EXPLANATORY MEMORANDUM TO

THE FAMILY PROCEDURE (AMENDMENT No. 2) RULES 2013

2013 No. 1472 (L. 15)

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

2. Purpose of the instrument

2.1 The Statutory Instrument amends the Family Procedure Rules 2011 in relation to the procedure for applying for an order in relation to the costs of legal expenses, which is possible under the provisions of sections 49 to 54 of the Legal Aid, Sentencing and Punishment of Offenders Act 2013. The rules themselves do not make such orders possible (that is done by sections 49 to 54), but clarify the procedure to be used in applying for an order.

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

3.1 None

4. Legislative Context

4.1 Sections 49 to 54 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 make provision for the court in relation to proceedings for divorce, nullity or dissolution of civil partnership to be able to order one party to make a payment or payments to the other in relation to the costs of legal expenses for the proceedings. Those sections make comprehensive provision for the nature of the order and the factors which the court is to take into account in deciding whether to make an order and on what terms, and were commenced on 1 April 2013. The rules accordingly do not provide for the orders, but make provision to clarify aspects of the procedure for applying for such orders, in particular to confirm that such orders are within the meaning of "financial orders" in the Family Procedure Rules, so that the procedure applicable for financial orders generally is applicable.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 The Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into force on 1 April 2013, makes a number of changes to the provision of legal aid. In family cases in particular, changes to scope mean that there is a greater chance that there may be a significant imbalance in the position of the two parties to a case.

7.2 Before the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provisions came into effect on the 1st April 2013 lump sum orders in ancillary relief proceedings could only be made after Decree Nisi. The previous court rules stated that "the general rule in ancillary relief proceedings is that the Court will not make an order requiring one party to pay the costs of the other", except in some circumstances relating to the conduct of a party in the proceedings. There was provision in legislation to allow the Court to make an interim order for the payment of a lump sum but this remained unimplemented.

7.3 Sections 49-54 of the Act therefore make provision for the Court to make an interim lump sum order against a party with the means to fund the cost of representation for the other party. The materially disadvantaged party may apply for an order at any stage of the proceedings, where they can demonstrate that they could not reasonably procure legal advice by any other means (as was previously possible, in the form of periodical payments as part of maintenance pending suit). Any order made will include the payee's undertaking to pay the sum to their legal representative to cover the costs of the proceedings. This will be credited against any ultimate liability that the payer might have to pay or part-pay towards the costs. Although these changes to the courts' powers were not a precondition for the proposed changes in legal aid scope, they were brought into effect at the same time as the scope changes.

- Consolidation

7.4 This Statutory Instrument is one of a number of Family Procedure (Amendment) Rules which amend the Family Procedure Rules 2010. The rules are published in consolidated form via the MoJ's website, and there are no immediate proposals for a legislative consolidation.

8. Consultation outcome

8.1 The consultation 'Proposals for the reform of legal aid in England and Wales' was published on 15 November 2010 and closed on 14 February 2011, and included the proposal for interim lump sum orders. Over 5,000 responses were received from representative bodies, practitioner and other organisations, individual members of the judiciary, members of the House of Commons and Lords, individual solicitors and barristers and members of the public.

8.2 A detailed Government response to the consultation exercise is available at http://webarchive.nationalarchives.gov.uk/20111121205348/http:/www.justice.gov.uk/consultations/legal-aid-reform.htm

9. Guidance

9.1 The purpose of the Rules themselves is to clarify the procedure for applying for an interim lump sum order. Additional guidance is included in amendments made to Practice Directions supporting the rules (which may be found on the MoJ website alongside the rules).

10. Impact

10.1 The impacts of the Government's programme of legal aid reform are set out in an Impact Assessment, which was updated following the Act receiving Royal Assent. This is available at http://www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information.

10.2 This secondary legislation does not impact on business, charities or voluntary bodies.

10.3 The impact on the public sector arising from this instrument is likely to be negligible.

10.4 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Family Procedure Rule Committee will consider the effects of the amendments made to the 2010 Rules in the context of the ongoing consideration of the operation of the 2010 Rules.

13. Contact

PHILIP DEAR at the Ministry of Justice Tel: 020 3334 3125 or email: philip.dear@justice.gsi.gov.ukl can answer any queries regarding the instrument.