

**EXPLANATORY MEMORANDUM TO
THE FAMILY PROCEEDINGS (AMENDMENT) (No.2) RULES 2007**

2007 No. 2187 (L. 17)

AND

**THE FAMILY PROCEEDINGS COURTS (MISCELLANEOUS AMENDMENTS)
RULES 2007**

2007 No. 2188 (L. 18)

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

2. Description

- 2.1 The Family Proceedings (Amendment) (No 2) Rules 2007 amend the Family Proceedings Rules 1991 (“the FPR 1991”), which apply to the High Court and county courts. The Family Proceedings Courts (Miscellaneous Amendments) Rules 2007 make parallel amendments to the Family Proceedings Courts (Children Act 1989) Rules 1991 (“FPC (CA 1989) R 1991”) and the Family Proceedings Courts (Child Support Act 1991) Rules 1993 (“FPC (CSA 1991) R 1993”), which apply to family proceedings courts (magistrates’ courts).
- 2.2 These statutory instruments cover three policy areas. The Family Proceedings (Amendment) (No2) Rules 2007 amend the FPR 1991:
 - (a) to make provision for the implementation of sections 6 and 7 of the Children and Adoption Act 2006 (“the 2006 Act”) which amends the Children Act 1989 (“the 1989 Act”) in respect of family assistance orders and risk assessments;
 - (b) to enable automatic disclosure of information relating to proceedings concerning children which are heard in private or ancillary relief proceedings (county court or the High Court) to a child support appeal tribunal, a McKenzie Friend, a lay adviser or the Secretary of State for purposes relating to an appeal to a child support tribunal. They also enable information to be disclosed without the permission of the court to adoption panels in order to enable adoption panels to discharge their functions;
 - (c) to make consequential amendments arising from the Mental Capacity Act 2005 (“the 2005 Act”) reflecting the new terminology and new institutions of the Act and to amend various references to “minor” in the Family Proceedings Rules to “child” or “children” as appropriate.
- 2.3 The Family Proceedings Courts (Miscellaneous Amendments) Rules 2007 amend the FPC(CA89)R 1991 and the FPC(CSA91)R1993:

(a) to make mirroring provision in respect of the 2006 Act as referred to above;
and

(b) to make mirroring provision in respect of disclosure of information as above:
as regards child support appeals, the provisions will apply in proceedings which
are akin to ancillary relief proceedings in a magistrates' court.

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

3.1 None.

4. Legislative Background

4.1 The Family Proceedings (Amendment) (No 2) Rules 2007 are made by the Family Procedure Rule Committee under the powers conferred by section 40 (1) of the Matrimonial and Family Proceedings Act 1984 with the agreement of the Lord Chancellor under section 40A of that Act.

4.2 The Family Proceedings Courts (Miscellaneous Amendments) Rules 2007 are made, under section 144 of the Magistrates' Courts Act 1980, by the Lord Chief Justice with the concurrence of the Lord Chancellor after consulting the Magistrates' Courts Rule Committee.

4.3 The 2006 Act received Royal Assent on 21 June 2006 and sections 6 and 7 will come into force on 1st October 2007. The 2005 Act received Royal Assent on 7 April 2005 and will commence, for the most part, on 1 October 2007.

5 Extent

5.1 The statutory instruments apply to England and Wales.

6. European Convention on Human Rights

6.1 As the instruments are subject to the negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy Background

Policy aims

Sections 6 and 7 of the Children and Adoption Act 2006

7.1 Section 16 of the 1989 Act makes provision for courts dealing with private family law cases to make family assistance orders. These are orders whereby an officer of the service (being an officer of the Children and Family Court Advisory and

Support Service), a Welsh family proceedings officer or a local authority officer can be required to advise, assist and, where appropriate, befriend the persons named in the order.

- 7.2 Section 6 of the 2006 Act amends section 16 of the 1989 Act to extend the maximum period for which a family assistance order can be made from six to twelve months and to remove the need for the circumstances of the case to be exceptional for a family assistance order to be made. The amendments made by the 2006 Act also provide for the court to direct that the officer involved with the family assistance order should report to the court on such matters in relation to an order under section 8 of the 1989 Act (being a residence order, contact order, specific issue order or prohibited steps orders in relation to a child) as the court may require (including whether the section 8 order should be varied or discharged). These reports are referred to as “family assistance order reports” in the Rules amended by the two statutory instruments.
- 7.3 Section 7 of the 2006 Act inserts new section 16A into the 1989 Act which requires an officer of the service or Welsh family proceedings officer to prepare a risk assessment where in the course carrying out specified duties the officer is given cause to suspect that a child might be at risk of harm.
- 7.4 The amendments made by the two statutory instruments provide for various existing rules relating to such officers to also apply where they are preparing family assistance order reports and risk assessments. The amendments also provide for the additional powers and duties of officers of the service and Welsh family proceedings officers which will apply when they prepare family assistance order reports and risk assessment reports, and for the duties of local authority (social services) officers preparing family assistance order reports.
- 7.5 The amendments also provide for the service of risk assessments and, in particular, for the court to consider whether any information should be deleted from a risk assessment before it is served on a party, or whether service of a risk assessment on a party should be delayed for a time, in order to prevent a risk of harm to a child.
- 7.6 In order to address the situation where a risk assessment may be carried out where there are no ongoing proceedings, for example where a final contact order has been made at the same time as a family assistance order and the proceedings have concluded, the amendments made by the two statutory instruments amend the standard form of the family assistance order (form C42) (prescribed in the FPR 1991 and the FPC(CA89)R 1991) for the officer of the service or Welsh family proceedings officer to apply to revive the proceedings if a risk assessment is prepared.
- 7.7 The amendments to the provisions for family assistance orders arise from recommendations in the Government’s Green Paper *Parental Separation:*

Children's Needs and Parents' responsibilities. They are intended to increase the amount of help that can be given to families under these orders, including increased support for contact orders so that children can have contact with both their parents following divorce or separation.

- 7.8 The provisions for risk assessments provide greater protection for children and ensure that when an officer of the service or Welsh family proceedings officer, in the course of carrying out any duties in respect of child contact, residence or other private family disputes, considers that a child might be at risk of harm, he or she must assess the risk and report to the court. The court will then be able to consider the position and use its existing powers to make orders necessary to protect the child concerned.

Disclosure of information

- 7.9 Rules of court already make provision for when information can be disclosed from proceedings heard in private relating to children without this being in contempt of court. This covers information and all confidential documents relating to the case to be disclosed to the following persons:
- The parties and their legal representatives
 - Professional legal advisers not instructed in proceedings (for example, legal advisers who provide advice for the CAB or other such agencies)
 - Cafcass and Cafcass Cymru or any s7 court reporter
 - A local authority welfare officer
 - Legal Services Commission
 - An expert whose instruction has been authorised by the court
 - A professional acting in furtherance of the protection of children
- 7.10 Certain other people are listed in the Rules as being able to receive certain documents at certain times during proceedings from specified people and for a specified purpose. Where a recipient of documents wishes to use them for any other purpose, or where people involved in a case wish to share documents with anybody not listed in the Rules, they have to apply to the court to do so.
- 7.11 The amendments to the rules relating to disclosure of information are prompted by concerns that people are attempting to disclose information relating to proceedings concerning children or family proceedings of a financial nature to Child Support Appeal Tribunals without permission of the court dealing with the family matter. Unless prior permission of the family court has been given to disclose this information, the Child Support Appeal Tribunal is having to adjourn the appeal proceedings in order for the people involved to seek the permission of the family court to disclose the relevant information. This is leading to considerable delay and dissatisfaction with the child support system.
- 7.12 The amended rules make provision for automatic disclosure of information relating to proceedings concerning children which are heard in private and

ancillary relief proceedings in a county court or the High Court or financial proceedings akin to ancillary relief proceedings in a magistrates' court. Ancillary relief proceedings are those proceedings concerning financial matters arising upon dissolution of a marriage or a civil partnership. The amendments provide that information relating to these proceedings may be given to the Secretary of State, a McKenzie Friend, a lay adviser or to an appeal tribunal as long as it is for the purposes of an appeal heard by a Child Support Appeal Tribunal. The effects of this amendment are that child support appeals will be processed with minimal delay and people who are disclosing such information will no longer run the risk of being held in contempt of court for doing so.

- 7.13 The British Association for Adoption and Fostering are concerned there is a lack of clarity about the type of information relating to proceedings concerning children that are heard in private that can be disclosed to adoption panels and when it can be disclosed. The proposed amendment would mean that court reports, health reports, CAFCASS reports and judgments could be disclosed by parties to adoption panels without leave of the court, which could also reduce delays. Adoption panels would be able to make fully informed recommendations to the adoption agency about whether a child should be placed for adoption and in considering a match with potential adoptive parents.

Consequential amendments arising from the Mental Capacity Act 2005

- 7.14 The amendments in relation to the 2005 Act are necessary to ensure that the procedures set out in the FPR are consistent with the concepts and terminology of the 2005 Act. In particular, the amendments ensure that the FPR reflect the new concepts created by the 2005 Act such as deputies and lasting powers of attorney, as well as ensuring that the new test for capacity (being a decision- and time-specific test) is reflected.

Consultation

Sections 6 and 7 of the Children and Adoption Act 2006

- 7.15 The Government conducted an extensive consultation on the Green Paper: Children's Needs and Parental Responsibilities in 2004 and published a draft of the Children and Adoption Bill in February 2005. The draft Bill was subject to pre-legislative scrutiny and comments were received from a wide range of stakeholders and also members of the public. No formal consultation has been carried out on the draft Statutory instruments as they are implementing a relatively small proportion of the provisions of the 2006 Act. The rules have been discussed with DfES, CAFCASS and CAFCASS Cymru colleagues and have been considered by the Family Procedure Rule Committee and the Magistrates' Courts Rule Committee.

Disclosure of information

- 7.16 The proposals to widen disclosure are widely seen to be necessary. In respect of the Child Support Appeals, His Honour Judge Harris, Chair of the Child Support Appeal Tribunal made the recommendation to the Family Procedure Rule Committee in November 2006. The Department for Work and Pensions has been consulted, as well as the Magistrates' Courts Rule Committee and the Family Procedure Rule Committee, who are content with the proposed changes.
- 7.17 In respect of disclosure to Adoption panels, the British Association for Adoption and Fostering initially raised concerns about the lack of clarity of the current rules. The Family Procedure Rule Committee agreed to make the proposal in February. The DfES and the Welsh Assembly have been consulted and are content with the amendments.

Consequential amendments arising from the Mental Capacity Act 2005

- 7.18 The Ministry conducted an extensive consultation process before the passing of the 2005 Act, including publishing a draft Mental Incapacity Bill in 2003 for public comment and pre-legislative scrutiny by a Joint Committee of both Houses. For the 2005 Act related amendments to the FPR 1991, no formal consultation was undertaken, as the amendments are relatively minor, and reflect the new terminology and institutions of the 2005 Act. However, a group was formed comprising members of the judiciary and legal profession with experience of the operation of the current Court of Protection and the High Court, under the auspices of the President Designate of the new Court of Protection, for the purpose of providing assistance in the preparation of rules of court for the Court of Protection. The proposed amendments to the FPR 1991 were provided to that group for comment, and their feedback was incorporated into the amendments.

Consolidation

- 7.19 These statutory instruments amend existing Rules. Work is currently ongoing to produce a new, single set of Family Procedure Rules which will apply to all levels of family courts. This is a large-scale project. It has proved necessary, not least in light of the coming into force on 1st October 2007 of parts of the 2005 Act and the 2006 Act to make amendments to existing Rules in the meantime.

8 Impact

- 8.1 A Regulatory Impact Assessment was prepared for the provisions of the 2006 Act. The impact on public expenditure of the provisions of the Act in respect of family assistance orders and risk assessments have been considered, as these will involve some additional work for CAFCASS and CAFCASS Cymru. It has been agreed that appropriate resources will be made available to CAFCASS and

CAFCASS Cymru as appropriate to enable them to carry out their functions in relation to these provisions.

- 8.2 A full Regulatory Impact Assessment was produced for the passage of the 2005 Act, considering the benefits, costs and risks of setting up a statutory framework.

9 Contact

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