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Response to **New draft Part 3A of the Family Procedure Rules 2010
(Children and Vulnerable Persons: Participation in proceedings and giving evidence)**

Issued by **The Ministry of Justice**

Link to consultation https://consult.justice.gov.uk/digital-communications/draft-amendments-to-family-procedure-rules/supporting_documents/fprccvwwgdrafrulesconsultationpaper.pdf

*Q1. There is a need to reflect Article 12 UNCRC and the right of a child to express a view if he or she wishes and is old enough (and see *ZH (Tanzania) v SSHD* [2011] UKSC 4). The Committee recollects 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?*

MA response: Further elaboration of the conditions where a child should participate are given in 3A.2 which are clear and robust. 3A.1 taken together with 3A.2 does suffice. It would be helpful however to reference 3A.2 within 3A.1.

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?*

MA response: Whilst 'involved' is a broad term, we believe that with the extra definition in rule 3A.2 it suffices for the purposes of rule 3A.1. If an alternative phrasing is required the term 'affected by' could be used.

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.*

MA response: Yes these conditions are appropriate.

Q2. The overriding objective of the Family Procedure Rules.

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

MA response: The overriding objectives should be amended to emphasise consideration by the court of enabling effective participation by children and vulnerable witnesses in proceedings. This would

demonstrate the importance attached to children and vulnerable witnesses' participation and make it clear these are some of the overriding objectives of the Rule.

A new (f) in the overarching objectives of 'facilitating the effective participation of affected children as appropriate' could be added. In addition a new (g) of 'facilitating the effective participation of vulnerable witnesses as appropriate' could be added.

- 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?*

MA response: The overriding objective is sufficiently dealt with the draft rule. However if the overriding objective was amended to include effective participation of children and vulnerable witnesses, this reference to the overriding objective would be more effective in ensuring effective participation of children and vulnerable witnesses.

The draft rule 3A.3 states 'If the court does not make a direction under paragraph (2), the court order must state that the court considers the child's interest and position can properly be secured without any direction under paragraph (2) being made or by making an alternative direction meeting the overriding objective.' However if an 'alternative direction meeting the overriding objective' is made, the direction should have a specific reference to our suggested addition to the overriding objective '(f) facilitating the effective participation of affected children as appropriate'

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

- a) *Do you agree with the use of the phrase "is likely to be diminished" to define the persons other than children to whom the rules apply and who may be eligible for assistance (see the following rules 3A.1 (1) (b) and (c), 3A.4 (1), 3A.5 (1), 3A. 9 (1) (a) and (b)?*

MA response: The MA welcomes this phrase being drafted at a high level as this gives judges at all levels of the family court the opportunity to use discretion in whether cases fall under this description and empowers the court.

Where 'is likely to be diminished' is used instead the terminology 'is likely to be diminished and would be enhanced by additional support' could be used. This proposal is to ensure there is no unnecessary tying up of resources or delays.

Training and non-statutory guidance to ensure consistency of interpretation and appropriate use of special measures, whilst still allowing judicial discretion, would be welcomed

- 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?*

MA response: The MA agrees that the rule should be drafted at a high level, as proposed. The MA thinks that the wording enables the court to use discretion and empowers the court to implement the rules where they see appropriate.

Alongside the ability for the judiciary to use discretion, training and non-statutory guidance on circumstances when the measures in rule 3A.7 should be applied would be welcomed.

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

The current draft at 3A.5 states that the court must consider whether the quality of evidence given by a party or witness is likely to be diminished and, if so whether it is necessary to make one or more of the directions in order to assist the party or witness give evidence. Rule 3A.6 sets out a list of factors which the court must have regard to. Rules 3A.6(j), 3A.7(4) and 3A.11(2) deal with the availability of measures.

Current draft rule 3A.4 makes similar provision about a party's participation in proceedings. We would welcome views on whether additional safeguards are required to make sure that the measures are used appropriately and in accordance with available resources. For example;

(a) Should certain measures in 3A.7 (1) be subject to an enhanced level of agreement from a senior judge?

MA response: No, the measures in 3A.7 (1) should not be subject to an enhanced level of agreement from a senior judge. It should be at the discretion of the judge(s) presiding over the court as to whether these measures are implemented. Judges at all levels of the family court should be able to use their discretion as to whether to implement these measures and are capable of doing so. Training and non-statutory guidance should be put in place to assist judges at all levels in deciding if the measures in 3A.7 (1) need to be implemented. This training and guidance would help negate the need for a senior judge to make the decision.

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

MA response: There should not be further tests. It should be at the discretion of the judge(s) as to whether measures are implemented. Judges at all levels of the family court should be able to use their discretion as to whether to implement these measures and are capable of doing so.

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.

MA response: The rules explain the procedures for deciding on the availability of measures. Judicial decisions will balance the requirements of all the parties on the basis of need.

Q5. Factors the court is to have regard to.

The Committee noted that reference to a party or witness's employment is not contained in the list of factors the court is to have regard to in draft rule 3A.6(G).

Would a party or witnesses employment status be relevant to the consideration? If so, should a reference to employment be included in the list of factors.

MA response: There is no need for an addition of employment status. The MA does not feel this is necessary.

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

MA response: The MA would like to make the following points for consideration:

- The MA welcomes provision for children and vulnerable witnesses as demonstrated in this Rule.
- It is important to recognise the issues of participation by children and the ability to participate fully of vulnerable witnesses are separate issues and need to be treated as such.
- In the cases of children, who is going to be responsible for ascertaining from the child(ren) concerned their wishes relating to participation in proceedings? For instance would it be CAFCASS in public law proceedings? Who would be responsible in private law proceedings where CAFCASS may not be involved? What role would the child's legal representative play? What duty would the court have?
- The MA suggests it could be difficult for a court to identify whether a direction involving a child is needed in situations where a child is not party to proceedings if the court does not have access either to the child or the views of the child.
- In the case of vulnerable witnesses who would apply for special measures on their behalf? How would this process work? What would happen with vulnerable witnesses without legal representation? What duty would the court have?
- In replacement of the use of the terminology 'age and maturity' in relation to a child in the draft rule the MA suggests the use of the terminology 'age and understanding'. The terminology of 'understanding' is used for instance in the 'welfare checklist' (Children Act 1989 (s1(3))). It is important to recognise that as well as the child's age and maturity their understanding is an important factor in interactions with the child.