

**EXPLANATORY MEMORANDUM TO
THE FAMILY PROCEEDINGS (AMENDMENT) (No.2) RULES 2008**

2008 No. 2861 L.25

**THE FAMILY PROCEEDINGS COURTS (CHILDREN ACT 1989) (AMENDMENT)
RULES 2008**

2008 No. 2858 L.23

**THE MAGISTRATES' COURTS (ENFORCEMENT OF CHILDREN ACT 1989
CONTACT ORDERS) RULES 2008**

2008 No. 2859 L.24

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 instruments**
 - 2.1. The Family Proceedings (Amendment) (No.2) Rules 2008 (“the FP(A)(No.2)R 2008”) amend the Family Proceedings Rules 1991 (“the FPR 1991”), which apply to the High Court and county courts.
 - 2.2. The Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2008 (“the FPC(CA)(A)R 2008”) amend the Family Proceedings Courts (Children Act 1989) Rules 1991 (“the FPC(CA)R 1991) which apply to the Family Proceedings Courts.
 - 2.3. The Magistrates’ Courts (Enforcement of Children Act 1989 Contact Orders) Rules 2008 (“the MC(E)R 2008”) apply the FPC(CA)R 1991, with modifications, to specified cases.
 - 2.4. These statutory instruments cover the following areas:
 - 2.5. The FP(A)(No.2)R 2008 amend the FPR 1991 to:
 - make provision for the practice and procedure to be followed in the High Court and in county courts in respect of proceedings relating to the implementation of sections 1 to 5 and 8 of the Children and Adoption Act 2006 (“the C&A Act 2006”); and
 - Introduce a new form C100 for applications in the High Court or county courts for orders under section 8 of the Children Act 1989 (“the CA 1989”) and make associated consequential amendments.
 - 2.6. The FPC(CA)(A)R 2008 make amendments to the FPC(CA)R 1991 to:
 - make provision for the practice and procedure to be followed in the Family Proceedings Courts in respect of proceedings relating to the implementation of sections 1 to 3 of the C&A Act 2006; and
 - Introduce a new form C100 for applications in the Family Proceedings Courts for orders under section 8 of the CA 1989 and make associated consequential amendments.

2.7. The MC(E)R 2008 apply the FPC(CA89)R 1991 to specified cases to make provision for the practice and procedure to be followed in the Magistrates' Courts in respect of proceedings relating to the implementation of sections 5 to 8 of the C&A Act 2006.

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

3.1. None

4. Legislative Context

4.1. The Family Procedure Rule Committee makes the FP(A)(No.2)R 2008 with the agreement of the Lord Chancellor.

4.2. The FPC(CA)(A)R 2008 and the MC(E)R 2008 are made by the Lord Chief Justice with the concurrence of the Lord Chancellor after consulting with the Magistrates' Courts Rule Committee.

4.3. Sections 1 to 5 and 8 of the C&A Act 2006 will come into force on 8 December 2008. Sections 1 to 5 of the C&A Act 2006 make amendments to the CA 1989 in respect of the enforcement of contact orders. Transitional provision is made in section 8 of the C&A Act 2006. Court rules are required to support the coming into force of these primary provisions: such rules are made via the attached instruments. More detail regarding this is set out in section 7 of this Memorandum.

4.4. As regards the implementation of sections 1 to 5 and 8 of the C&A Act 2006, it has proved necessary to make provision for the practice and procedure in the magistrates' courts in two separate statutory instruments (the FPC(CA)(A)R 2008 and the MC(E)R 2008). This is because section 65 Magistrates' Courts Act 1980 expressly excludes from the definition of "family proceedings" proceedings relating to the enforcement of orders under the CA 1989. This being the case, it was not considered appropriate to make direct provision in relation to these enforcement matters in the FPC(CA)R 1991. Instead, provision in respect of these enforcement matters is made in the MC(E)R 2008, which apply the FPC(CA)R 1991 to cases for enforcement of contact orders with appropriate modifications.

5. Territorial Extent and Application

5.1. These instruments apply to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

A. Sections 1 to 5 and 8 of the C&A Act 2006

- 7.1. The C&A Act 2006 received Royal Assent on 21 June 2006. The amendments made by the C&A Act 2006 to the CA 1989 will give the courts more flexible powers to facilitate child contact and enforce contact orders made under the CA 1989.
- 7.2. Sections 1 to 7 of, and Schedule 1 to, the C&A Act 2006 amend the CA 1989 to make provision for:
- contact activity directions and conditions to be made by courts dealing with cases under the CA 1989 where contact with a child is in issue;
 - the monitoring of contact orders by officers of the Children and Family Court Advisory Support Service (“Cafcass”) and Cafcass Cymru;
 - orders for financial compensation where a contact order has been breached;
 - enforcement orders where a contact order (or earlier enforcement order) has been breached;
 - amendments to section 16 of the CA 1989 in relation to family assistance orders;
 - the preparation and filing of risk assessments by officers of Cafcass or Cafcass Cymru (section 16A of the CA 1989).
- 7.3. In addition, the C&A Act 2006 includes a transitional provision in section 8 to enable a “warning” notice to be attached to a contact order made under section 8 of the CA 1989 where that order was made before sections 3 to 5 of the C&A Act 2006 come into force. Such a notice warns of the consequences of breaching a contact order.
- 7.4. These provisions have been implemented in two stages. The first stage involved the commencement of section 6 of the C&A Act 2006 (amendments to section 16 of the CA 1989 relating to family assistance orders) and section 7 of the C&A Act 2006 (bringing into force the new section 16A of the CA 1989 relating to risk assessments). Those provisions, and associated amendments to rules of court, came into force in October 2007.
- 7.5. The second stage involves the commencement of the remaining provisions of Part 1 of the C&A Act 2006. These provisions will come into force on 8 December 2008.
- 7.6. The C&A Act 2006 arises from the proposals in the Government’s Green Paper “Parental Separation: Children’s Needs and Parents’ Responsibilities” published in July 2004 and the subsequent “Next Steps” document published in January 2005. The Government’s intention is to help separating parents make arrangements in the interests of their child to enable both parents to continue to have a meaningful relationship with the child, provided this is safe and in the child’s best interests. The family courts handle approximately 100,000 applications for contact each year and disputed cases are highly emotive. A significant number of people will be effected by these changes and therefore there is likely to be some considerable media interest in the changes and how they work.
- 7.7. The changes to the CA 1989 are significant legally as they give the court greater powers to direct people to attend contact activities during the course of a case and therefore extend the range of facilities available to the courts to resolve disputes. The changes also introduce a new sanction (unpaid work via enforcement orders) into the family courts and allow the court to make an order for financial compensation when a contact order has been breached, which is a departure from the current practice of family courts generally not making financial orders as between parties to a dispute.

- 7.8. The relevant provisions of the FP(A)(No.2)R 2008, the FPC(CA89)(A)R 2008 and the MC(E)R 2008 make provision in respect of the practice and procedure to be followed in the courts in relation to the coming into force of these provisions. The provisions in the court rules will ensure that:
- various existing duties of officers of Cafcass or Cafcass Cymru will now extend to such officers undertaking new duties imposed by the CA 1989 as amended by the C&A Act 2006;
 - the procedure to be followed is specified in relation to the making and service or notification of applications relating to enforcement cases, together with the procedure for responding to and hearing such applications, and dealing with service of any orders made in such proceedings;
 - new forms are prescribed for the making of applications relating to enforcement cases and for orders made in respect of such applications.

B. New Form C100

- 7.9. During the debate in the passage of the Children & Adoption Bill in November 2005, the Government undertook to look at the applications for section 8 CA 1989 proceedings with a view to adding questions about the use of mediation before going to court. The Government is committed to encouraging the use of family mediation and believes that mediation can offer considerable assistance in the settling of family disputes, especially where children are involved. This is reflected in the new C100 form. The intention is to make parties aware that the court will attach importance to mediation. The opportunity was also taken to make the form more user friendly, to simplify the language and provide more direct questions and ‘tick box’ responses.
- 7.10. The new C100 form will be used for applications for orders under section 8 of the CA 1989. The new form is derived from form C1 that is currently used for applications for proceedings under the CA 1989, as prescribed in the FPR 1991 and the FPC(CA)R 1991. The new C100 form is for use in section 8 CA 1989 applications only. The form C1 will continue to be used for other private law applications, and for public law applications, under the CA 1989. The attached statutory instruments make consequential amendments as a result of the introduction of the new form C100: the title of the form C1 has been amended to reflect this change in use. The form C7 has been amended so that it now refers to both form C1 and form C100.
- 7.11. The attached statutory instruments include transitional provisions to ensure there are no implications for pre-existing proceedings of the implementation of the new form C100.

Consolidation

- 7.12. The statutory instruments referred to in this Memorandum 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, in light of the coming into force of sections 1 to 5 and 8 of the C&A Act 2006, to make amendments to existing Rules in the meantime.

8. Consultation outcome

A. Sections 1 to 5 and 8 of the C&A Act 2006

- 8.1. The Government conducted an extensive consultation on the Green Paper: Parental Separation: Children's Needs and Parents' 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.
- 8.2. A consultation draft of the C&A Act 2006-related provisions now in the FP(A)(No.2)R 2008, was published on 7 May 2008, with the approval of the Family Proceedings Rule Committee. As the consultation concerned technical changes to court rules which in themselves would be of limited interest to the general public, Ms Bridget Prentice MP, Parliamentary under Secretary of State for Justice, decided that a reduced consultation period of six weeks was appropriate.
- 8.3. Responses were received from 24 respondents including Cafcass, the Family Bar Association, the Family Justice Council, the Justices' Clerks Society and the Magistrates' Association, the National Youth Advocacy Service, Women's Aid and the Families Need Fathers. Generally respondents were content with the detailed provisions of the Rules, although some respondents raised questions in respect of the effect of some of the provisions. Several respondents commented on the policy underlying the C&A Act 2006 and whether the provisions of the Act would successfully address the issue of resolving contact disputes and improving enforcement of contact orders where necessary. A number of respondents raised questions about safety and some raised concerns about implementation of the provisions. There were a number of detailed comments on the draft application forms and the draft order forms.
- 8.4. The responses were considered by the Family Proceedings Rule Committee and amendments were made to the draft Rules and draft statutory forms as a result. The Government's formal response to the consultation is published at <http://www.justice.gov.uk/publications/consultations-with-response.htm>.
- 8.5. The C&A Act 2006-related provisions in the FPC(CA89)(A)R 2008 and the MC(E)R 2008 were not issued for public consultation, as they largely mirror the provisions for the C&A Act 2006 in the FP(A)(No.2)R 2008. The Magistrates' Courts Rule Committee were consulted in respect of the FPC(CA)(A)R 2008 and the MC(E)R 2008, as required by section 144 of the Magistrates' Courts Act 1980. No responses to that consultation were received.

B. New Form C100

- 8.6. Questions about the CA 1989 forms were asked within the consultation "Family Procedures Rules - A new procedural code for family proceedings" was issued on 3rd August 2006. The consultation closed on 1st December 2006 and the response was published on 22 February 2008 and can be found at <http://www.justice.gov.uk/publications/cp1906.htm>.

8.7. The majority of responses to the consultation agreed there should be separate forms for “public law” work (for example, proceedings involving a child being taken into the care of a local authority) and “private law” work (for example, where there is no public authority involvement, but where parents cannot agree on residence or contact arrangements for their child). Suggestions made in this consultation about format/wording have been taken into consideration in drafting the application form. For example, the form asks for more detail about the dispute and what efforts – formal and informal – have been made to resolve the dispute, to ensure “core” information about the case is included on the first page. Further, “tick-box” style answers are allowed for, where appropriate.

8.8. Following the above consultation, the Department has continued to consult with individuals and organisations involved in section 8 proceedings to review the application form, using the feedback received to draft the final C100 form. This included:

- Court visits across the country to examine completed forms and shadow the court officers who deal with the application forms at the point of receipt to learn what information is often incomplete or missing from C1 application forms.
- Liaising with the Citizens Advice Bureau at the Principal Registry of the Family Division to discuss the current form and difficulties experienced by applicants.
- A workshop to review the new application form with representative groups, such as those representing fathers’ interests or victims of domestic violence.
- User testing with members of the public using fictional case scenarios.
- Meetings and liaison with court staff, judiciary and the legal community via the Family Justice Council Children in Families Committee and the Law Society Children’s Law Committee.

8.9. A number of changes were made as a result of this specific detailed consultation. These include:

- requesting previous addresses, previous names and place of birth for the applicants and, where known, the respondent. This information is to help the police undertake accurate and timely checks on individuals, when requested to do so by Cafcass to ensure the safety of the child.
- spelling out on the form who Cafcass and CAFCASS CYMRU are
- providing the full title of the Parenting Plan booklet
- inserting an explanatory sentence about permission
- changing the order and adjusting the wording of certain questions
- asking for the DOB of the child on the front page rather than age
- requesting both home phone number and mobile number
- requesting both the solicitors name and name of firm, and
- requesting better information to enable timely accurate police checks.

9. Guidance

A. Sections 1 to 5 and 8 of the C&A Act 2006

9.1. Guidance will be issued in relation to the completion of the new application forms and the procedure applicable to the proceedings to which the applications relate.

B. New Form C100

9.2. Guidance will be issued as to the use and completion of the new form C100 via a leaflet entitled “Making an application – children and the family courts”.

10. Impact

A. The C&A Act 2006

- 10.1. A regulatory impact assessment was completed for the publication of the draft Children (Contact) and Adoption Bill which was published at <http://www.parliament.uk/documents/upload/CCABill.pdf> and for Children and Adoption Bill on its introduction to Parliament in June 2005.
- 10.2. As regards the CA 1989 amendments (coupled with the rule amendments made by the attached instruments), the impact on business, charities or voluntary bodies will be that some additional assistance may be required for clients involved in disputes over child contact. There will also be some opportunities available to provide contact activities, for which funding will be provided. Mediation services may provide additional meetings to give information about mediation, for which remuneration will be provided either through legal aid for those eligible or through charges to clients. Solicitors will be required to provide additional advice and support to clients, for which remuneration will be provided from legal aid or through charges to clients.
- 10.3. The impact on the public sector is that additional hearings will be required in family courts dealing with contact disputes and additional duties will be required of Cafcass and CAFCASS CYMRU in respect of monitoring contact, arranging contact activities and monitoring enforcement orders. The National Probation Service will be required to provide and supervise unpaid work for people made subject to enforcement orders. It has been agreed that appropriate resources will be made available to HM Courts Service, Cafcass and CAFCASS CYMRU and the National Probation Service as appropriate to enable them to carry out their functions in relation to these provisions. Resources have been made available to commission contact activities as required under the provisions of the CA 1989 as amended and also to provide financial assistance with the cost of contact activities for those who are eligible.

B. New Form C100

- 10.4. The impact on business, charities or voluntary bodies is likely to be extremely small. Whilst the layout and design of the new form means that it is longer than the current C1 form, and therefore the applicant will incur additional costs in making photocopies of the form, this new layout, using specific spaces and tick box style questions is much easier for applicants to complete. This has been tested with members of the public and with representative groups. The new format will also help ensure key information often missing from forms, such as date of birth, will be completed. This will help eliminate the need for court staff to pursue missing information with the applicant. It is unlikely that the Form C100 will place any additional burdens on solicitors preparing applications for clients or voluntary support groups assisting applicants.
- 10.5. The impact on the public sector is likely to be negligible as the new Form does not in itself increase the number of applications which can be made and the new format should assist court staff extracting the necessary information for the application to be taken forward.

10.6. In light of what is set out above, separate Impact Assessments have not been prepared for these instruments.

11. Regulating small business

11.1. The legislation applies to small business, in particular to firms of solicitors dealing with contact disputes and applying the new provisions under the CA 1989 (as amended) and the associated amendments to court Rules. Solicitors will have to carry out some tasks differently and deal with new applications. There will also potentially be some additional income, including legal aid payments, for the additional tasks required.

11.2. To minimise the impact of the requirements on firms employing up to 20 people, the approach taken has been to provide information in advance of implementation so as to assist practitioners in preparation for the introduction of the provisions. The draft Rules and new forms have been published and guidance leaflets have been prepared to assist with the new applications available. Solicitors have also been involved in multi-agency discussions about the amendments made by the C&A Act 2006 in local Family Justice Councils.

11.3. The basis for the final decision on what action to take to assist small business was that the provision of information and raising awareness would be an appropriate way to assist in preparation for the coming into force of the amendments to the CA 1989 made by the C&A Act 2006, and the associated amendments to court rules.

12. Monitoring & review

A. The C&A Act 2006

12.1. The Government intends to monitor the effects of the CA 1989 as amended by the C&A Act 2006. Statistical data about the numbers of the new orders and directions made will be collected and will give an indication of the extent to which the provisions are being used. The Government reviews the effects of work in respect of child contact generally and in 2007 commissioned a repeat of the 2002 Omnibus Survey on Parental Contact which was aimed at obtaining the views and experiences of separated parents within the general population and formed the basis for many of the proposals in *Parental Separation: Children's Needs and Parents' Responsibilities (July 2004)* – including new legislation (now the C&A Act 2006). The results of the 2007 survey will be published later in the year. In relation to cases that come to court, the Government is particularly concerned about the number of cases returning to court because contact arrangements have broken down. Monitoring the impact of the CA 1989 as amended by the C&A Act 2006 will be considered within this context.

12.2. The Government is currently considering what further academic research might be needed to support evaluation of the Act.

B. New Form C100

12.3. It is proposed that a review of the C100 will take place a year after it has been implemented. This will be via research of completed forms to identify any common

errors and also by obtaining the views of representative groups of applicants, in particular litigants in person.

13. Contact

13.1. In relation to the Children and Adoption Act 2006 please contact Philip Dear, In relation to the Children and Adoption Act 2006 please contact Philip Dear, Family Relationships Branch 2, Family Law and Justice, 2.03, 102 Petty France, London SW1H 9AJ Tel: 0203 334 3125 e-mail: philip.dear@hmcourts-service.gsi.gov.uk.

13.2. In relation to the C100 please contact Suzanne Alexander, Children's Proceedings Branch, Family Law and Justice, Point 2.02, 102 Petty France, St James Park, London SW1H 9AJ. Tel: 0203 334 3120. E-Mail suzanne.alexander@justice.gsi.gov.uk.

Ministry of Justice