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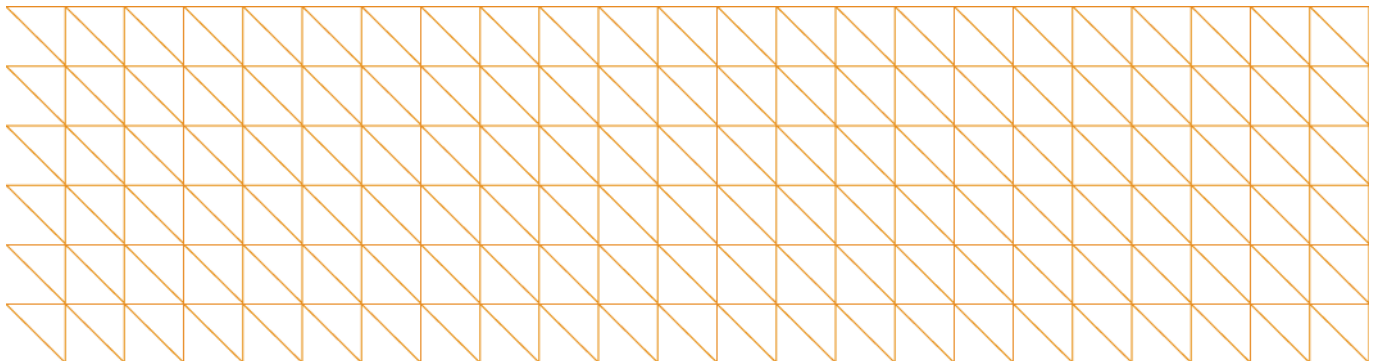
Children and Adoption Act 2006 – Court Rules

Amendments to the Family
Proceedings Rules 1991

Response to consultation

CP(R) 07/08

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Response to consultation carried out by the Ministry of Justice.

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Children and Adoption Act 2006 – Court Rules

Amendments to the Family Proceedings Rules 1991 Response to consultation

Introduction and contact details

This document is the post-consultation report for the consultation paper, CP07/08 **Children and Adoption Act 2006 – Court Rules** Amendments to the Family Proceedings Rules 1991.

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **Florence Johnson** at the address below:

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This report is also available on the Ministry's website: www.justice.gov.uk.

Alternative format versions of this publication can be requested from the above address.

Background

The consultation paper **Children and Adoption Act 2006 – Court Rules – Amendments to the Family Proceedings Rules 1991** was published on 7 May 2008. It invited comments by 20 June 2008.

The Children and Adoption Act 2006 (“the 2006 Act”) completed its Parliamentary passage and received Royal Assent on 21 June 2006. When the 2006 Act is implemented it will give the courts more flexible powers to facilitate child contact and enforce contact orders made under the Children Act 1989 (“the 1989 Act”). New facilitative measures in the 1989 Act (as amended by the 2006 Act) include giving courts the power to require parents to undertake a “contact activity” such as attending relevant parenting programmes or classes, or information sessions, before a contact order is made. The 1989 Act will also provide the courts with the power to attach conditions to contact orders, which may require a parent to undertake a “contact activity” and to require a Cafcass officer to monitor contact.

Where a contact order has been breached, there will be provisions in the 1989 Act to enforce contact orders, enabling the courts to impose unpaid work on the person who breaches a contact order without reasonable excuse. This will give the courts greater flexibility in dealing with breaches of contact orders, and will be in addition to the existing powers to treat the breach of the order as a contempt of court.

Amendments to the 1989 Act already in force also improve the flexibility of family assistance orders (orders requiring a Children and Family Court Advisory and Support Service (“Cafcass”) officer, a Welsh family proceedings officer or a local authority officer to assist advise and befriend named individuals) by extending the maximum time for which the court can make an order from six to twelve months and by removing the requirement that the circumstances of the case must be exceptional before an order can be made. Section 16A of the 1989 Act (inserted by section 7 of the 2006 Act) requires Cafcass officers, or Welsh family proceedings officers, to carry out risk assessments where they consider that there is cause to suspect that a child is at risk of harm. The officers are then required to inform the court of their findings in respect of the risk of the child-suffering harm.

The provisions in part 1 of the 2006 Act in relation to Family Assistance Orders and risk assessments were implemented from October 2007. On 1 July 2008 the Government made a written ministerial statement that the remaining provisions of part 1 would come into force in autumn 2008. The Government will make an announcement about the implementation date shortly.

The consultation period closed on 20 June 2008 and this report summarises the responses, including how the consultation process influenced the final shape/further development of the policy/proposal consulted upon.

A list of respondents is at Annex A.

Summary of responses

1. A total of 25 responses to the consultation paper were received. Of these, ten responses were from members of the judiciary, the magistracy and associated bodies and four were from legal stakeholders and practitioner organisations in the family justice system. Nine responses were from stakeholder representative groups and two responses were from members of the public.
2. The responses were analysed for comments on the detailed provisions contained in the court rules and for comments on the draft application forms and order forms to be used for implementation of the 2006 Act.
3. 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 2006 Act and whether the provisions of the 1989 Act as amended 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.
4. There were a number of detailed comments on the draft application forms and a number of revisions have been made by the Family Proceedings Rule Committee. Some comments were also made in respect of the draft order forms and these have also been amended as appropriate .

Responses to specific questions

1. Do you have any comments on the draft rules? If so, please state them.

The majority of respondents were content with the draft rules and did not suggest any amendments. The main amendments suggested in respect of the rules are summarised below. There were a number of concerns expressed about the policy underlying the court rules and the more general policy on child contact disputes.

The response from the Central and South West Lancashire Family Panel expressed concern about the provision for personal service of enforcement orders on the respondent by the applicant in draft new rule 4.21AA of the Family Proceedings Rules 1991 (“FPR 1991”). As many applicants are not legally represented it was felt there could be severe problems. The response from the Family Panels for Nottinghamshire also highlighted concerns with personal service. In response, we would say that the rules do provide for the court to direct that other arrangements should be made for service where this is considered appropriate. Applicants will also be provided with instructions about service of the enforcement order, including explanation about the use of process servers to complete personal service on the person required to carry out the unpaid work.

Families Need Fathers (FNF) were also concerned about personal service and suggested that use of a 'proper officer' or process server to put the papers in the hand of the respondent would cause confusion for litigants in person. FNF felt this should be clearly laid out and properly signposted, otherwise this would leave room for provocative behaviour and anger and distress. FNF considered the issue of enforcement to be between the court and the person in breach and it would be the court's responsibility to ensure compliance.

In response, we would note that there will be a guidance note sent to applicants when an enforcement order is sent to them for service. That will explain that the term “personal service” does not mean that the applicant must serve in person but, rather, that the respondent must be handed the order in person. It will note that a process server could be used to effect this service.

The joint response from the Justices' Clerks' Society and the Magistrates' Association noted that draft new Rule 4.16(A) FPR 1991 had the effect of prohibiting a court from proceeding in absence of the parties to make a Contact Activity Order, Direction or Enforcement Order. It was considered that this would mean that the provisions, particularly in relation to enforcement, would be of limited effect and that the Magistrates' Courts appropriate powers of enforcement in such circumstances would be under Section 63 of Magistrates' Courts Act 1980.

In response we would acknowledge that the powers for enforcement in the Magistrates' Court would indeed be under the Section 63 of 1980 Act. However, we would note that the draft rule's restriction on proceeding in the absence of a party will only apply if the court does not have before it sufficient information to resolve the issue at hand.

The same response noted that the Act and the Rules do not make provision for where an application for an Enforcement Order can be heard, and therefore any court could deal with the application. The respondents considered that it would be preferable if the application were to be made to the court that made the original contact order as only that court would be able to exercise powers of committal if an Enforcement Order were unsuccessful.

The Government's approach to this is that we would not wish to restrict applications to a particular court as the circumstances of the parties may have changed, making it more convenient to apply to another court.

The joint response raised a concern as to which court would have jurisdiction to deal with an application to amend or revoke an Enforcement Order. References in Schedule A1 of the 1989 Act as amended to "the court" followed on from references to "where a court has made an Enforcement Order". Whilst this could be interpreted as meaning that all powers under Schedule A1 have to be exercised by the court that made the order, the respondents considered this ought to be clarified.

The Government's response to this is that there are numerous references to "the court" in the Rules, and that we consider it to be clear that these are generic references, rather than references to a specific court.

The response also sought clarification in respect of the powers of the court to suspend an enforcement order for a specified period under the new Section 11J(9) of the Children Act.

In response we would note that in cases where the court suspends an enforcement order, generally it would be on the condition that the person concerned complies with the contact order. The conditions relating to the suspension and the period for which the enforcement order is suspended would be included in the enforcement order. It would also be open to the court to require Cafcass or CAF/CASS Cymru to monitor the contact order and report to the court on compliance. If the contact order is not complied with, an application can be made to vary or enforce it and the court could then consider whether to "activate" any suspended enforcement order. A specific new section has been added to the new enforcement order form (form C80) in respect of suspended enforcement orders.

In their response, Families Need Fathers (FNF) said they considered there should be minimal opportunities for someone seeking to defy a contact order to 'duck and weave' to avoid allowing a child to see a parent to whom they feel hostile. Repeated 'stays of execution' can go on for, sometimes, years. In some of these cases the children are being alienated

from the parent they do not see, and on occasions that becomes irreversible. FNF were concerned the courts would be too ready to adjourn cases.

In response, we would note that given the nature of the enforcement order sanction, the approach taken in the 1989 Act is that the breach must be proved beyond reasonable doubt and that the person must be assessed as to his or her suitability for unpaid work before an enforcement order can be made.

In respect of draft Rules 20 and 21 (which amend Rule 4.21A of the FPR 1991 regarding the attachment of a penal notice to contact orders and other orders made under the Children Act 1989) FNF were concerned that people should have to apply for enforcement. They said that if the court is satisfied that the order is being breached, it is up to the court, or its agents or other official body to ensure that its order is complied with. FNF said they believed a good enforcement regime could be self-policing and welcomed the fact that a warning be added automatically and without a hearing. FNF also welcomed the introduction of warning notices but considered it bizarre that such a warning should be necessary at all, adding that there is in fact a general understanding at present that contact orders do not have to be complied with.

In response we would note that the provisions in the 1989 Act itself provide for the need for an application for enforcement to be made, so the Rules could not provide for the court to make an enforcement order of its own volition. Equally, the 1989 Act itself imposes the requirement for warning notices. In his response, Mr Tony Whittaker also raised concerns about the risk of delay with the process for enforcement of existing contact orders because of the need to apply to attach a warning notice.

In response, we would note that in view of the general policy that provisions in family law should not have a retrospective effect, it was not possible to add a warning notice to all contact orders in force at the date of implementation of the provisions of the 2006 Act. The transitional provisions do allow for warning notices to be added to existing contact orders. Action can then be taken for enforcement in respect of a failure to comply with the contact order which takes place after the warning notice has been added.

It is only in respect of pre-commencement contact orders that an application for a warning notice will be needed. All contact orders made from the date of implementation of the remainder of Part 1 of the 2006 Act will have a warning notice attached – so there will be no need for an application for a warning notice in those cases. Applications for enforcement orders or orders for financial compensation can be made in respect of any failure to comply with a contact order made after the provisions of the 2006 Act come into force. The statutory Form C43 (Contact Order) is amended by the draft Rules to provide for the inclusion of the text of the warning.

FNF welcomed the new duties on CAFCASS officers and Welsh family proceedings officers to monitor contact arrangements, and provide the court with information.

The Greater London Domestic Violence Project raised concerns about safety for parties and children in contact proceedings and in undertaking contact activities and the need for accreditation for domestic violence perpetrator programmes. The Project welcomed the amendment of Form C43 and the opportunity for Cafcass officers to be able to apply to re-open cases to consider a risk assessment. In response we would say that contact activities will include provision of properly accredited programmes to deal with domestic violence.

In the response from Cafcass concern was expressed about the need for Cafcass or CAFCASS CYMRU to have to apply to revive the proceedings for the court to consider a risk assessment.

In response we would note that the provisions enabling Cafcass and CAFCASS CYMRU to apply to revive proceedings are required to ensure that the court can consider a risk assessment in respect of a child when the proceedings have been completed. If no application is made by one of the parties, an application is required from Cafcass or CAFCASS CYMRU as, apart from the High Court, the court does not have inherent powers to re-open cases. It follows that, despite the concern raised by Cafcass, the provision is necessary.

2. Do you have any comments on the draft order forms? If so please state them.

Eight respondents made detailed comments about the two application forms, including a significant number of comments in the joint response from the Justices' Clerks Society and the Magistrates' Association and Martyn Cook on behalf of the Family Justice Council.

The comments can be summarised as follows:

(A) Changes to both form C78 (Application to attach a warning notice to an existing contact order) and form C79 (application for an enforcement order or an order for financial compensation)

- Additional details (name of court and names of parties) should be requested about the contact order, to aid the court in identifying the correct order.

The applicant's date of birth should be requested.

A note should be added to both forms about completing Form C8 to keep an address confidential where this is necessary.

- Space for solicitor's references should be provided.
- The relationship of each respondent to each child should be requested.
- The forms should ask if the respondent has a solicitor acting for them (if known).
- Details about pending cases should be requested.
- The "Checklist" details at end of form should be linked to the specific sections of the form where appropriate to help clarify what should be checked.

(B) Changes to the C78

- A standard section to ask about special requirements if attending court (interpreter needs etc) should be added.

(C) Changes to the C79

A number of respondents noted an error in the wording on page 1 which should be amended to read "To change the area where you *are* completing the unpaid work"

The list of orders to be applied for should be amended to make it clearer that some orders are about existing enforcement orders.

References to "residence" should be changed to "address" (simpler).

The wording in subsections a, b and c should be amended to assist the applicant in moving on if the section is not applicable.

Details of the current enforcement order (and a copy where possible) should be requested if the applicant is applying following breach of that enforcement order.

References to "Justice area" should now be changed to "Local Justice Area".

The above comments have been accepted and incorporated into the revised forms C78 and C79.

Responses suggested the inclusion of email addresses for parties and solicitors. This had been considered when previously raised by the Family Proceedings Rule Committee, but as the current court rules do not allow for electronic service, email addresses are not requested on these forms. On balance it was considered that although email addresses might be useful for communication other than service, to include spaces for email addresses on the forms could create confusion about when electronic communication was acceptable or not, and could lead to incorrect service of documents. The application forms can be amended in the future as appropriate to accommodate electronic service of documents.

Responses to the consultation also highlighted areas of the application process that require explanation, for example, who are the respondents and other people to be notified, and how are documents to be served.

In response, we would note that these issues that will be addressed in the guidance notes to be produced to accompany the forms.

The response from National Family Mediation stressed the need for the application forms to be as simple to use as possible to assist applicants who did not have legal representation.

Families Need Fathers (FNF) were pleased that the new application forms catered for the needs of the litigant in person completing them without the help of a legal representative. FNF were concerned about the rather complex rules for notification.

The Government intends to provide guidance for the application forms to assist people completing them and to give full guidance about service.

3. Do you have any comments on the draft order forms? If so please state them.

In respect of statutory form C80 (Enforcement Order) the Family Law Bar Association suggested that the section containing the warning should be in bold print for greater emphasis. The joint response from the Justices' Clerks Society and the Magistrates' Association pointed out that in the light of the court's power to suspend an enforcement order under the new section 11J (9) of the Children Act the C80 form should have an additional section to reflect the fact that the order could be suspended.

Both these points have now been included in the final version of the form C80.

4. Do you have any comments on any other part of the consultation? If so please state them.

There were a number of comments about the wider aspects of the policy in respect of contact disputes and the implementation of the Children and Adoption Act 2006. The response from the Central Herts Family Panel raised concerns about the adequacy of resources for Cafcass and CAFCASS Cymru in view of the demands placed upon them by the provisions of the Act. These concerns were echoed by the response from the Mansfield Magistrates' Court, which also raised concerns about the transfer of cases to the Family Proceedings Courts. Children in Wales expressed concern about the relatively short period of time for implementation and the challenge of putting an adequate range of contact activities in place in all areas in time.

Both Women's Aid and the Greater London Domestic Violence Project expressed concern that at the Government's decision to apply a reduced period for consultation of six weeks for the Court Rules.

In response, we would note that because 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 was appropriate in the circumstances. In order to ensure that this consultation was as effective as possible, it was sent to a range of interested stakeholders.

Women's Aid were concerned about the use of mediation where there were issues of domestic violence and recommended adequate provision of perpetrator programmes.

In response, we note that perpetrator programmes will be included in the contact activities which are available to courts under the provisions of the 1989 Act as amended.

The Greater London Panel of Family Justices, National Youth Advocacy Service and Families Need Fathers expressed the view that the application fees payable for enforcement applications should not be set at a level which would deter applications. In response we would say that the Family Proceedings Fees Order 2008 (*and the Fees Order applicable in the Magistrates' courts*) will be amended to provide for applications made under the provisions introduced by the 2006 Act. The fees will reflect the amount of work required for the courts to deal with the various applications and will reflect the need to recover the costs in the civil and family courts. The Official Solicitor and Public Trustee commented that it was important that when a protected party (a person who lacks the capacity to represent themselves due to minority or incapacity) became subject to enforcement provisions that the courts take special care that the person understands the effect of the order. In response we would say that the courts would be required to take into account

all relevant factors in a case, including the capacity of all the parties. The *1989 Act, as amended by the 2006 Act*, requires the court to consider the likely effect on the person concerned of any order it proposes to make. [Mr Gary Westcar commented on the general policy in respect of child contact and whether this was compliant with the European Convention on Human Rights in that it did not adequately protect the position of fathers. Families Need Fathers commented about the United Kingdom's compliance with United Nations Convention on the Rights of the Child.

In response, we would note that upon introduction of the Bill the Lord Adonis made the following statement under section 19(1)(a) of the Human Rights Act 1998: "In my view the provisions of the Children and Adoption Bill [HL] are compatible with the Convention rights." On compliance with the UN Convention on the Rights of the Child we would note that implementation of the *2006 Act* will support articles 5, 9-11, 18, paragraphs 1 and 2; 19-21, 25, 27, paragraphs 4 and 39 which are concerned with the aspect of **Family environment and alternative care**, as noted in *The Consolidated 3rd and 4th Periodic Report to UN Committee on the Rights of the Child* (2007).

Conclusion and next steps

1. Following completion of the consultation, revised court rules and statutory forms for the High Court and County Court have been considered by the Family Proceedings Rule Committee. The Committee has now approved the rules and the Statutory Instrument containing these rule changes will shortly be laid before Parliament.
2. The Lord Chief Justice will also make parallel rule amendments for the Family Proceedings Courts. As proceedings to enforce contact orders under the provisions of the 1989 Act are not technically “family proceedings” in the Magistrates’ Court, the rule amendments to support these enforcement proceedings in the Magistrates’ Court are included in a separate Statutory Instrument to the other rules changes for the Family Proceedings Rules.
3. On 1 July 2008 the Government announced in a Written Ministerial Statement that the remaining provisions of Part 1 of the Children and Adoption Act 2006 would come into effect in autumn 2008. The Government will make an announcement about the date of implementation for the remaining provisions of Part 1 of the 2006 Act shortly.

Consultation Co-ordinator contact details

If you have any complaints or comments about the **consultation process** rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 7210 1326, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

**Gabrielle Kann
Consultation Co-ordinator
Ministry of Justice
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given on page 3.

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

1. Mr Gary Westcar
2. Mr David Kaye of Scunthorpe Combined Family Proceedings Court Panel
3. Mr James Welsh of the Bristol Family Proceedings Court Panel
4. Bury Magistrates' Court
5. Alan Critchley of Cafcass (England)
6. Penny Williams of the Central Herts Family Panel
7. Lynn Chesterman of The Grandparents' Association.
8. Ann Fletcher of the Greater London Family Panel of Justices
9. Keith Hurst JP of Mansfield Magistrates' Court
10. Lisa Cohen on behalf of JUMP (Jewish Unity for Multiple Parenting)
11. Ursula J. B. Walton, Chairman, Central and South West Lancashire Family Panel
12. Carol Harris of the Family Law Bar Association
13. Casey Marie of Respect, the UK association for domestic violence perpetrator programmes
14. Sid Brighton on behalf of the Justices' Clerks Society and the Magistrates' Association
15. Jane Robey of National Family Mediation
16. Becky Silbert of Families Need Fathers
17. Martyn Cook JP (member of the Family Procedure Rule Committee) on behalf of the Family Justice Council
18. Sean O'Neill of Children in Wales
19. Joanna Sharpen of the Greater London Domestic Violence Project
20. Kate Hurt on behalf of the Family Panels for Nottinghamshire
21. Amandeep Hothi of Women's Aid

22. Debbie Singleton of the National Youth Advocacy Service
23. District Judge Michael Buckley of the Association of Her Majesty's District Judges
24. Mr Tony Whittaker
25. Mr Alastair Pitblado, the Official Solicitor and Public Trustee

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