EXPLANATORY MEMORANDUM TO

THE ACCESS TO JUSTICE ACT 1999 (DESTINATION OF APPEALS) (FAMILY PROCEEDINGS) ORDER 2014

2014 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1. The purpose of the instrument is to establish appropriate routes of appeal to reflect the creation of the family court. When the provisions in the Crime and Courts Act 2013 that establish a family court for England and Wales are implemented, existing routes of appeal below the Court of Appeal will cease to apply, and all appeals regardless of the type or level of the original decision would by default lie to the Court of Appeal. This instrument will provide for appeals against decisions of certain levels of judge or office holders of the new family court to lie to the family court instead of to the Court of Appeal.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. The Committee's attention is drawn to the three matters set out below.

3.2. The first matter relates to the commencement provision in the Access to Justice Act 1999 (Destination of Appeal) (Family Proceedings) Order 2014. The Order is stated to come into force on the date on which section 17(3) of the Crime and Courts Act 2013 is brought fully into force. This drafting device has been used because at the time of laying the Draft Order, a final decision as to the commencement date has yet to be made, so it would not have been appropriate to include a calendar date in the coming into force provision of the Order.

3.3. The second matter is that in making this Order, reliance is placed on section 13 of the Interpretation Act 1978. The reason is that it is considered that the provision made by this Order will be necessary for the purpose both of bringing fully into force, and of giving full effect to, sections 31A and 31O of the Matrimonial and Family Proceedings Act 1984, as inserted by section 17(3) and Schedule 10 of the Crime and Courts Act 2013 respectively, when that section and that Schedule come fully into force.

3.4. In essence, without the provision made by these Rules, the family court will not be able to be brought practically into operation because the replacement of appeal by default to the Court of Appeal with appeal as appropriate to the family court is essential to the operation of the new single family court.

3.5. The anticipatory exercise of the powers in section 56(1) of the Access to Justice Act 1999 as amended by section 17(6) and Schedule 10, Part 2, paragraphs 78 and 81 of the Crime and Courts Act 2013 to insert reference to the family court in paragraph (1), is therefore expedient for the purposes of bringing section 31A of the 1984 Act into force.

3.6. The third matter drawn to the attention of the Committee is that this Order forms only part of a package of statutory instruments which will be needed for the purposes of the family court. For example, provision for numerous statutory instruments is made in new sections 31B – 31O of the Matrimonial and Family Proceedings Act 1984 as inserted by Schedule 10 of the Crime and Courts Act 2013. The intention is that all of these associated statutory instruments will come into force on the same date.

3.7. There are also consequential and other related amendments to the Family Procedure Rules which are made by negative statutory instrument and will also come into force on the same date as the statutory instruments under the new family court sections of the 1984 Act cited above.

3.8. Despite the links outlined above, there is no intention to lay any negative statutory instrument which includes any provision which is dependent on the approval by Parliament of an affirmative statutory instrument, until that approval has been given.

4. Legislative context

4.1. These Rules and this Explanatory Memorandum should be read in conjunction with section 17 and Schedules 10 and 11 of the Crime and Courts Act 2013, including in particular section 31K, section 17(6) and Schedule 10, Part 2, paragraphs 15(1) and (2), 78 and 81 of the Crime and Courts Act 2013. The Act can be found online at http://www.legislation.gov.uk/ukpga/2013/22/contents

4.2. Section 31 K of the Matrimonial and Family Proceedings Act 1984 provides that if any party to any proceedings in the family court is dissatisfied with the decision of the court, that party may appeal from it to the Court of Appeal. The new subsection (2A) of section 13 of the Administration of Justice Act 1960 provides that the route of appeal against decisions or an order of the family court relating to contempt of court is also to the Court of Appeal. The Access to Justice Act 1999 (Destination of Appeal) (Family Proceedings) Order 2014 alters these routes of appeal so that appeals from decisions of certain judges or office holders of the family court lie to the family court instead of the Court of Appeal.

4.3. This Order also makes small adjustments to the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2011 primarily in consequence of the establishment of the family court, as the 2011 Order will still route appeals from decisions of certain judges in the High Court away

from the Court of Appeal to the High Court, which will continue to be able to hear family proceedings.

4.4. This Order is one of a group of instruments required to implement the single family court for England and Wales. For example, rules made under section 31D of the Matrimonial and Family Proceedings Act 1984 (which will be subject to the negative procedure) will make provision for the level of judge who is to hear an appeal that is re-routed to the family court by this Order. Amendments are planned to Part 30 of the Family Procedure Rules 2010 and supporting practice direction relating to appeals to reflect the family court. The instruments will be made and laid at various dates in 2014 with the intention that they will all come into force on the same date. A separate Explanatory Memorandum will be published for each instrument.

5. Territorial Extent and Application

5.1. This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1. The Minister of State, Simon Hughes, has made the following statement regarding Human Rights:

"In my view the provisions of the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2014 are compatible with the Convention rights."

7. Policy Background

- *What is being done and why*

7.1. In its response to the Family Justice Review, published in February 2012, the Government accepted the recommendations that a single family court should be created to deal with family proceedings, replacing the current three tiers of court structure. The High Court should retain exclusive jurisdiction in a limited number of areas, such as the exercise of its inherent jurisdiction. In order to achieve this, primary legislation was required and provision for the establishment of a family court for England and Wales was enacted by Parliament in the Crime and Courts Act 2013.

7.2. The current routes of appeal against decisions of judges and magistrates in family proceedings reflect the three tier structure. For example, there are statutory rights of appeal to the Court of Appeal from the determination of a judge of a county court (section 77(1) of the County Courts Act 1984). Appeals from decisions made by a district judge of a county court are routed away from the Court of Appeal to a judge of a county court. There are also currently statutory rights of appeal to a county court from decisions of magistrates' courts in family proceedings (see, for example, section 94 of the Children Act 1989 which relates to the route of appeal for decisions in

proceedings under the Children Act 1989 http://www.legislation.gov.uk/ukpga/1989/41/section/94).

7.3. When the new family court is implemented, the county courts will become the single County Court and will no longer deal with family proceedings. Magistrates' courts will also no longer deal with family proceedings. The intention is that, in practice, all family business will be conducted in the family court, save for those cases reserved exclusively to the High Court. There are therefore new statutory rights of appeal cited above to the Court of Appeal against a decision or order of the family court.

7.4. The Access to Justice Act 1999 (Destination of Appeal) (Family Proceedings) Order 2014 makes the necessary provision to maintain the current position that appeals against the decisions made at district judge level and below in family proceedings will be routed away from the Court of Appeal. In addition, as the High Court will still make decisions in family proceedings, the instrument makes small technical amendments to the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2011.

7.5. The policy intention is generally that appeals within the family court will be to Circuit Judge or a High Court Judge. This will ensure that appeals are dealt with at the most appropriate level largely replicating the current arrangements. To fully achieve the policy intention concerning routes of appeals from decisions of the family court, the intention is that the requirement to obtain permission to appeal against a decision of a district judge will be extended to apply to a decision of District Judge (Magistrates' Courts) by amendments to Part 30 of the Family Procedure Rules 2010 and the supporting Practice Direction which will be brought into force at the same time as the Order.

- *Consolidation*

7.6. The Order re-routes appeals against the decisions of certain judges away from the Court of Appeal to the family court and makes only small amendments to the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings)) Order 2011, which relate to decisions of the High Court in family proceedings. The Department has no plans to consolidate the legislation as a result of the Order which is the first such order in relation to the family court.

8. Consultation outcome

8.1. As required by section 56(4) of the Access to Justice Act 1999, the Lord Chancellor has consulted with the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division, and the Chancellor of the High Court. The Heads of Division are content with the provisions of the Order.

8.2. The creation of a single family court was recommended by the independently chaired Family Justice Review. The Review Panel's public consultation

found there was overwhelming support for the single Family Court – 309 (75%) out of the 412 respondents agreed a single Family Court should be established, including members of the public and family justice professionals.

8.3. The Government has not carried out a separate public consultation on the changes included in this Order as these are changes arising from the policy approach to create a single family court.

9. Guidance

9.1. This instrument and all the other instruments related to the setting up of the family court will be published on the www.legislation.gov.uk website.

9.2. Training for court staff, the judiciary, magistrates and their legal advisers will be provided in the run up to implementation.

10. Impact

10.1. There is no impact on business, charities or voluntary bodies.

10.2. There is no impact on the public sector.

10.3. An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1. The legislation applies to small firms of solicitors dealing with family proceedings.

11.2. To minimise the impact of the requirement on solicitors firms employing up to 20 people, the approach taken is to provide guidance for court users on the appeals structure of the family court and to carry out work to raise awareness.

12. Monitoring and review

12.1. The implementation of the new family court, including the effect of the changes to appeals, will be reviewed within five years of implementation as stated in the published Impact Assessment.

13. Contact

Wendi Mitchell at the Ministry of Justice Tel: 0203 334 5647 or mailto:wendi.mitchell@justice.gsi.gov.uk who can answer any queries regarding the instrument.