public body established to make Family Procedure Rules, are working together to improve family procedures. Their aim is to follow the example set by the Civil Procedure Rules 1998 (the 'CPR'), and produce one set of simple and simply expressed rules of court for all family proceedings, namely the Family Procedure Rules. A significant first segment of these rules, the Family Procedure (Adoption) Rules, were made in October 2005, and we are now moving on to complete the task for all family proceedings.

This consultation paper seeks views on the policy behind the Family Procedure Rules. First, it sets out the four key objectives that the Rules intend to achieve: modernisation of language, harmonisation with the CPR, a single unified code of practice and alignment in all levels of court. Specific views are then sought on how these objectives could be realised in the following 6 parts :-

Part 1- Modernisation of language and process. In particular how electronic service will be handled and what language changes are proposed for matrimonial and civil partnership causes.

Part 2- Matrimonial and Civil Partnership Proceedings. This is one of the core areas of the consultation and includes proposals on: applications by respondents, the naming of persons alleged to have committed adultery, the statement of

¹ Section 75 of the Courts Act 2003

arrangements for children, extending special procedure to cases of nullity and the use of affidavits.

Part 3- Financial Proceedings. A shift away from making the current ancillary relief proceedings “ancillary” to the divorce/dissolution to which they relate is proposed. It is also proposed that a series of other financial proceedings should follow the current ancillary relief procedure and that a simplified ancillary relief procedure should be applied to financial proceedings in magistrates’ courts. In addition, views are sought on the operation of rules relating to applications for a financial order or a property adjustment order where a party has remarried or entered into a civil partnership.

Part 4- Children’s proceedings. Given that current rules relating to children’s proceedings are relatively recent there are fewer proposals arising in this part of the consultation paper. First, specific issues are considered in relation to the incorporation of the Private Law Programme and the Protocol for Judicial Case Management in Public Law Children Act cases. Secondly, potential changes to application forms under the Children Act 1989 are discussed.

Part 5- Family Proceedings in Magistrates’ Courts. This part deals with a range of issues that arise when rules governing practice and procedure in family proceedings in the magistrates’ courts are aligned with those in the High Court and county courts.

Part 6- Appeals. This part considers the rules governing the process of appeal and the route of appeal as they might be developed in the new Family Procedure Rules.

In addition **annex A** sets out in technical detail the extent of family proceedings which the new Family Procedure Rules will cover.

Introduction

This paper is consulting on the policy behind the proposed new Family Procedure Rules. The general principles that will guide the making of the rules are set out and views sought on aspects of policy relating to the rules. Consultation is aimed at all family court users, and those who publish and refer to the family rules of court in England and Wales.

This paper does not address the content of the rules themselves. The Family Procedure Rules will be made by the Family Procedure Rule Committee, a non-Departmental public body, established under the Courts Act 2003. The Committee will later consult on the draft rules under its statutory² obligation. The proposals in this paper are the result of close collaboration between Her Majesty's Courts Service (HMCS) and the Family Procedure Rule Committee. HMCS would like to record its gratitude to the members of the Family Procedure Rule Committee, and its working groups, for the work they have already put into this significant project.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The Consultation Criteria, which are set out on page 62 have been followed.

An initial Regulatory Impact Assessment does not indicate that any groups are likely to be particularly affected. The proposals are unlikely to lead to additional costs and savings for businesses, charities or the voluntary sector, or on the public sector. Consequently, this paper does not contain a Partial Regulatory Impact Assessment. If you disagree with this conclusion you are invited to send your reasons as part of your overall response to this paper.

Copies of the consultation paper are being sent to:

- Senior Judiciary, the Council of HM Circuit Judges, the Association of District Judges, the Magistrates' Association, the Family Justice Council, The Law Society, The Bar Council, Justices' Clerks' Society, Family Law Bar

² Section 79 (1) (a) of the Courts Act 2003

Association, Resolution, Association of Lawyers for Children, Lesbian and Gay Lawyers Association, and Institute of Legal Executives.

- Citizens Advice, Consumers' Association, British and Irish Association of Law Librarians and leading publishers of rules.
- The Legal Services Commission and CAFCASS.

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper. Responses from individual practitioners, academics or members of the public are all welcome.

Background

Legislative background

The following new power to make rules about family proceedings³ is contained in the Courts Act 2003.

S. 75(1) "There are to be rules of court (to be called "Family Procedure Rules") governing the practice and procedure to be followed in-

(a) the High Court

(b) county courts and

(c) magistrates' courts"

The Act requires the power to make Family Procedure Rules to be exercised with a view to securing that (a) the family justice system is accessible, fair and efficient and (b) the rules are both simple and simply expressed. Family Procedure Rules may apply any rules of court including in particular Civil Procedure Rules (Courts Act 2003, s76 (4)). The 2003 Act (s76 (8)) also permits Family Procedure Rules to refer to provision made or to be made about a matter in Practice Directions instead of rules. Practice Directions supplement the rules and have mandatory force.

Family Procedure Rules have already been made in relation to adoption and related proceedings. The next stage of the work is to make rules for all family proceedings in the High Court, county courts and magistrates' courts.

Current position

Rules of court governing the practice and procedure in family proceedings (excluding adoption proceedings) in the High Court, county courts and magistrates' courts are currently contained in a number of different instruments and are made under different rule-making powers.

³ "Family Proceedings" are defined in Annex A to this paper

One disadvantage of this position is that courts and court users need to be familiar with different procedures depending on the level of court in which the cases are proceeding. Additionally, the existing rules in places contain language that now appears outdated. Practice directions are made but unlike the directions which will support new Family Procedure Rules, they do not have mandatory force, so giving greater scope for inconsistency of procedure.

Additionally, the current rules for the High Court and county court fall back on the Rules of the Supreme Court 1965 (“RSC”) and the County Court Rules 1981 (“CCR”). The application of the RSC and CCR to family proceedings in those courts is mandatory in the absence of provision in the Family Proceedings Rules or any enactment. The Civil Procedure Rules 1998 (“CPR”) came into effect on 26 April 1999 but are not applied to family proceedings (although specific Parts of the “CPR” are applied to certain matters such as costs). The RSC and CCR that are still applied to family proceedings are those rules which were in force immediately before the CPR came into effect. The result is that the rules are difficult to find, outdated and out of line with those applying to civil proceedings.

The new Family Procedure Rules will be made by one body, the Family Procedure Rule Committee, under the powers contained in one statute, the Courts Act 2003. They will govern the practice and procedure to be followed in family proceedings in the High Court, county courts and magistrates’ courts. As far as possible the Family Procedure Rules will be harmonised with and modelled on the Civil Procedure Rules.

Principles for the new Family Procedure Rules

The Courts Act 2003 requires the new Family Procedure Rules to be made with a view to securing that (a) the family justice system is accessible, fair and efficient, and (b) the rules are both simple and simply expressed⁴. With these requirements in mind the Family Procedure Rule Committee and Her Majesty’s Court Service have adopted the following four principles:

(i) **Modernisation of language.** Where appropriate, outdated language used in existing family rules will be modernised in the Family Procedure Rules following the example of the civil courts. In 1994 the Lord Chancellor appointed Lord Woolf to conduct a review of the rules and procedures in the civil courts. The conclusions of the review are contained in two reports “Access to Justice - interim report” and

⁴ Section 75 (5)

“Access to Justice – final report”. Two of the aims of the review were to reduce complexity and modernise terminology. The Civil Procedure Rules 1998 were drafted with these aims in mind.

(ii) **Harmonisation with the Civil Procedure Rules.** It is unsatisfactory for courts and court users that the old RSC and CCR are still relied upon in family proceedings. The aim is to harmonise the family rules as far as possible with those for civil proceedings. It is intended that general parts of the new Family Procedure Rules such as those relating to case management powers, service and evidence will be modelled on the civil procedure equivalent with adjustments as appropriate for family matters. The Family Procedure (Adoption) Rules 2005 have already adopted this approach. In one or two subject areas such as rules relating to domestic enforcement of court orders the new Family Procedure Rules may fall back on the CPR with adjustments rather than incorporating rules modelled exactly on the CPR within the rules.

(iii) **Creation of a single unified code of practice in addition to rules.** Family proceedings are supported by a number of practice directions, protocols and other forms of guidance. In accordance with the principle of simplification and increasing accessibility, the intention is to create rules and practice directions for family proceedings that will contain all necessary procedural guidance for court users. Consideration is also being given to the use of appropriate pre-action Protocols, which are used in the CPR.

(iv) **Alignment of the procedures in all levels of Court.** There are a number of procedural differences between family proceedings in the magistrates’ courts and the county courts and High Court. The new Family Procedure Rules will govern family proceedings in magistrates’ courts as well as the High Court and county courts. It is proposed to align the procedures between the different levels of court where possible unless there are strong reasons not to do so.

The proposals

Part 1- Modernisation of language and process

Electronic service of documents

1. Under existing rules⁵ applying to family proceedings, service of documents is permitted by a number of methods, subject to specific requirements in particular circumstances. These methods include:
 - by post to an address for service
 - at a document exchange
 - by FAX
 - by serving a document personally
 - by leaving documents at an address

Service by e-mail is not permitted

2. Documents may only be served by fax where the party being served is represented by a solicitor and agrees to that form of service. To be effective, sending a hard copy of the document must follow service by fax.
3. However, under rule 6.2(1)(e) of the Civil Procedure Rules (CPR) and paragraph 3 of the supplementary Practice Direction, service is also allowed by e-mail and fax even to those not represented by a solicitor. Nor does a hard copy need to follow. Agreement in writing of the party to be served is required in advance. A party seeking to serve a document by electronic means should first clarify whether there are any limitations to the recipient's agreement to accept service in this way including format or maximum size of attachments.
4. One of the principles of the rule-making programme is to harmonise the new Family Procedure Rules with the CPR, *where appropriate*. Family proceedings

⁵ rule 10.2 and 10.3 of the Family Proceedings Rules 1991

are often of a sensitive and personal nature and frequently involve children. It is essential that documents served are only received by those for whom they are intended. Views are invited as to the extent, if any, that electronic service of documents may be appropriate in family proceedings.

Question 1: Do you consider the Family Procedure Rules should permit service of documents by email?

Question 2: What restrictions or conditions, if any, do you consider should be placed on the use of service by email?

Question 3: What restrictions or conditions, if any, do you consider should be placed on the use of service by fax?

Modernisation of key terms relating to matrimonial and civil partnership causes

5. The area of language identified for modernisation is that related to matrimonial and civil partnership causes. Much of the language which describes the procedure in matrimonial (and now civil partnership) causes is derived from the Matrimonial Causes Act 1973. That language (cause, suit, petition etc) now looks dated. Modernising this language would contribute significantly to the work to unify and modernise family procedure rules.
6. The overall effect of change will be to remove the more outdated terminology of the existing rules (Family Proceedings Rules 1991) making them more accessible by writing them in a more modern and user-friendly style and to harmonise the new rules with the CPR. In order to achieve this modernisation, a Modification of Enactments Order, using the powers contained in the Courts Act 2003⁶ for this purpose, would be necessary.

Proposed amendments to terminology

7. The terms set out below are those which underpin the current procedure in Part II of the Family Proceedings Rules and derive from primary legislation, such as the Matrimonial Causes Act 1973. The process of preparing the new draft rules

⁶ Section 80

will involve a fundamental review of language and style generally. Therefore, terms such as “prayer” and “special procedure” have not been included in the table below. They will be reviewed as part of the wider work on procedure for applications.

Current Term	Proposed New Term
Decree Nisi	Conditional Order
Decree of Divorce	Divorce Order
Decree of Nullity	Nullity Order
Decree of Judicial Separation	Judicial Separation Order
Decree Absolute	Final Order
Ancillary Relief	Financial Order
Cause	Case or Proceedings
Maintenance pending suit	Maintenance pending outcome of proceedings
Petition	Application
Petitioner	Applicant

- In addition to the above table, views are sought on the terms used for recipient parties. Currently several terms are used to describe the various recipient parties in a case, i.e. respondent, co-respondent and party cited. The use of different terms can cause confusion to parties acting in person. With a view to simplifying language to be used in family cases it is proposed that the single term of “respondent” should be used in place of the three currently used.

Question 4: Do you agree some of the current terminology of Part II of the Family Proceedings Rules 1991 requires modernisation?

Question 5: Do you agree that the new rules should adopt the new proposed terminology and that the relevant primary legislation should be amended accordingly?

Question 6: Are there any other terms within current family procedure that you think should be modernised?

Question 7: Do you agree that the new rules should adopt a single term “respondent” in place of “respondent”, “co-respondent” and “party cited”?

Part 2 - Matrimonial and Civil Partnership Proceedings

Application by a respondent for a matrimonial or civil partnership order

9. Under the current Family Proceedings Rules 1991 respondents applying for a divorce or a dissolution may file either an answer incorporating a cross petition or a freestanding petition. These dual procedures can be difficult to manage, as there is the potential for several applications and answers to be circulating at any given time.
10. It is proposed that the new rules amend that procedure so that all applications for a matrimonial or civil partnership order made by a respondent would be treated as an application in the original proceedings. This new procedure seeks to provide a unified way of allowing a respondent to apply for an order in their favour whilst avoiding the complexity of the current rules.
11. The proposed procedure reflects the current practice set out in Part 20 (Counterclaims and Other Additional Claims) of the Civil Procedure Rules (CPR), the aim of which is to manage a claim conveniently and effectively.
12. A consequence of amending the rules in this way is that respondents will be left with a more restrictive time limit in which to seek their order. Under the current rules a respondent can make a freestanding application at any time without leave of the court. Under the new rules an application by the respondent is effectively treated as a cross application in the same proceedings. As such it must be made within 21 days of the date by which they are required to acknowledge service of the original application, unless permission of the court is sought and obtained.

<p>Question 8: Do you agree that the time limit on a respondent to make an application is proportionate?</p>

Parties to Proceedings- Divorce cases involving allegations of adultery

13. Under section 49 of the Matrimonial Causes Act 1973, where a party to a divorce or judicial separation alleges that the other party has committed adultery he or she must make the person with whom the party is alleged to have committed adultery, a party to the proceedings unless the court excuses it on special grounds. The section also provides that rules of court may exclude the application of this provision where the person with whom the adultery is said to have been committed is not named.
14. The Family Proceedings Rules 1991 [FPR 2.7(1)] provide that such a party shall be made a co-respondent in the cause unless that party is not named in the petition or the court otherwise directs.
15. The Resolution (formerly Solicitors Family Law Association- SFLA) Code of Practice and the Law Society's Family Law Protocol recommend that in a divorce application involving an allegation of adultery solicitors should discourage their clients from naming a co-respondent unless there is a compelling reason to do so.
16. The practice of not naming a co-respondent in a divorce application can encourage a conciliatory approach by parties and solicitors, which can be beneficial to the parties, as it should reduce animosity.
17. The court rules could go further than they presently do to encourage solicitors and parties not to name a co-respondent unless absolutely necessary. For example, a practice direction attached to the rules could provide that the person with whom the respondent is alleged to have committed adultery should not be named. Naming a co-respondent would be necessary only to support the application where the respondent was likely to defend the divorce or there were other special reasons.

Question 9: Do you consider that a Practice Direction to the new rules should provide a stronger barrier against the naming of the person with whom the respondent is alleged to have committed adultery?

18. Some commentators have suggested that there should be a complete ban on naming in all circumstances. The advantages of this are the same as those above in that it encourages a conciliatory approach. However, there are several disadvantages. For example the respondent's ability to defend their case may be prejudiced. Without the option of naming the person with whom it is alleged the respondent committed adultery, the applicant may find it difficult to provide evidence of the adultery and so may be prevented from using this fact as a basis for their divorce. This would also require amendments to primary legislation and arguably goes beyond the scope of this consultation.

Question 10: Do you consider that there should be an absolute ban on naming the person with whom the respondent is alleged to have committed adultery?

19. Another suggestion is that applicants should not be prevented from naming the person with whom their spouse is alleged to have committed adultery. However, where they do, that person would not automatically be made a party to the proceedings, but it would be left to the Court to determine whether this was required. This has several advantages including:

- that an applicant is not hindered in their attempts to obtain a divorce based on adultery, and
- where the case becomes defended, the named party could be made a respondent to the case.

20. However, this approach has some disadvantages from the point of view of the co-respondent. If that party can be named but will not automatically be made a party to the proceedings they will not receive a copy of the application. Potentially their name could be used in proceedings without their knowledge and without giving them the opportunity to deny the allegation.

Question 11: Do you consider that, where an applicant names the person with whom the respondent is alleged to have committed adultery, that named person should be made a party to the proceedings?

Extending the Special Procedure to Applications for the Annulment of a Marriage or a Civil Partnership

21. Currently, under the Family Proceedings Rules, undefended divorce and dissolution cases follow the 'special procedure'⁸. This means that the court will consider the court file and in particular the petition, acknowledgement of service, applicant's affidavit and any exhibits and, if satisfied that the applicant has proved their case, the court will issue a certificate to this effect. Where the court is not satisfied a request for further information can be made or the case can be removed from the special procedure list, and a hearing will be set.
22. This 'special procedure' cannot currently be used for a case of nullity and every case must have a hearing, whether or not it is defended.
23. It is proposed that the new rules will continue to contain a method of obtaining orders in matrimonial and civil partnership proceedings, where the case is not defended, without the hearing of evidence in open court. It is further proposed that undefended nullity cases could also follow the procedure. The procedure allows the case to be dealt with expeditiously where the court is satisfied that the requirements are met. However, if there is any doubt about the applicant's entitlement to an order the court is able to direct that the application be removed from the special procedure list and a hearing date set.
24. There seems to be little merit in holding a hearing in an uncontested nullity case where the court can be satisfied by the papers before it. In many cases the hearing is a formality that adds little to the proceedings and which increases the cost of the application to both parties as well as the potential for distress. It is considered that by dealing with uncontested nullity cases in the same way as uncontested divorce and dissolutions, court time could be saved and cost savings to the parties could be made, as well as minimising the distress caused by the proceedings.

Question 12: Do you agree that it should be possible for the court to make a nullity order without the hearing of oral evidence?

⁸ rule 2.24 (3)

Statement of Arrangements for Children

25. Under the current Family Proceedings Rules [FPR 2.2(2)] where a petition for divorce, dissolution, nullity or judicial separation discloses that there is a child of the family who is under 16, or one who is over that age and is still receiving education or training, the petition should be accompanied by a statement containing information about the arrangements for the child(ren). This is provided on Form M4⁹.
26. The Statement of Arrangements is required to enable the court to fulfil its duty under Section 41 of the Matrimonial Causes Act 1973 or Section 63 of the Civil Partnership Act 2004. These provisions require the court to consider whether it needs to exercise any of its powers under the Children Act 1989 before concluding divorce or civil partnership proceedings.
27. The statement is completed and signed by the petitioner personally and if practicable by the respondent also, to indicate that they agree with the arrangements set out. Where the respondent does not wish to sign the statement they have the option to file their own statement in the course of the proceedings.
28. It has been suggested that there are several shortcomings with the current statement of arrangements. There is some debate as to the relevance of some of the questions and whether these are best dealt with as part of the divorce process or dealt with separately if needed.
29. Further, there is some overlap between the information required by this rule, rule 2.3 (contents of the petition) and information given within applications for Section 8¹⁰ orders under the Children Act 1989. The statement itself does not form an application and as a result either party may find that they are repeating information that has already been provided to the court.
30. Additionally, although the emphasis is on *trying* to reach agreement, making this statement or trying to agree this statement can cause disputes between the parties in an already emotional situation, particularly where either party may be reluctant or hostile.

⁹ Appendix 1, Family Proceedings Rules 1991

¹⁰ Section 8 orders are orders made under Section 8 of the Children Act 1989 for Residence, Contact, Specific Issue or Prohibited Steps.

31. The issues that the statement currently covers are:

- Details of the children (names & dates of birth)
- Home details
- Education and training
- Childcare details
- Maintenance
- Details for contact
- Details of health
- Details of care and other court proceedings

32. This information may not be timely or the most relevant to the court. For example, the details of the number of rooms etc at the address at which the children reside may change. As a result of the divorce the property may need to be sold and the children may no longer reside there.

33. It would be helpful to receive views on the merit of the detail in the current form, and whether consultees would welcome a shorter simplified version.

34. It is proposed that the statement be simplified to include questions regarding:

- details of the child's names, date of birth, and gender;
- whether a child has special health or educational needs;
- whether there are or have previously been any other court proceedings.

These would enable the court to intervene under the Children Act 1989 if it deemed it appropriate.

35. It is possible these questions could be incorporated into the application form. Following on from this it is an option that two versions of the application form could be made available; one where children are involved and a shorter version where there are no children. Benefits of this would include:

- decreasing the amount of information which is currently repeated and therefore the time taken to complete;
- reducing the number of forms the parties need to complete;
- reducing the length of the application form for those without children; and,
- ensuring that parties are only asked questions that are relevant to their circumstances.

36. However, this option could introduce the potential for the wrong form to be completed by the parties. Further, if there were no children at the time the application was filed but a child was born later, before the pronouncement of a matrimonial or civil partnership order, how would the parties notify the court of this change in circumstances?

37. Her Majesty's Court Service wishes to make clear that this change in approach is simply about what information should be provided to the court in order for it to be able to fulfil its obligations under Section 41 of the Matrimonial Causes Act 1973 and Section 63 of the Civil Partnership Act 2004. It is not the intention to reduce the court's opportunity to consider this issue or to increase the number of applications for Section 8 orders.

Question 13: What are your views as to whether a shorter version of the statement would be appropriate?

Question 14: Do you think this should remain a separate document or be included within the originating application?

Question 15: What are your views regarding the option of having two versions of the divorce / dissolution application to be used depending on whether or not there is a child of the family?

Question 16: Would you agree with the inclusion of a question identifying the gender of the child(ren)?

Statements of Truth instead of Affidavits

38. An affidavit is defined as a written statement in the name of a person by whom it is voluntarily signed and sworn or affirmed, and which might be used as evidence in a court of law.
39. Under Family Proceedings Rules 1991, Rule 10.12, in applications within family proceedings, evidence may be given by affidavit.
40. County Courts Act 1984, s 58(1), as modified by Family Proceedings Rules 1991 Rule 10.13, provides that in relation to family proceedings:
- “An affidavit to be used in a county court may be sworn before
- (a) the judge or district judge of any court; or
 - (b) any justice of the peace; or
 - (c) an officer of any court appointed by the judge of that court for the purpose; or
 - (d) a district judge of the principal registry; or
 - (e) any officer of the principal registry authorised by the President under section 2 of the Commissioners for Oaths Act 1889; or
 - (f) any clerk in the Central Office of the Royal Courts of Justice authorised to take affidavits for the purposes of proceedings in the Supreme Court,
- as well as before a commissioner for oaths or any person authorised to take affidavits under the Commissioners for Oaths Act 1889 or 1891.”
41. In practice this means that a person wishing to swear an affidavit must therefore identify and locate such a person and attend before them in person in order for the oath/affirmation to take place and be witnessed. This can not only inconvenience the individual party but also delay the submission of documents and potentially the case. Further, Notaries Public and other Commissioners for Oaths charge a fee for this service. In Legal Services Commission (LSC) funded cases this is ultimately paid for by the taxpayer.

42. In 1998 the CPR, Part 22, introduced the Statement of Truth. This is a statement that is made by the party, his litigation friend or his legal representative, indicating that he *believes* that the matters set out, for example, within his application notice, are true. The statement of truth must be made if the party wishes to rely on those matters as evidence.

43. The benefit of using the statement of truth in place of affidavits is to simplify the procedure and reduce the likelihood of delay. It would remove the need for an authorised person to be located for the oath to be taken. However it would not reduce the importance placed by the court on the need to verify that evidence, for example a statement, is being given truthfully.

Question 17: Do you agree that affidavits should be replaced by evidence supported by a statement of truth as set out in paragraphs 38-43?

44. Providing for the originating application and response to be verified by a statement of truth would allow the matters set out in that application / response to be relied on as evidence. This would retain the current position whereby the originating application does not have to be sworn although it would require signature by the litigant himself. In the absence of an affidavit in support of the petition, it may discourage parties from making erroneous applications.

Question 18: Do you agree that the matrimonial / civil partnership application should include a statement of truth?

45. It is suggested that the following are documents which should be verified by a statement of truth:

- an application or response (including amended versions);
- a reply complying with an order to provide further information about the contents of an application or response;
- a witness statement;
- a certificate of service;
- a statement of arrangements about children of the family;
- any other documents where a rule or practice direction requires it.

Question 19: If statements of truth replaced affidavits do you agree with the list of documents that should be verified by a statement of truth?

Question 20: Are there any other documents that you think might benefit from being verified by a statement of truth?

The effect of failing to verify a document with a statement of truth

46. It is proposed that if a party fails to verify an application or response they may not rely on matters contained within it as evidence. Further, if the person who makes a witness statement fails to verify it with a statement of truth the court may direct that it shall not be admissible as evidence.

47. It is also proposed that the court, upon the application of any party, may order a person to verify a document by a statement of truth.

Question 21: Do you agree that the court should be able to rule that evidence / witness statement is inadmissible if a statement of truth does not verify it?

Question 22: Do you agree that upon application a court should be able to order the verification of a document by way of a statement of truth?

Part 3- Financial Proceedings

Ancillary Relief Rules

48. It is proposed that the following changes to the ancillary relief rules are made:

- It is envisaged that proceedings for ancillary relief will no longer be “ancillary” to the divorce / dissolution proceedings to which they relate. Therefore, an application will commence all proceedings, rather than a “notice of intention to proceed with an application” that was previously made in the divorce or dissolution petition.
- As a result of this, it is proposed that ancillary relief proceedings should be called “proceedings for a financial order”.
- It is also proposed that the ancillary relief procedure should be applied to a wider range of financial proceedings than just those arising on the breakdown of a marriage or civil partnership. In particular, it is envisaged that the ancillary relief procedure will apply to proceedings under Schedule 1 to the Children Act 1989 and to proceedings under the Matrimonial and Family Proceedings Act 1984. In these proceedings, and in the others to which it is proposed that the procedure will apply (see below), the emphasis is on full and frank disclosure of the parties’ financial position at the outset of proceedings and on early settlement.
- It is proposed that the term “financial remedy” should apply to all of the proceedings to which the ancillary relief procedure will apply.

Application of Ancillary Relief Rules to other financial proceedings

49. It is proposed that the following financial proceedings use the current ancillary relief procedure:-

- **Applications under section 27 Matrimonial Causes Act 1973 or Part 9 of Schedule 5 Civil Partnership Act 2004 (failure to maintain).**
Applications for failure to maintain can be made where the applicant alleges that the respondent has failed to maintain the applicant or has failed to make proper provision for a child of the family during the marriage. The section provides for a discretionary exercise similar to that for ancillary relief and the court can make an order for periodical payments or for payment of a lump sum.

- **Applications under the Matrimonial and Family Proceedings Act 1984 or Schedule 7 Civil Partnership Act 2004 (financial provision following overseas divorce/dissolution).** The provisions allowing the making of an order for financial provision following an overseas divorce or dissolution are similar to the ancillary relief provisions. There would, therefore, seem to be considerable advantage to applying the ancillary relief procedure to such applications.
- **Applications under section 35 Matrimonial Causes Act 1973 or paragraph 69 of Schedule 5 to Civil Partnership Act 2004 (alteration of maintenance agreement by court during lifetime of parties).** This provision allows one party to apply to the court where it is alleged that (i) since a maintenance agreement was made there has been a change of circumstances and that the arrangements should therefore be changed or revoked or additional provision made, or (ii) that the agreement does not make proper financial provision for a child of the family. When making an order the court applies the criteria set out in section 25, Matrimonial Causes Act 1973 to determine how to alter the agreement. The court has to exercise the same discretion as on an ancillary relief application and so there is benefit in the ancillary relief procedure applying.
- **Applications under Schedule 1 to the Children Act 1989** Applications under Schedule 1 to the Children Act 1989 allow the court to make a range of financial orders for, or for the benefit of, a child. Periodical payments for the child between biological parents may be agreed between them or may be dealt with through the Child Support Agency (CSA). Therefore, this proposed change to procedure would have no effect on the majority of child maintenance cases. Financial disputes between parties who have been married or in a civil partnership will usually be dealt with by way of ancillary relief through the courts.

50. Schedule 1 applications are, therefore, most common: in disputes between unmarried parties in relation to the capital or housing provision for a child; for periodical payments in cases above the CSA threshold; and for provision where the child is cared for by a person who is not their parent. The court has discretion similar to that in section 25 of the Matrimonial Causes Act 1973. In most applications, full financial disclosure will be necessary to determine the outcome of the application. This would suggest that the ancillary relief procedure is appropriate – but only to those proceedings that are not dealt with by the Child Support Agency.

51. Other financial applications which do not involve the application of a wide discretion analogous to ancillary relief would be dealt with separately using a procedure similar to Part 8 (Alternative Procedure for Claims) of the Civil Procedure Rules (CPR). This would include applications under section 17 of the Married Women's Property Act 1882 (questions between husband and wife as to property to be decided in a summary way) or under section 36 Matrimonial Causes Act 1973 (Alteration of agreements by court after death of one party).

Question 23: Do you agree that the ancillary relief rules should apply to applications under section 27 Matrimonial Causes Act 1973 or Part 9 of Schedule 5 Civil Partnership Act 2004 (failure to maintain)?

Question 24: Do you agree that the ancillary relief rules should apply to applications under the Matrimonial and Family Proceedings Act 1984 or Schedule 7 Civil Partnership Act 2004 (financial provision following overseas divorce/dissolution)?

Question 25: Do you agree that the ancillary relief rules should apply to applications under section 35 Matrimonial Causes Act 1973 or paragraph 69 of Schedule 5 to Civil Partnership Act 2004 (alteration of maintenance agreement during lifetime of parties)?

Question 26: Do you agree that the ancillary relief rules should apply to applications under Schedule 1 to the Children Act 1989?

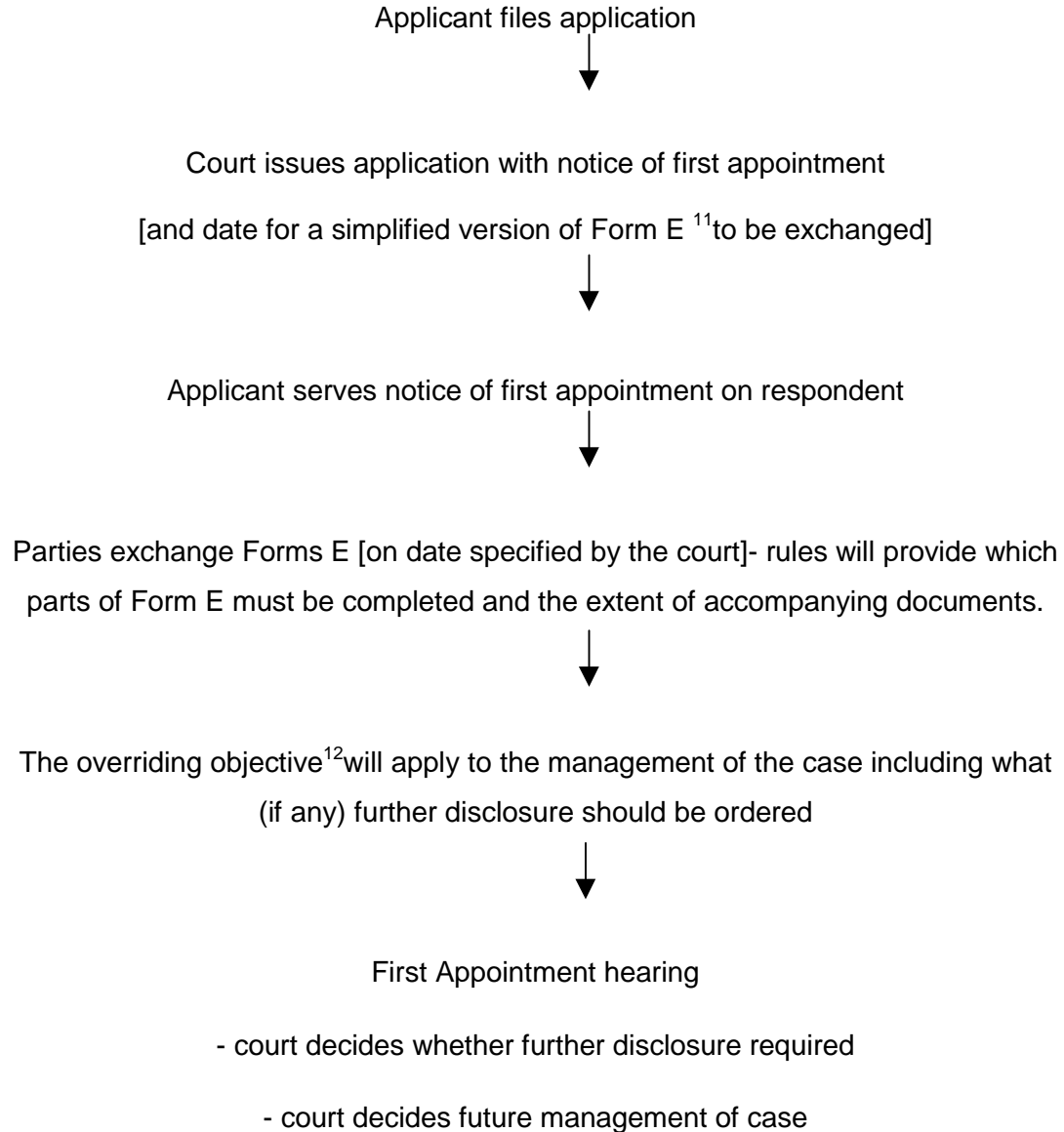
Question 27: Do you agree that the term 'ancillary relief' should now not be used in the proposed new Family Procedure Rules and that it should be replaced with the term 'financial order'?

Question 28: Do you agree that all of the financial proceedings listed in paragraph 49 above, including ancillary relief proceedings, should come under the term "financial remedy"?

Financial Proceedings in Magistrates' Courts

52. In order to achieve unification of the court process and clarity of the rules, it is proposed that the ancillary relief procedure should be applied to financial proceedings in magistrates' courts. However, as financial proceedings in the magistrates' courts involve relatively small sums of money it is felt that they do not merit the detailed disclosure of all assets and pre-trial hearings found in the county courts and High Court. Application of a simplified version of the ancillary relief procedure is therefore also proposed.

53. If a simplified version of the ancillary relief procedure is used, the procedure will be as follows:



¹¹ Form E is a Financial Statement which is completed, sworn and filed by both parties in Ancillary Relief proceedings.

¹² The overriding objective is to enable the court to deal with a case justly. This includes, so far as practicable, ensuring that the parties are on equal footing, saving expense and dealing with the case proportionately to the amount of money involved, importance of the case, complexity of the issue and financial position of each party. It also includes dealing with a case expeditiously and fairly and allotting it an appropriate share of the court's resources, while taking the need to allot resources to other cases.

Question 29: Do you consider that a simplified ancillary relief procedure should be applied to financial proceedings in magistrates' courts?

Making an application for a financial order

54. Section 28(3) of the Matrimonial Causes Act 1973 prevents a party to a marriage, who has remarried, from applying for a financial provision order or a property adjustment order. The rules currently provide (rule 2.53 Family Proceedings Rules 1991) that an application for financial provision can be made in a divorce petition or answer, or in Form A. Similar provisions exist in relation to civil partnership dissolutions. Therefore where a party to a divorce or dissolution includes a prayer (request) for ancillary relief in their petition they are able to remarry or register a civil partnership (once they have their divorce / dissolution) without losing their right to proceed with an application for a financial provision order or a property adjustment order.
55. Under the new draft rules it is intended to separate matrimonial and civil partnership proceedings from related financial proceedings. The application for a financial order will be made separately. It will not be possible to include an application for a financial order within the application for a matrimonial or civil partnership order. As a result, a person who did not apply separately for a financial order before re-marrying or entering into a civil partnership would lose their entitlement to apply for a financial provision order or a property adjustment order.
56. It is intended that a prominent warning of the consequences of remarriage on the right to apply for a financial order be given on the application form for a divorce, dissolution or nullity order and on the acknowledgement of service. This will ensure that both applicants and respondents receive this information and can make an informed decision about when to make a financial application. This change will influence when some individuals make a substantive financial application, either because of their intended remarriage/civil partnership or, for example, because they need to ensure that they can receive backdated periodical payments. Therefore, it is intended that the rules will allow the first appointment in financial proceedings to be deferred where this would help the resolution of the proceedings by agreement.
57. It is proposed that this change would enable the two proceedings to be separate and distinct. It will encourage parties to take a realistic look at their finances at an early stage and provide a level playing field for both parties to

operate in, whether or not they receive legal advice in relation to their matrimonial or civil partnership proceedings.

Question 30: Do you consider that it is appropriate to separate the proceedings in this way?

Question 31: Do you consider that such a warning provides sufficient protection to a person who wishes to remarry or register a civil partnership? If not, what alternatives may provide better protection?

Part 4-Children's proceedings

Protocol for Judicial Case Management in Public Law Children Act Cases & Private Law Programme

58. A key part of the planned work on the new Family Procedure Rules in respect of children's proceedings is to incorporate two freestanding publications into rules and practice directions. The aim is to reduce the plethora of protocols and guidance so they reside in one set of rules and practice directions, as is the case for civil proceedings. The two documents are: -

- The Private Law Programme¹³
- Protocol for Judicial Case Management in Public Law Children Act cases ("Public Law Protocol")¹⁴

59. Whilst incorporating these two documents into rules and practice directions, the aim is to strike a balance between the necessary flexibility to suit individual cases and the underlying timetable for their speedier disposal by making provision for:

- The fixing of the final hearing date at *any* point in the proceedings
- The varying of the timetable at *any* hearing

60. It is proposed that the rules will give the court robust case management powers. The rules will be modelled on the case management approach adopted in Civil Procedure Rules (CPR) Part 29 (the Multi-track). An overriding objective similar to the one which applies in civil proceedings (see CPR Part 1) and general case management powers (modelled on CPR Part 3) is also intended. The general rules would be applied to all public and private law Children Act proceedings. The 'Public Law Protocol' and Private Law

¹³ The President of the Family Division, the Dame Elizabeth Butler-Sloss, issued the Private Law Framework in July 2004. The President's Private Law Programme, was issued as guidance to all family courts in January 2005, and set a guideline for first dispute resolution hearing within 4-6 weeks. Its aim is to improve the resolution of private law family cases in a timely and effective manner.

¹⁴ The 'Public Law Protocol' was produced by the Lord Chancellor's Advisory Committee and implemented in November 2003. It sets a guideline of 40 weeks for the conclusion of care cases.

Programme and other more detailed information about the processes will be placed in a Practice Direction¹⁵.

61. Providing for robust case management powers in the rules raises to what extent case management tools such as the case management conference¹⁶, pre-hearing review¹⁷ and 'Schedule of Issues'¹⁸ as set out in the Public Law Protocol could be available to other children's proceedings. Views are welcome as to whether these would be useful tools for all children proceedings, and whether there are any other case management tools that might be similarly useful. If they were to be contained in the rules, the court would not be compelled to use them in every case but would have the option of doing so where appropriate to the individual proceedings.

Question 32: Should the key case management tools detailed in the Public Law Protocol be available in all children's proceedings?

Question 33: Are there any other case management tools that would be similarly useful in all children's proceedings?

62. The rules drafted will need to pay regard to recommendations from the publication of the report of the 'Review of the Child Care Proceedings System in England & Wales'¹⁹, and the revised Public Law Protocol following the Thematic Review of the Public Law Protocol, completed in December 2005. Additionally, regard will need to be given to the review of the Private Law Programme, the findings of which are due to be reported on this year.

¹⁵ The Practice Directions would be made under s81 of the Courts Act 2003 and be mandatory (s76(8) of the Courts Act 2003)

¹⁶ Case Management Conference is at step 4 of the Public Law Protocol; the objective is 'To consider case management directions and timetable'.

¹⁷ Pre-hearing Review is at step 5 of the Public Law Protocol, the objective is 'To identify/narrow issues and ensure effective and final hearing'.

¹⁸ Schedule of Issues is contained at Appendix B of the Public Law Protocol – Standard Documents. It should be a composite schedule of issues produced by the advocates at the end of the Advocates' meeting prior to the Case Management Conference and the Pre-Hearing Review and should be agreed so far as possible and where not agreed should set out the differing positions as set out in the Appendix.

¹⁹ Department For Education and Skills / Department For Constitutional Affairs, 2006

Forms for applications under the Children Act 1989

63. Current proposals with regard to the application forms needed for the new Family Procedure Rules follow the precedent set in the Family Procedure (Adoption) Rules 2005. That is, application forms would be set out in a practice direction.
64. Some of the current Children Act forms require amendment in any event, for example, to remove the references to current rules. Also, during the debate in the passage of the Children and Adoption Act²⁰ in November 2005, the Government undertook to look at the applications for private law Children Act proceedings with a view to adding questions about the use of mediation before going to court. The intention was to make parties aware that the court will attach importance to mediation, and to place privately funded and unrepresented applicants in a similar position to publicly funded applicants undergoing the Community Legal Service (CLS) funding code referral. In addition, Her Majesty's Court Service has undertaken to review the current questions collecting information on domestic violence in the light of user feedback.
65. However, the new Family Procedure Rules provide the opportunity for a more radical rethink of all the application forms. It is proposed that the new forms should be more consistent with the style of applications under the Adoption and Children Act 2002. The aim would be to make all forms more user friendly, to simplify the language where possible and to provide for more direct questions and 'tick box' responses. This would facilitate on-line completion for the public and data entry for court staff, and reduce the need for the applicant to enter free text (which may not always provide all the necessary information).
66. The new application forms should contain more comprehensive guidance notes on completion and list the documents that should be attached.
67. It is also proposed to look at the feasibility of developing separate forms for different Children Act applications to replace the current Form C1²¹ and supplemental forms. For example, it may be more efficient and helpful to local authorities to have a dedicated form for applications for care/supervision orders. Another could be developed specifically to deal with applications for orders under section 8 of the Children Act 1989. Views are welcome on

²⁰ Children and Adoption Act 2006, c.20

²¹ Appendix 1, Family proceedings Rules 1991

proposed changes to forms and in particular having a dedicated form for applications for care/supervision.

Question 34: Should there be a dedicated application form for applications for care/supervision?

Question 35: Are there any other changes to forms for applications under the Children Act 1989 that you think would be helpful?

Part 5- Family Proceedings in Magistrates' Courts

Aligning rules governing practice and procedure in family proceedings in the magistrates' courts with those in the High Court and county courts

Background

68. Historically, the jurisdiction of magistrates' courts in family proceedings has been (and to a large extent remains) different from the jurisdiction of other courts. Consequently, rules of court governing the practice and procedure in the different levels of court have developed separately. However, under the reforms brought about by the Children Act 1989, family proceedings courts²² were created and rules relating to applications in magistrates' courts under that Act largely mirror those contained in the rules governing the practice and procedure in the High Court and county courts.
69. The creation under the Courts Act 2003 of the Family Procedure Rule Committee to make rules governing the practice and procedure for family proceedings in the High Court, county courts and magistrates' courts provides an opportunity to achieve closer alignment of practice between the different levels of court.
70. Currently, rules of court governing the practice and procedure in family proceedings (excluding adoption proceedings) in the High Court and county courts are contained in the Family Proceedings Rules 1991, which are made under powers contained in the Matrimonial and Family Proceedings Act 1984 (section 40).
71. Rules of court governing the practice and procedure in family proceedings in the magistrates' courts (excluding adoption proceedings) are contained in a number of instruments. These are principally the Magistrates' Courts Rules 1981, the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991 and the Family Proceedings Courts (Children Act 1989) Rules 1991, which are made under powers contained in the Magistrates' Courts Act 1980 (section 144).
72. The aim of the new Family Procedure Rules (as set out in page 9 of this paper) will be to align the rules across the different levels of court unless there are

²² Section 92 (1) of the Children Act 1989

strong reasons *not to do so*. This is consistent with both the statutory requirement to make rules that are simple and simply expressed and the broader drive to move towards a single family court.

Procedural differences

73. The following paragraphs set out several procedural differences between the rules applying to the magistrates' courts and those applying to the High Court and county court. It is not an exhaustive list but reflects those areas that have been so far identified as warranting consultation on the underlying policy.
74. **Power to order disclosure against a non-party.** Rule 31.17 of the Civil Procedure Rules (CPR) provides for disclosure against a non-party. The intention is that the new Family Procedure Rules should contain a similar rule along the lines of rules 79 and 80 of the Family Procedure (Adoption) Rules 2005. However, there is no equivalent to the provisions of Supreme Court Act 1981, s 34 (Power of High Court to order disclosure of documents, inspection of property etc. in proceedings) and County Courts Act 1984, s.53 (Power of court to order disclosure of documents, inspection of property etc. in proceedings) for magistrates' courts. At present rules 79 and 80 of the 2005 rules do not apply to magistrates courts. The proposal is that the power to order discovery against a non-party ought to be available to the magistrates' court.
75. **Power to stay proceedings.** At present magistrates' courts do not generally have power to stay proceedings. There is, however, specific power to stay proceedings pending the establishment of jurisdiction under Council Regulation (EC) No. 2201/2003²³ and a limited power to stay proceedings where the proceedings amount to an abuse of the process of the court. It is proposed that magistrates' courts should have a general power to stay proceedings. We envisage this being mostly used in relation to appeals.
76. **Power to issue a witness summons.** The power to issue a witness summons in the Magistrates' Courts Act 1980, s97 only applies to proceedings started by complaint. Proceedings under the new Family Procedure Rules will be started by application. Section 97 has already been amended by The Family Procedure (Modification of Enactments) Order 2005 (2005 no 3275), under s 80 of the 2003 Act for adoption and related proceedings. It is proposed that it

²³ Article 19

should be further amended to ensure that witness summonses can be issued in the magistrates' courts for all family proceedings.

77. Appointing, changing or removing a solicitor from the court record.

Currently, there is no specific provision here in the rules of court for magistrates' courts (with the exception of those proceedings covered by the Family Procedure (Adoption) Rules 2005 Part 18). The intention is to follow the example of the Family Procedure (Adoption) Rules and apply CPR Part 42 (Change of Solicitor) as adjusted for all family proceedings courts.

78. Authentication of documents. Provision regarding the authentication of documents by seal or stamp of the court in the magistrates' courts relates to those proceedings covered by rule 9 of the Family Procedure (Adoption) Rules 2005. The intention is to apply rule 9 to all family proceedings across all levels of court.

79. Providing for evidence by way of affidavit. Unlike the rules governing the practice and procedure in family proceedings in the High Court and county court, rules governing the practice and procedure in such proceedings in the magistrates' courts do not prescribe the filing of affidavits. In line with the policy of harmonising rules for family proceedings with the CPR it is intended to move away from the use of affidavits in family proceedings wherever possible and to use statements of truth. However, where the rules do require evidence by affidavit it is proposed that these should apply to all levels of court.

80. Power to make civil restraint orders. A civil restraint order is an order restraining a party –

- (a) from making any further applications in current proceedings (a limited civil restraint order);
- (b) from issuing any further applications or making certain applications in specified courts (an extended civil restraint order); or
- (c) from issuing any claim or making any application in specified courts (a general civil restraint order).

without permission of a judge.

81. Certain provisions of the CPR require the court to consider whether to make a civil restraint order. For example, CPR3.3 (7) provides that if the court, of its own initiative, dismisses an application and it considers that the application was

totally without merit, it must consider whether to make a civil restraint order. Civil restraint orders are made using the court's inherent power to control abuse of its processes. The civil restraint order itself provides the mechanism for enforcing it as the court just refuses a further application covered by the terms of the order. It is therefore proposed that the rules relating to civil restraint orders in the Family Procedure (Adoption) Rules 2005, rule 16 and the Practice Direction to Part 3 should be applied to all levels of court. This Practice Direction is modelled on equivalent provisions in CPR Part 3 and the accompanying Practice Direction.

82. **Power to grant interim injunctions.** The magistrates' court does not have a general inherent power to grant injunctions equivalent to the power of the High Court or to the power of the county court. The power of the High Court is set out in the Supreme Court Act 1981, s37 (Powers of the High Court with respect to injunctions and receivers). The power of the county courts is set out in the County Courts Act 1984, s38 (Remedies available in county courts). However, the magistrates' court does have certain statutory powers to grant injunctions, for example, under the Family Law Act 1996, Part IV (Family Homes and Domestic Violence). The question of whether a general power for all proceedings is required needs to be considered.

<p>Question 36: Should a general power to grant interim injunctions be applied to all levels of court?</p>

- 83. Provision of written reasons in the Family Proceedings Courts.** Rules on the provision of written reasons in the family proceedings courts are set out in: Rule 21(5) of the Family Proceedings Courts (Children Act 1989) Rules 1991 and rule 12 (5) of the Family Proceedings Courts (Matrimonial Proceedings etc.) Rules 1991. These require the justices' clerk to record in writing in consultation with the justice or justices the reasons for the court's decision and any findings of fact *before* the court makes an order or refuses an application or request. The consequence of this is that no order may be made without a written record having been made of the magistrates' reasons and findings of fact being stated in court. The time needed for the preparation of written reasons inevitably causes inconvenience to the court, the parties and their representatives. The delay can be a deterrent to court users and an inducement to argue for the transfer of the case to the county court.
84. The present position in the county courts and the High Court is more flexible, as there is no duty to pre-record the reasons and findings in writing and the judges are able to deliver judgments orally at the same time as making the order. Proceedings under the Children Act 1989 are governed by the Family Proceedings Rules 1991 Rule 4.21. As with the Family Proceedings Courts (Children Act 1989) Rules 1991 and Family Proceedings Courts (Matrimonial Proceedings etc.) Rules, the court is required to make its decision "as soon as practicable". It is also required to state its finding of fact and reasons for its decision when making any order. The key difference between the High Court/county courts and the family proceedings courts is that the reasons are not required by the rules to be in writing before the court makes an order or refuses an application or request.
85. Her Majesty's Court Service does not intend that justices should make the order and agree the reasons afterwards. We are considering making an adjustment to the current process in so far as the timing of the administrative matter of preparing the final note of the reasons. A record of the reasons for the order would still be taken before the order was made. The form C22 (record of hearing) could be amended to ensure that the reasons were properly noted and agreed by the bench before announcing the decision.

Question 37: How can the present position regarding the preparation of written reasons in the family proceedings courts be improved upon in terms of reducing delay and the efficiencies provided by the practice in the county courts?

Question 38: Do you consider that any of the areas listed in paragraphs 73-85 above are not suitable for rule alignment? If so, please give reasons.

Question 39: Are there any other areas you consider unsuitable for alignment? If so, please identify the areas and give reasons why alignment would not be suitable.

Question 40: Are there any other areas where you consider alignment of a procedural nature would be appropriate? If so, please identify the areas.

Part 6- Appeals

Process of appeal

86. The rules relating to appeals from family proceedings courts are complex having been developed piecemeal over many years through a range of different statutes. A number of statutes make provision for specific appeals from the magistrates' courts to the High Court: for example, the Children Act 1989, s94 and the Domestic Proceedings and Magistrates' Courts Act 1978, s29. In the absence of a prescribed route of appeal to the High Court, appeals from the magistrates court are by way of case stated to the High Court (the Magistrates' Courts Act 1980, s111).
87. Appeals are currently required to be commenced in a variety of ways- by way of case stated, by way of notice of appeal and by way of notice of motion. A variety of time limits and processes apply. For example –
- an application to magistrates requesting them to state a case has to be made within 21 days of the decision of the magistrates (Magistrates' Courts Act 1980,s111(2));
 - where s94 of the Children Act 1989 applies, the notice of appeal is to be filed within 14 days (Family Proceedings Rules 4.22 (3))
 - for appeals under the Domestic Proceedings and Magistrates' Courts Act 1978,s29 the notice of motion must be lodged within 6 weeks of the decision (Family Proceedings Rules 8.2(2)).
88. It is proposed that there should be a single process of appeal from decisions of a magistrates' court in family proceedings. As indicated below appeals by way of case stated would be abolished. The use of a single form of appeal notice would be consistent with the statutory requirement that the Rule Committee exercise its rule-making powers with a view to making rules that are simple and simply expressed. As part of the exercise relating to harmonising the rules relating to Family Proceedings with the Civil Procedure Rules (CPR), it is

intended that CPR Part 52 will be adjusted and applied to all family proceedings. It has already been applied to adoption and related matters. Part 19 of the Family Procedure (Adoption) Rules 2005 is modelled on CPR Part 52.

Question 41: Do you agree that a single form of appeal notice should initiate all appeals from decisions of magistrates' courts in family proceedings?

Route of appeal

89. Currently all appeals from decisions of family proceedings courts are made as of right to the High Court. This can lead to delay given the heavy workload of the High Court Bench and that on circuit a High Court Judge may not be readily available to hear the appeal. The Family Procedure Rule Committee has recommended that it would be more appropriate for appeals to lie to a county court. This is consistent with the Department for Constitutional Affairs' longer-term policy to create single civil and family courts. The consultation paper *A single civil court*²⁴ proposed that routes of appeal for family cases should generally follow the same tier-based approach as the civil system, with any final decisions appealed to a judge one level up. Under this system, appeals from decisions of Justices of the Peace and District Judges (Magistrates' Courts) would lie to a Circuit Judge in a county court.

Question 42: Do you agree that appeals from decisions of magistrates' courts in family proceedings should lie to a county court?

Question 43: Do you agree with the proposal that appeals by way of case stated from Family Proceedings Courts should be abolished?

²⁴ DCA Consultation Paper CP06/05

Annex A- “Family Proceedings”

“Family proceedings”, in relation to a court, means proceedings in that court which are family proceedings as defined by

- (a) section 65 of the Magistrates’ Courts Act 1980, or
- (b) section 32 of the Matrimonial and Family Proceedings Act 1984²⁵

(a) section 65 of the Magistrates’ Courts Act

“(1) In this Act family proceedings means proceedings under any of the following enactments, that is to say –

- (a) the Maintenance Orders (Facilities for Enforcement) Act 1920
- (b) section 43 of the National Assistance Act 1948
- (c) section 3 of the Marriage Act 1949
- (ca) schedule 2 to the Civil Partnership Act 2004
- (ee) section 35 of the Matrimonial Causes Act 1973
- (ef) paragraphs 69 to 72 of Schedule 5 to the Civil Partnership Act 2004
- (f) Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972
- (h) Adoption and Children Act 2002
- (i) Section 18 of the Supplementary Benefits Act 1976
- (j) Part I of the Domestic Proceedings and Magistrates’ Courts Act 1978
- (ja) Schedule 6 to the Civil Partnership Act 2004

²⁵ Section 75 (3) of the Courts Act 2003

- (l) section 60 of the Magistrates' Courts Act 1980
- (m) Part I of the Civil Jurisdiction and Judgments Act 1982, so far as that Part relates to the recognition and enforcement of maintenance orders
- (mm) section 55A Family Law Act 1986
- (n) the Children Act 1989
- (na) section 30 of the Human Fertilisation and Embryology Act 1990
- (nb) section 106 Social Security Administration Act 1992
- (o) section 20 (so far as it provides, by virtue of an order under section 45, for appeals to be made to a court) of the Child Support Act 1991
- (p) Part IV of the Family Law Act 1996
- (q) sections 11 and 12 of the Crime and Disorder Act 1998
- (r) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, so far as that Regulation relates to the recognition or enforcement of maintenance orders.
- (s) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility insofar as that Regulation relates to jurisdiction, recognition and enforcement in parental responsibility matters.

Except that, subject to subsection (2) below, it does not include –

- (i) proceedings for the enforcement of any order made, confirmed or registered under any of those enactments;
- (ii) proceedings for the variation of any provision for the periodical payment of money contained in an order made, confirmed or registered under any of those enactments ; or
- (iii) proceedings on an information in respect of the commission of an offence under any of those enactments.

(2) The court before which there falls to be heard any of the following proceedings, that is to say –

- (a) proceedings (whether under this Act or any other enactment) for the enforcement of any order made, confirmed or registered under any of the enactments specified in paragraphs (a) to (k), (m), (n) (p) and (r) of subsection (1) above;
- (b) proceedings (whether under this Act or any other enactment) for the variation of any provision for the making of periodical payments contained in an order made, confirmed or registered under any of those enactments;
- (c) proceedings for an attachment of earnings order to secure maintenance payments within the meaning of the Attachment of Earnings Act 1971 or for the discharge or variation of such an order; or
- (d) proceedings for the enforcement of a maintenance order which is registered in a magistrates' court under Part II of the Maintenance Orders Act 1950 or Part I of the Maintenance Orders Act 1958 or for the variation of the rate of payments specified by such an order;
- (e) proceedings under section 20 (so far as it provides, by virtue of an order under s.45, for appeals to be made to a court) of the Child Support Act 1991

may if it thinks fit order that those proceedings and any other proceedings being heard therewith shall, notwithstanding anything in subsection (1) above, be treated as family proceedings for the purpose of the Act.

(3) Where the same parties are parties –

- (a) to proceedings which are family proceedings by virtue of subsection (1) above, and
- (b) to proceedings which the court has power to treat as family proceedings by virtue of subsection (2) above,

and the proceedings are heard together by a magistrates' court, the whole of the proceedings shall be treated as family proceedings for the purposes of this Act.

(4) No appeal shall lie from the making of, or refusal to make, an order under subsection (2) above."

(b) section 32 of the Matrimonial and Family Proceedings Act 1984

"family proceedings" means proceedings which are family business

"family business" means business of any description which in the High Court is for the time being assigned to the Family Division and to no other Division by or under section 61 of (and Schedule 1 to) the Supreme Court 1981

Schedule 1 to the Supreme Court Act 1981

3. To the Family Division are assigned:

- (a) "all matrimonial causes and matters (whether at first instance or on appeal);
- (b) all causes and matters (whether at first instance or on appeal) relating to –
 - (i) legitimacy
 - (ii) the exercise of the inherent jurisdiction of the High Court with respect to minors, the maintenance of minors and any proceedings under the Children Act 1989, except proceedings solely for the appointment of a guardian of a minor's estate
 - (iii) adoption
 - (iv) non-contentious or common form probate business
- (c) applications for consent to marriage of a minor or for a declaration under section 27B(5) of the Marriage Act 1949
- (d) proceedings on appeal under section 13 of the Administration of Justice Act 1960 from an order or decision made under section 63(3) of the Magistrates' Courts Act 1980 to enforce an order of a magistrates' court

made in matrimonial proceedings or proceedings under Part IV of the Family Law Act 1996 or with respect to the guardianship of a minor

- (e) applications under Part III of the Family Law Act 1986
- (e) *sic* proceedings under the Children Act 1989
- (f) all proceedings under –
 - (i) Part IV of the Family Law Act 1996
 - (ii) the Child Abduction and Custody Act 1985
 - (iii) the Family Law Act 1986
- (iv) section 30 of the Human Fertilisation and Embryology Act 1990
 - (v) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility so far as that Regulation relates to jurisdiction recognition and enforcement in parental responsibility matters
- (fa) all proceedings relating to a debit or credit under s.29(1) or 49(1) of the Welfare Reform and Pensions Act 1999
- (g) all proceedings for the purpose of enforcing an order made in any proceedings of a type described in this paragraph
- (h) all proceedings under the Child Support Act 1991
- (i) all proceedings under sections 6 and 8 of the Gender Recognition Act 2004
- (i) *sic* all civil partnership causes and matters (whether at first instance or on appeal)
- (j) applications for consent to the formation of a civil partnership by a minor or for a declaration under paragraph 7 of Schedule 1 to the Civil Partnership Act 2004
- (k) applications under section 58 of that Act (declarations relating to civil partnerships)".

Questionnaire

Question 1: Do you consider the Family Procedure Rules should permit service of documents by email?

Question 2: What restrictions or conditions, if any, do you consider should be placed on the use of service by email?

Question 3: What restrictions or conditions, if any, do you consider should be placed on the use of service by fax?

Question 4: Do you agree that some of the current terminology of Part II of the Family Proceedings Rules 1991 requires modernisation?

Question 5: Do you agree that the new rules should adopt the new proposed terminology and that the relevant primary legislation should be amended accordingly?

Question 6: Are there any other terms within current family procedure that you think should be modernised?

Question 7: Do you agree that the new rules should adopt a single term “respondent” in place of “respondent”, “co-respondent” and “party cited”?

Question 8: Do you agree that the time limit on a respondent to make an application is proportionate?

Question 9: Do you consider that a Practice Direction to the new rules should provide a stronger barrier against the naming of the person with whom the respondent is alleged to have committed adultery?

Question 10: Do you consider that there should be an absolute ban on naming the person with whom the respondent is alleged to have committed adultery?

Question 11: Do you consider that, where an applicant names the person with whom the respondent is alleged to have committed adultery, that named person should be made a party to the proceedings?

Question 12: Do you agree that it should be possible for the court to make a nullity order without the hearing of oral evidence?

Question 13: What are your views as to whether a shorter version of the statement would be appropriate?

Question 14: Do you think this should remain a separate document or be included within the originating application?

Question 15: What are your views regarding the option of having two versions of the divorce / dissolution application to be used depending on whether or not there is a child of the family?

Question 16: Would you agree with the inclusion of a question identifying the gender of the child(ren)?

Question 17: Do you agree that affidavits should be replaced by evidence supported by a statement of truth as set out in paragraphs 38-43?

Question 18: Do you agree that the matrimonial / civil partnership application should include a statement of truth?

Question 19: If affidavits were replaced by statements of truth do you agree with the list of documents that should be verified by a statement of truth?

Question 20: Are there any other documents that you think might benefit from being verified by a statement of truth?

Question 21: Do you agree that the court should be able to rule that evidence / witness statement is inadmissible if a statement of truth does not verify it?

Question 22: Do you agree that upon application a court should be able to order the verification of a document by way of a statement of truth?

Question 23: Do you agree that the ancillary relief rules should apply to applications under section 27 Matrimonial Causes Act 1973 or Part 9 of Schedule 5 Civil Partnership Act 2004 (failure to maintain)?

Question 24: Do you agree that the ancillary relief rules should apply to applications under the Matrimonial and Family Proceedings Act 1984 or Schedule 7 Civil Partnership Act 2004 (financial provision following overseas divorce/dissolution)?

Question 25: Do you agree that the ancillary relief rules should apply to applications under section 35 Matrimonial Causes Act 1973 or paragraph 69 of Schedule 5 to Civil Partnership Act 2004 (alteration of maintenance agreement during lifetime of parties)?

Question 26: Do you agree that the ancillary relief rules should apply to applications under Schedule 1 to the Children Act 1989?

Question 27: Do you agree that the term ‘ancillary relief’ should now not be used in the proposed new Family Procedure Rules and that it should be replaced with the term ‘financial order’?

Question 28: Do you agree that all of the financial proceedings listed in paragraph 49 above, including ancillary relief proceedings, should come under the term “financial remedy”?

Question 29: Do you consider that a simplified ancillary relief procedure should be applied to financial proceedings in magistrates’ courts?

Question 30: Do you consider that it is appropriate to separate the proceedings in this way?

Question 31: Do you consider that such a warning provides sufficient protection to a person who wishes to remarry or register a civil partnership? If not, what alternatives may provide better protection?

Question 32: Should the key case management tools detailed in the Public Law Protocol be available in all children's proceedings?

Question 33: Are there any other case management tools that would be similarly useful in all children's proceedings?

Question 34: Should there be a dedicated application form for applications for care/supervision?

Question 35: Are there any other changes to forms for applications under the Children Act 1989 that you think would be helpful?

Question 36: Should a general power to grant interim injunctions be applied to all levels of court?

Question 37: How can the present position regarding the preparation of written reasons in the Family Proceedings Courts be improved upon in terms of reducing delay and the efficiencies provided by the practice in the county courts?

Question 38: Do you consider that any of the areas listed in paragraphs 73-85 above are not suitable for rule alignment? If so, please give reasons.

Question 39: Are there any other areas you consider unsuitable for alignment? If so, please identify the areas and give reasons why alignment would not be suitable.

Question 40: Are there any other areas where you consider alignment of a procedural nature would be appropriate? If so, please identify the areas?

Question 41: Do you agree that a single form of appeal notice should initiate all appeals from decisions of magistrates' courts in family proceedings?

Question 42: Do you agree that appeals from decisions of magistrates' courts in family proceedings should lie to a county court?

Question 43: Do you agree with the proposal that appeals by way of case stated from family proceedings courts should be abolished?

Thank you for participating in this consultation exercise

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (eg. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

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

How to respond

Please send your response by 1st December 2006 to:

**Clive Buckley
Her Majesty's Courts Service
Civil Law and Justice Division
5.15 Selborne House
54-60 Victoria Street
London
SW1E 6QW**

Tel: 020 7210 1497

Fax: 020 7201 8825

Email: clive.buckley@hmcourts-service.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.dca.gov.uk/index.htm>

Publication of response

A paper summarising the responses to this consultation will be published in 5 months time. The response paper will be available on-line at <http://www.dca.gov.uk/index.htm>

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The Consultation Criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact the Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at: consultation@dca.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Laurence Fiddler
Consultation Co-ordinator
Department for Constitutional Affairs
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page 57.

