

# **CHILDREN AND ADOPTION ACT 2006**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS AND SCHEDULES**

#### **Part 1 - Orders with respect to children in family proceedings**

##### ***Section 1 - Contact activity directions and conditions***

17. **Section 1** inserts new sections 11A to 11G after section 11 of the 1989 Act. Inserted section 11A of the 1989 Act makes provision for courts to make orders for 'contact activity directions' where a court is considering whether to make a contact order (or to vary or discharge a contact order).
18. This allows the court to direct a party to the case, at any stage in proceedings prior to a final order being made as to contact, to undertake activities promoting contact (or 'contact activities'). The type of activities covered by this heading may include, in particular, those referred to in section 11A(5) of the 1989 Act, such as programmes, classes and counselling or guidance sessions which may assist with establishing, maintaining or improving contact with a child. Other possible activities are programmes designed to address a person's violent behaviour in order to facilitate contact and information sessions about arrangements for contact, including information sessions about mediation. Section 11A(6) prevents a contact activity direction being used to require mediation or medical or psychiatric treatment.
19. Section 11B of the 1989 Act provides that a contact activity direction may only be made where there is some dispute about the provision about contact that the court is considering whether to make, i.e. whether to make a contact order, or what its detailed provisions for contact should be. It also provides that the court cannot order a child to take part in an activity, unless that child is the parent of the child concerned. The court cannot order an individual to take part in an activity unless that individual is habitually resident in England and Wales. If an individual who is subject to a contact activity direction ceases to be habitually resident in England and Wales, the contact activity direction will cease to have effect.
20. Section 11B also provides that contact activity directions cannot be used in proceedings where an 'excepted order' is being considered. This means that a contact activity direction may not be made in cases where an adoption order is being considered at the same time as a contact order, or in cases where, post-adoption, a court is considering making, varying or discharging a contact order in relation to someone who, but for the adoption, would have been a relative of the child. These exceptions for adoption cases will not apply where the adoption is, or was, by a partner of one of the child's parents or by a couple, one member of which is a parent of the child.
21. Section 11C of the 1989 Act enables a court to make a 'contact activity condition' when making or varying a contact order under section 8 of the 1989 Act. The condition will require a person to take part in a contact activity. Section 11C(5) provides that the activities that may be required by a contact activity condition are the same as those that may be required by a contact activity direction. The following may be subject to a contact activity condition:

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(c.20) which received Royal Assent on 21 June 2006*

- the person with whom the child concerned lives or is to live;
  - the person whose contact with the child is provided for by the contact order;
  - a person upon whom the contact order imposes a condition under section 11(7)(b) of the 1989 Act.
22. Section 11D of the 1989 Act provides that a contact order which is an 'excepted order' (see section 11B) may not impose a contact activity condition. As with contact activity directions, the court cannot require a child to undertake a contact activity condition (unless the child is a parent of the child concerned), nor can a person who is not habitually resident in England and Wales be subject to a contact activity condition.
23. Section 11E of the 1989 Act sets out what steps the court must take before it makes a contact activity direction or condition. It makes clear that a court can only make such directions or conditions if it is satisfied that:
- the activity is appropriate in the circumstances of the case,
  - the provider of the activity concerned is suitable to provide it, and
  - the activity is available in a place to which it is reasonable to expect the person in question to travel.
24. A court is also required to consider the likely effect of the contact activity on the person who would be required to undertake it, taking into account in particular any conflict with the person's religious beliefs and the times when he or she works or attends an educational establishment. The section provides that a court may ask a CAFCASS officer<sup>1</sup> to provide information on the matters specified in section 11E.
25. Section 11F of the 1989 Act enables the Secretary of State, or the National Assembly for Wales, as appropriate, to make provision by regulations authorising the Secretary of State or the National Assembly for Wales (depending on the ordinary residence of the child) to make payments to assist some of those required to undertake contact activities in paying the charges or fees of those providing the activities. Regulations may provide that the activity provider must have been approved by the Secretary of State (or the National Assembly for Wales) in order for financial assistance to be provided in respect of their activities.
26. Regulations may set a maximum amount of financial assistance that will be paid for a contact activity, may set a sliding scale to determine how much assistance individuals get depending on their financial circumstances, and may provide for payments to be made direct to activity providers rather than to individuals.
27. Section 11G of the 1989 Act provides that a court may ask a CAFCASS officer to monitor compliance with contact activity directions or conditions and to report to the court if there is a failure to comply.

## ***Section 2 - Monitoring contact***

28. In addition to the power to ask a CAFCASS officer to monitor compliance with contact activity directions and contact activity conditions under new section 11G, section 11H of the 1989 Act, inserted by section 2, provides that a court may ask a CAFCASS officer to monitor compliance with a contact order, and to report to the court on such matters relating to compliance as the court may specify. The court may ask the CAFCASS officer to carry out this role for a period of up to a year. The court may not request monitoring of an order which is an 'excepted order'. Those who can be subject to monitoring are:

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<sup>1</sup> References in these Notes to CAFCASS officers should be read as referring equally to Welsh family proceedings officers in relation to Wales.

- a person who is required to allow contact with the child;
- a person whose contact with the child is provided for;
- a person who is subject to a condition under section 11(7)(b) of the 1989 Act.

### ***Section 3 - Contact orders: warning notices***

29. **Section 3** inserts new section 11I into the 1989 Act, which provides that whenever a court makes or varies a contact order, it must attach a notice warning of the consequences of failing to comply with a contact order. (The consequences of failure to comply may be an enforcement order, an order for financial compensation, or the use of the courts' existing sanctions for contempt.)

### ***Section 4 - Enforcement orders***

30. **Section 4** inserts provision in the 1989 Act for a court to make an 'enforcement order' (sections 11J to 11N of the 1989 Act). An enforcement order imposes an unpaid work requirement on a person who has breached a contact order. Before making an enforcement order, the court must be satisfied beyond reasonable doubt that the person was in breach of the contact order. A breach of a contact activity condition, or of a condition attached to a contact order under section 11(7) of the 1989 Act, constitutes a breach of a contact order. The court may not make an enforcement order if it is satisfied that the person in breach of the contact order had a reasonable excuse for breaching the order. The burden of proving that there was a reasonable excuse for breach falls upon the person who claims to have had a reasonable excuse, and the standard of proof is the balance of probabilities.
31. Enforcement orders may only be made in response to an application by the following:
- the person who is, for the purposes of the contact order, the person with whom the child concerned lives or is to live;
  - the person whose contact with the child concerned is provided for in the contact order;
  - any individual subject to a section 11(7)(b) condition or a contact activity condition imposed by the contact order;
  - the child concerned (with the leave of the court).
32. Section 11K of the 1989 Act provides that a court may not make an enforcement order against a person unless the person has received a copy of a notice under section 11I of the 1989 Act, or has been otherwise informed of its terms. It also provides that an enforcement order cannot be made against anyone who was aged under 18 at the time of the breach in question, or in relation to a breach of an 'excepted order'.
33. Section 11L of the 1989 Act provides that in deciding whether to make an enforcement order, the court must be satisfied that the making of the order is necessary to secure compliance with the contact order in question and that the order is proportionate to the seriousness of the breach.
34. That section also requires the court, before making an enforcement order, to obtain and consider information about the person on whom the order would be imposed, and the likely effect of the order on him including, in particular, any conflict with his religious beliefs, or times at which he is at work or attending an educational establishment. The court must be satisfied that the enforcement measure is available within the local justice area in which the person subject to the enforcement order resides. The court may ask a CAFCASS officer to provide the information required under this section. When considering making an enforcement order, the court must take into account the welfare of the child concerned.

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35. Section 11M of the 1989 Act provides that the court may ask a CAFCASS officer to monitor, or arrange for the monitoring of, a person's compliance with an enforcement order, and to report to the court on failure to comply and on any unsuitability to undertake the unpaid work.
36. Section 11N of the 1989 Act provides that where an enforcement order is made, the court must attach a notice warning of the consequences of breaching that order. The possible consequences are the imposing of a further enforcement order, or the enhancing of the existing enforcement order under paragraph 9 of Schedule A1 to the 1989 Act as inserted by Schedule 1, or the use of existing sanctions for contempt.
37. [Section 4](#) also introduces Schedule 1 which inserts Schedule A1 to the 1989 Act.

***Schedule 1 - Enforcement orders***

38. Schedule A1 to the 1989 Act, inserted by Schedule 1 to the Act, makes further provision about enforcement orders.
39. [Paragraphs 2 and 3](#) of Schedule A1 to the 1989 Act modify Chapter 4 of Part 12 of the Criminal Justice Act 2003 ('the 2003 Act') so as to make further provision about enforcement orders under section 11J of the 1989 Act. As well as a number of detailed technical changes to ensure the operation of those provisions, it specifies that the maximum number of hours of unpaid work that may be required is 200, rather than 300, which is the maximum that may be required by a criminal court.
40. [Part 2](#) of Schedule A1 to the 1989 Act gives powers to the court to amend or revoke an enforcement order.
41. [Paragraph 9](#) of Schedule A1 provides that, if the terms of an enforcement order are breached, the court may (in circumstances specified in paragraph 9) amend the original order to make it more onerous, or impose another enforcement order.

***Section 5 - Compensation for financial loss***

42. Sections 11O and 11P of the 1989 Act, inserted by section 5, allow the court to require a person who has caused financial loss to another person as a result of breaching a contact order (which would include breaching a condition attached to a contact order), to pay compensation up to the amount of the loss. The court must take into account the welfare of any child concerned, and the financial circumstances of the person in breach, when making such an order.
43. Applications for an order under section 11O may be made only by a person falling within one of the following categories:
  - a person who is, for the purposes of the contact order, the person with whom the child concerned lives or is to live;
  - the person whose contact with the child concerned is provided for in the contact order;
  - an individual subject to a condition under section 11(7)(b) or a contact activity condition imposed by the contact order;
  - the child concerned (with the leave of the court).
44. Section 11P of the 1989 Act makes provision for when a court may not make an order for financial compensation. This includes cases where the person in breach did not receive a notice under section 11I and was not otherwise informed of its terms or where the contact order is an excepted order.

### ***Section 6 - Provision as to family assistance orders***

45. **Section 6** amends section 16 of the 1989 Act so as to enable family assistance orders (FAOs) to be used more often and for a longer duration. The requirement that FAOs be made only in exceptional circumstances is removed, and the maximum duration of such orders is extended from six to twelve months.
46. The amendments also provide that where an FAO is to be in force at the same time as a contact order with respect to a particular child, the FAO may direct the CAF/CASS or local authority officer carrying it out to give advice and assistance about improving and maintaining contact.
47. Finally, the amendment made to section 16(6) of the 1989 Act by *subsection (5)* provides that FAOs may direct the CAF/CASS or local authority officer concerned to report to the court on matters regarding any section 8 order<sup>2</sup> which is in force at the same time, including whether the order ought to be varied or discharged.

### ***Section 7 - Risk Assessments***

48. **Section 7** adds a new section 16A to the 1989 Act, which requires CAF/CASS officers to carry out a risk assessment and provide it to the court if, in the course of carrying out any function in private law family proceedings under the 1989 Act, the officer is given cause to suspect that the child concerned is at risk of harm. Private family law proceedings include applications for residence and contact orders and applications for enforcement of contact orders. The duty applies whenever an officer is involved in any function connected with such proceedings including, for instance, preparing a report for the court under section 7 of the 1989 Act, monitoring of contact orders as provided for by new section 11H of the 1989 Act or working on alternative dispute resolution. It also applies where an officer is carrying out functions under a family assistance order.

### ***Section 8 - Transitional provision***

49. **Section 8** makes transitional provision as regards contact orders made before the commencement of sections 4 and 5. The section provides for two ways in which warning notices can be attached to such contact orders. Either a specific application can be made for a warning notice to be attached to the contact order, or the court must attach a warning notice to the contact order if the contact order is in issue in any family proceedings. Attaching a warning notice makes it possible to apply for an enforcement order or an order for financial compensation against the person given the notice.

## **Part 2 - Adoptions With A Foreign Element**

### ***Section 9 - Declaration of special restrictions on adoptions from abroad***

50. **Section 9** makes provision regarding the restriction of intercountry adoptions from countries where the Secretary of State has determined that it would be contrary to public policy to further the bringing of children into the United Kingdom by British residents in the cases specified in *subsection (2)*. The provisions apply equally to adoptions from countries that are signatories to the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, concluded at The Hague on 29<sup>th</sup> May 1993, and those that are not.
51. *Subsection (2)* provides that the cases to which the section applies are, under paragraph (a), where a British resident wishes to bring or cause another person to bring a child who is not a British resident into the United Kingdom for the purposes of adoption by the British resident and there have been, or would have to be, some proceedings in the country that has given rise to the concern or dealings with authorities or agencies there; and, under paragraph (b), where a British resident wishes to bring or to cause another

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<sup>2</sup> A section 8 order is an order under section 8 of the 1989 Act. A contact order is a section 8 order.

to bring a child into the United Kingdom having adopted the child abroad within 12 months of the date on which he brings the child in. The term British resident is defined in *subsection (10)*.

52. These cases mirror the cases to which section 83 of the Adoption and Children Act 2002 (restriction on bringing children in) applies, subject to the amendment of that section by section 14 of this Act.
53. *Subsections (4) and (5)* provide that the suspension is achieved through a declaration made by order by the Secretary of State, following consultation with the National Assembly for Wales and the Department of Health, Social Services and Public Safety in Northern Ireland, that 'special restrictions' are to apply in relation to bringing children into the United Kingdom in the cases specified in subsection (2). The Secretary of State must publish his reasons for making the declaration in relation to each restricted country (*subsection (7)*) and must publish a list of restricted countries, the 'restricted list', which he must keep up to date (*subsection (8)*). *Subsection (9)* requires publication of both the restricted list and the reasons in whatever way the Secretary of State thinks appropriate for bringing them to the attention of adoption agencies and members of the public.

### **Section 10 - Review**

54. **Section 10** requires the Secretary of State to keep the restricted list under review. If the Secretary of State no longer has reason to believe that it would be contrary to public policy to further the bringing of children into the United Kingdom from a restricted country, he is required to revoke the order containing the declaration made in relation to that country. Before doing so, he must consult the National Assembly for Wales and the Department of Health, Social Services and Public Safety in Northern Ireland.

### **Section 11 - The special restrictions**

55. **Section 11** makes provision for the special restrictions that may be applied by virtue of section 9. It provides that the appropriate authority is not to take any step which he or it may otherwise have taken to further the intercountry adoption.
56. The term 'appropriate authority' is defined in *subsection (4)*. Who the appropriate authority is in a particular case will depend on whether or not the case is a Convention case; that is, one conducted under procedures established under the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, concluded at The Hague on 29<sup>th</sup> May 1993. If it is a Convention case then the appropriate authority will be the Central Authority: that is, in relation to England, the Secretary of State; in relation to Wales, the National Assembly for Wales; and in Northern Ireland, the Department of Health, Social Services and Public Safety. If it is not a Convention case, then the appropriate authority in England and Wales is the Secretary of State, and in Northern Ireland is the Secretary of State and the Department of Health, Social Services and Public Safety, for the purposes of the steps in the process which each takes.
57. The effect of the restrictions is that the Secretary of State, the National Assembly for Wales or the Department of Health, Social Services and Public Safety would no longer process intercountry adoption cases from the restricted country. The steps referred to would include, for example, the issuing of a certificate of eligibility to adopt and the forwarding of matching reports from the child's country of origin to the prospective adopters by those acting on behalf of the Secretary of State.
58. *Subsection (2)* also provides, however, for adoptions to be permitted to continue in exceptional cases - that is, cases where the prospective adopters are able to satisfy the appropriate authority (or, in the case of non-Convention cases in Northern Ireland, the Secretary of State) that the adoption should proceed. *Subsection (3)* allows regulations to provide for the procedure to be followed by the appropriate authority (or, in the case of non-Convention cases in Northern Ireland, the Secretary of State) in the consideration of exceptional cases and a non-exhaustive list of matters that must be taken into account.

***Section 12 - Imposition of extra conditions in certain cases***

59. When special restrictions are declared in relation to a country, regulations under section 12 will allow the Secretary of State to specify in the restricted list a step in relation to that country. The step is likely to be the latest point at which the appropriate authority is involved in the processing of intercountry adoption applications. The step might be, for example, forwarding a matching report from the foreign authority to the prospective adopter.
60. Where a step has been specified in relation to a country, the regulations may also provide one or more conditions that must be met in relation to adoptions from that country. These conditions would be in addition to any conditions already set out in existing legislation on restrictions on bringing children into the UK for adoption. A condition could be, for example, that the adopters have received written notification from the Secretary of State that their adoption can proceed.
61. If a child is brought into the UK without any such condition or conditions having been met, the person who brings the child into the UK (or causes another person to bring the child in) is guilty of an offence. In that case, they are liable to a prison term of up to twelve months in England and Wales, six months in Northern Ireland, and/or a fine.
62. If the step specified in the regulations has already been taken before the country was added to the restricted list, no offence would be committed.
63. *Subsection (6)* lowers the maximum prison sentence that can be imposed in England and Wales to six months for the period until the coming into force of section 154(1) of the Criminal Justice Act 2003, which will raise the maximum prison term that can be imposed by magistrates' courts to 12 months.

***Section 13 - Power to charge***

64. **Section 13** inserts new section 91A into the Adoption and Children Act 2002. Section 91A(2) provides the Secretary of State with the power to charge a fee to adopters or prospective adopters for services provided or to be provided by the Secretary of State in relation to intercountry adoptions. Section 91A(3) gives the National Assembly for Wales the power to charge a fee for the services provided or to be provided by it as the Central Authority in Convention cases.
65. The Secretary of State and the Assembly may determine how much to charge, and may in particular charge a single flat fee or set different fees for different cases, providing the fee income received, taking one financial year with another, is not greater than the cost of providing the services. The section also provides the Secretary of State and the Assembly with discretion to waive the fee in any given case.

***Section 14 - Other amendments relating to adoptions from abroad***

66. **Section 14** makes further provision regarding intercountry adoption. *Subsection (1)* amends section 83 of the Adoption and Children Act 2002. Section 83, among other things, makes it an offence for a British resident to bring or cause someone else to bring into the United Kingdom a child who was habitually resident outside the British Islands who has been adopted within the period of six months before he was brought in, unless the adopter meets certain requirements and conditions. These conditions include that the adopter has been assessed and approved in accordance with regulations. This section extends that time limit to twelve months.
67. *Subsection (2)* provides that the amendment mentioned above will only apply in relation to a child adopted under an external adoption order made after the change from six to twelve months is brought into force. Before commencing this amendment, the Government will look to give a sufficient period of notice.

68. Where a notice of intention to adopt a child (who has been brought into the country for the purposes of intercountry adoption) has been provided to a local authority the authority will have certain functions to discharge in respect of him, under regulations made under section 83 of the Adoption and Children Act 2002. Following the repeal of the 'protected child' provisions in the Adoption Act 1976, such a child may also be considered to be a privately fostered child as defined in section 66 of the 1989 Act. If he is then the local authority would have duties in respect of the child under regulations made under section 67 of the 1989 Act. The functions imposed on the local authority under these regulations are separate from, but additional and similar to, those imposed under the regulations made under section 83 of the Adoption and Children Act 2002. The effect of the provision in section 14(3) is to exclude a child in respect of whom a notice of intention to adopt has been served from the definition of a privately fostered child, so preventing the local authority being subject to two different sets of duties in respect of the same child.

### **Part 3 - Miscellaneous and Final**

69. This Part makes general provisions. Section 15 introduces Schedule 2, which deals with minor and consequential amendments, and Schedule 3, which deals with repeals. Section 16 provides for regulations and orders under the Act to be subject to the negative resolution procedure.