

**EXPLANATORY MEMORANDUM TO**  
**THE BLOOD TESTS (EVIDENCE OF PATERNITY) (AMENDMENT)**  
**REGULATIONS 2015**

**2015 No. 1834**

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 This instrument amends existing Regulations which set out procedures to be followed where a court has ordered DNA tests to establish a person's parentage. The amendments allow for additional types of people to take, or supervise the taking of, mouth swab samples for the purposes of such DNA tests. This instrument also amends the procedures for taking such samples.

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

3.1 None.

4. **Legislative Context**

4.1 If a parentage dispute arises in any civil court proceedings, the court has the power to order tests to be undertaken to establish if a party to the case is or is not the father or mother of the person in question (section 20 of the Family Law Reform Act 1969 – “the 1969 Act”). The detail of how these tests are to be carried out is set out in the Blood Tests (Evidence of Paternity) Regulations 1971 (“the 1971 Regulations”). The 1971 Regulations set out who may be a “sampler” (the person who takes the sample to be tested), and what a sampler must do, as well as who may be a “tester” (the person who carries out the testing of the sample) and what a tester must do. This instrument amends the 1971 Regulations.

4.2 This instrument is made under powers in section 22 of the 1969 Act. Section 22(1) of the 1969 Act lists examples of ways in which the regulation making power may be exercised. The Ministry of Justice notes that section 22(1)(a) envisages samples being taken for the purposes of establishing a person's parentage by medically qualified people.

4.3 This instrument makes amendments to the 1971 Regulations which will mean that specified trained but non-medically qualified people can take mouth swab samples, or supervise the giving of such samples. The Ministry of Justice considers this an appropriate use of the regulation making power, since the list in section 22(1) of the Act is in permissive terms, and is non-exhaustive. In addition,

as is explained below, modern-day DNA testing methods are non-invasive and so no longer require the involvement of medically qualified people.

## **5. Territorial Extent and Application**

5.1 This instrument extends to England and Wales.

## **6. European Convention on Human Rights**

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

## **7. Policy background**

7.1 The senior judiciary have expressed significant concerns that the lack of funding for DNA, drug and alcohol testing in private family law disputes relating to children was causing delay and potentially putting the child involved at risk. In response, the Ministry of Justice funded a pilot scheme, led by the Children and Family Court Advisory and Support Service (“Cafcass”), which provided funding for these tests.

7.2 The pilot demonstrated that DNA testing provides the judiciary with the conclusive evidence on parentage necessary to make a definitive order. It has now been decided to roll-out a scheme across England and Wales under which Cafcass will fund DNA testing where this is ordered by the court of its own initiative in a case under section 8 of the Children Act 1989 (for example where there is an application for a child arrangements order). For cases falling within this scheme, Cafcass will be contracting with one “tester” (as defined in the 1971 Regulations).

7.3 In order to make the scheme as cost-effective as possible, and in order to reflect modern advances in DNA testing methods, this instrument amends the definition of “sampler” in the 1971 Regulations. The term will include officers of both Cafcass and CAFCASS Cymru, where the tests are ordered by the court under its own initiative (under section 20 of the 1969 Act) in a section 8 Children Act 1989 case.

7.4 The term “sampler” will also include people who are appointed by a tester as samplers. People appointed by a tester as samplers will be able to be samplers in any case under section 20 of the 1969 Act.

7.5 The amendments to the 1971 Regulations state that all of these new types of samplers will only be able to be involved in sampling when they have been trained by a “tester” (as defined in the 1971 Regulations), or under arrangements made by a tester, and when the sampling is by way of a mouth swab.

7.6 These amendments are made so that it is no longer necessary for medically qualified people to take mouth swab samples, but also to provide safeguards to ensure that the sampling process is properly undertaken.

7.7 The amendments made by this instrument also mean that officers of both Cafcass and CAFCASS Cymru will be able to supervise the giving of a mouth swab sample by the subject of the test (rather than the officer taking the sample). A person appointed by a tester to be a sampler will be able to take a mouth swab sample from a subject, or supervise the subject giving that sample. These changes, again, reflect the fact that sampling by way of a mouth swab does not have to be undertaken or supervised by a medically qualified person.

### **Consolidation**

7.8 The Ministry of Justice appreciates that 1971 Regulations have been amended on numerous occasions and that consolidation would be desirable. It is intended to undertake a consolidation exercise as soon as resources and priorities allow. It was considered appropriate to make the amendments set out in this instrument in the meantime as these amendments are necessary to support the new Cafcass scheme for funding court ordered testing, for which there is widespread support.

## **8. Consultation**

8.1 The Ministry of Justice were aware that currently accredited “testers” (that is, laboratory providers of DNA testing who are accredited to undertake tests ordered under section 20 of the Family Law Reform Act 1969) would have considerable interest in any changes to the 1971 Regulations. For that reason, the Ministry of Justice consulted them, and other laboratories that had expressed an interest in becoming accredited, on the potential changes to the 1971 Regulations. Their views were sought on whether any changes could undermine the current procedural protections provided by the 1971 Regulations and whether any additional safeguards would be needed to maintain and protect the credibility of the sampling process. The consultation document and the Ministry of Justice response to the consultation can be found at <https://consult.justice.gov.uk/digital-communications/dna-testing-in-private-family-law-children-cases/>. Hard copies of these documents can be obtained from Francis Cairns (see 13.1 below).

8.2 The testing laboratories were unanimously in favour of widening the scope of the 1971 Regulations to allow suitably trained Cafcass officers or people appointed by testers to be samplers. A number of testing laboratories expressed concerns over proposals that Cafcass officers should supervise samples being given, rather than take the samples, with concerns specifically around poor sampling resulting in expensive repeat testing (and the delays caused by this) and deliberate adulteration of the sample.

8.3 To mitigate these concerns, in cases where Cafcass officers or CAFCASS Cymru officers are to be samplers, Cafcass plans to ensure that their contracted testing laboratory provides the nominated officers (all of whom will be in enhanced or management positions) with full theoretical and practical training including performance monitoring and annual refresher training. They intend also to respond to any patterns of poor sampling, to use straightforward sampling kits in controlled environments, and to take account of feedback from service users, sample supervisors, courts and the laboratory. There will also be the option of a person appointed by a tester being a sampler in potentially difficult cases such as highly litigious cases, cases with very small or timid children and cases where the Cafcass officer has any doubt about the validity of the sample taken.

## **9. Guidance**

9.1 Cafcass has a detailed communications and training strategy to ensure that that all agencies involved in the DNA testing programme are aware of and understand the service they are providing. A timetable of briefings is in place as part of the communications strategy with the primary audience being the Judiciary, Principal Legal Advisers working in the courts, Cafcass staff and HM Courts and Tribunal Service (HMCTS) staff.

9.2 Training for Cafcass officers and officers of CAFCASS Cymru who are to be “samplers” will be provided by the tester with whom Cafcass will contract to undertake the tests Cafcass is funding. Training methods will include initial face to face group sessions, online materials, refresher sessions and telephone support.

9.3 The annual accreditation letter sent by HMCTS to testing laboratories as part of the ongoing accreditation process will now include a specific reference to the need for the laboratories to provide training and guidance for non-medically trained staff in taking mouth swabs.

## **10. Impact**

10.1 An Impact Assessment has not been prepared for this instrument as this is a public sector regulation whose costs are not expected to be above £5 million per annum. Cafcass have estimated that they can carry out DNA testing in family court cases for circa £75 per test, compared to a government contract price per test of between £275 and £400 under the current regulations. Based on the numbers in the pilot scheme Cafcass estimate the costs of DNA roll-out in England and Wales to be around £43K per annum. Making savings through innovation will produce more sustainable savings packages without degrading the vital front-line service Cafcass provides to children and the family courts.

10.2 The amendments made by this instrument will support the new Cafcass scheme for funding court ordered DNA testing in certain cases when this scientific evidence is necessary to resolve a case that has reached stalemate (for example where parentage cannot be agreed between the parties). This is a service provision

that will specifically address a relatively recently identified problem in private family law cases where a court orders a DNA test in order to resolve a case. A pilot identified the need to provide this new service managed by Cafcass. The evaluation of the pilot also suggested qualitatively that the availability of tests may lead to less delay in proceedings and cases may be less likely to return to court. Cafcass funding these tests will ensure they are more readily available than currently, where the costs would otherwise have to be met by a party to the court case.

10.3 Cafcass estimate they will fund the costs of tests in around 0.68% of family court applications. These will be cases which would otherwise not benefit from the new testing arrangements. It will have a positive impact on the judiciary enabling them to be more confident in their decision making, while improving the engagement of the parties in the case with the resulting court orders. It will also have a positive impact on HMCTS by reducing the delays and risks identified at 7.1 above.

10.4 The amendments made by this instrument will have a positive impact on laboratories providing existing DNA testing arrangements outside these specific circumstances. Such testers will be able to use trained people appointed by them to take mouth swab samples, or supervise such sampling, so reducing the costs currently associated with using medically qualified staff as samplers.

## **11. Regulating small business**

11.1 The legislation does not apply to small business except as set out at 8.1 above.

## **12. Monitoring & review**

12.1 Cafcass will undertake monthly monitoring of the contract for court ordered DNA testing in section 8 Children Act 1989 cases, with a review towards the end of the first year, to evaluate effectiveness and recommendations for the way forward in relation to their scheme for the funding of DNA tests. This will include reviewing the role of officers of both Cafcass and CAF/CASS Cymru as “samplers”.

12.2 Other changes to the 1971 Regulations, such as the use of tester appointed samplers, will be monitored through Cafcass as in 12.1. In addition testers will be able to raise any concerns they have (whether on Cafcass funded cases or not) with the MoJ.

12.3 The testing laboratory must ensure that all staff performing DNA sampling have received appropriate training and have demonstrated their competence through formal assessment. Detail of the training received, the assessment of competence and subsequent authorisation shall be documented. Samplers from

accredited laboratories must comply with ISO/IEC 17025. The two main sections in ISO/IEC 17025 are Management Requirements and Technical Requirements. Management requirements are primarily related to the operation and effectiveness of the quality management system. Technical requirements includes factors which determines the correctness and reliability of the tests.

12.4 If Cafcass or a laboratory appointed person have not taken the samples him or herself or supervised sampling the tester shall evaluate the sampling service that has been used to ensure it is line with ISO/IEC 17025 requirements. This evaluation should include an assessment with respect to the procedures used and the training and competence of the staff involved.

## **Contact**

13.1 Francis Cairns at the Ministry of Justice Tel: 020 3334 3141 or email: [francis.cairns@justice.gsi.gov.uk](mailto:francis.cairns@justice.gsi.gov.uk) can answer any queries regarding this instrument.