EXPLANATORY MEMORANDUM TO

THE FAMILY PROCEEDINGS (AMENDMENT) (NO 3) RULES 2009
2009 No. 2027 (L. 22)

THE FAMILY PROCEEDINGS COURTS (MISCELLANEOUS AMENDMENTS) (NO2) RULES 2009
2009 No. 2025 (L. 21)

THE PARENTAL RESPONSIBILITY AGREEMENT (AMENDMENT) REGULATIONS 2009
2009 No. 2026

THE FAMILY LAW ACT 1996 (FORCED MARRIAGE) (RELEVANT THIRD PARTY) ORDER 2009
2009 No. 2023

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instruments

2.1 The purpose of these four instruments is to:

- Enable implementation of provisions of the Human Fertilisation and Embryology Act 2008 ("the 2008 Act") in respect of assisted parenthood which allow for a second female parent to obtain parental responsibility for a child;
- Make provision for appeals in the county court against orders and decisions made by the Child Maintenance and Enforcement Commission ("the Commission") in relation to deduction orders for unpaid child maintenance;
- Allow for a resident carer to apply for a special guardianship order under provisions of the Children and Young Persons Act 2008;
- Support applications for warrants to assist a person to gain access to a child or gain entry to premises under provisions of the Childcare Act 2006 to improve the regulation of the provision of childcare;
- Enable a local authority to apply on behalf of a victim of forced marriage for a forced marriage protection order as a relevant third party under provisions of the Forced Marriage (Civil Protection) Act 2007.

2.2 The Family Proceedings (Amendment) (No3) Rules 2009 ("the FP (A) (No3) R 2009") amend the Family Proceedings Rules 1991 ("the FPR 1991"), which apply to the High Court and county courts. The Family Proceedings Courts (Miscellaneous Amendments) (No 2) Rules 2009 ("the FPC (Misc A) (No 2) R 2009") make parallel provisions for rules for the family proceedings courts. The FPC (Misc A) (No 2) R 2009 cover all the provisions outlined above,

other than appeals against deduction orders and applications for forced marriage protection orders, which are not dealt with in family proceedings courts.

2.3 The Parental Responsibility Agreement (Amendment) Regulations 2009 ("the PRA (A) Regs 2009") amend the Parental Responsibility Agreement Regulations 1991 and insert a new parental responsibility agreement form (C (PRA) 3) to record an agreement between a second female parent and the child's mother. The Regulations are linked to the court rules above in that they implement other aspects of the provisions for a second female parent to obtain parental responsibility for the child.

2.4 The Family Law Act 1996 (Forced Marriage) (Relevant Third Party) Order specifies a relevant third party for the purposes of section 63C of the Family Law Act 1996. This enables a local authority to apply to the court for a Forced Marriage Protection order under section 63C of the Family Law Act 1996 as a relevant third party. This instrument is linked to the changes contained in the FP (A) (No3) R 2009, which prescribes the application form for such applications.

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

3.1 None

4 Legislative Context

The Family Proceedings (Amendment) (No3) Rules 2009

4.1 The Family Procedure Rule Committee makes the FP (A) (No3) R 2009 with the agreement of the Lord Chancellor.

The Family Proceedings Courts (Miscellaneous Amendments) (No2) Rules 2009

4.2 The Lord Chief Justice makes the FPC (Misc A) (No 2) R 2009 with the concurrence of the Lord Chancellor after consulting with the Magistrates' Courts Rule Committee.

The Parental Responsibility Agreement (Amendment) Regulations 2009

4.3 The Lord Chancellor makes the PRA (A) Regs 2009 under the powers conferred by the Children Act 1989 ("the 1989 Act").

The Family Law Act 1996 (Forced Marriage) (Relevant Third Party) Order 2009

4.4 The Lord Chancellor makes the FLA 1996 (FM) (RTP) O 2009 under the powers conferred by the Family Law Act 1996. These provisions came into force when the Forced Marriage (Civil Protection) Act 2007 ("the 2007 Act") was implemented on 25 November 2008.

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

Human Fertilisation and Embryology Act 2008

7.1 Section 42 of the 2008 Act makes provision for who will in law be the parents where a female civil partner gives birth to a child conceived as a result of donor insemination. In line with the Government's policy on civil partnerships, although the terminology is different, the position is precisely analogous to that of married couples in that the civil partner of the child's mother will be the second female parent of the child. Sections 43 and 44 of the 2008 Act similarly make provision about who will in law be parents for same-sex female couples who are not civil partners which mirrors the provision made about opposite-sex unmarried couples.

7.2 Likewise, paragraph 26 of Part 1 of Schedule 6 to the 2008 Act amends section 2 of the Children Act 1989 to make provision for who will have or may obtain parental responsibility for the child in such cases, mirroring the existing provision for married couples or unmarried opposite-sex couples as the case may be, and in particular places the second female parent in a position mirroring that of an unmarried father who agrees to be treated as the father of the child.

Child Support Act 1991

7.3 The changes to court rules in the FP(A)(No.3)R 2009 are required as a result of the Child Support (Deduction Orders) (Collection and Enforcement Amendment) Regulations 2009 ("the Regulations"), which come into force on 3rd August 2009. Regular deduction orders may be made to secure the payment of arrears of child support maintenance payable under a maintenance calculation or amounts of child support maintenance, and lump sum deduction orders may be made to secure the payment of arrears of child support maintenance.

7.4 Court rules are needed to provide for the county court process for appeals in respect of deduction orders from the Commission and a process for second appeals from the decision of a district judge to a judge of a county court relating to these appeals. The amendments in the FP(A)(No.3)R 2009 to the FPR 1991 are to the rules in Part 8 of the FPR 1991 which were inserted recently into the FPR 1991 by the Family Proceeding (Amendment) Rules

2009 (S.I. 2009/636) to accommodate appeals coming to a county court from a magistrates' court and apply the existing rules for appeals from the decision of a magistrates' court to a county court and for certain internal appeals in a county court are applied to deduction order appeals and second appeals relating to them.

Children and Young Persons Act 2008

7.5 Sections 36 to 38 of the 2008 Act amend the 1989 Act to:

- enable all relative carers to apply for a residence order and special guardianship orders under the 1989 Act if the child has lived with the carer for a period of at least one year immediately preceding the application (putting them on the same footing as local authority foster carers);
- Raise the age at which a residence order automatically ends from 16 to 18 years of age (to provide greater stability and facilitate continued financial support where applicable through a residence order allowance for carers, which ceases at the end of the residence order).

7.6 The rule amendments in the FP (A) (No.3) R 2009 and the FPC (Misc A) (No.2) R 2009 substitute a new form C13A (supplement for an application for a special guardianship order) for the existing one in the light of amendments to that form consequential on relatives being able to apply without the leave of the court in the circumstances outlined above.

Childcare Act 2006

7.7 The 2006 Act introduced a new system of registration for childcare providers in England (in Wales the provisions of the 1989 Act continue to apply). Section 77 of the 2006 Act gives the Chief Inspector powers of entry if he has reasonable cause to believe that a person is providing early years provision or later years provision without being registered (section 77(1)), and for the purpose of conducting certain inspections or determining whether conditions or requirements imposed on the provider are being complied with (section 77(2)). For Wales section 102 of the 1989 Act contains similar provisions.

7.8 Following the coming into force of the 2006 Act, consequential rule changes and changes to the court application form C19 (Application for a warrant of assistance) were made by the Family Proceedings (Amendment) Rules 2009 (SI 2009/636) and the Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2009 (SI 2009/637) to support applications under section 77 of the 2006 Act.

7.9 The FP (A) (No.3) R 2009 and the FPC (Misc A) (No.2) R 2009 make further consequential amendments and substitute a new Form C28 (Warrant to assist a person to gain access to a child or entry to premises) for the existing form to allow the form to be used for warrants granted pursuant to applications under section 79 of the 2006 Act, and in Wales under section 79U of the 1989 Act.

Forced Marriage (Civil Protection) Act 2007

7.10 The 2007 Act gives courts a wide discretion to issue Forced Marriage Protection Orders (FMPOs). In circumstances when victims are unable to make an application themselves, there is provision for a relevant third party to make an application without needing to seek the court's permission.

7.11 "Relevant third party" is defined in section 63(7) of the 2007 Act as a person specified, or falling within, a description of persons specified, by order of the Lord Chancellor. Since local authorities will be specified as relevant third parties from 1 November 2009 by the FLA1996 (FM) (RTP) O 2009 and will no longer need to complete the application form for leave to apply for a forced marriage protection order (form FL430), a change to the application form FL401A is made by the FP(A)(No.3)R 2009 to ensure local authorities are able to explain what they know about the background to a case the circumstances of the person to be protected; and the wishes and feelings of the person to be protected.

Consolidation

7.12 The FP (A) (No.3) R 2009 and the FPC (Misc A) (No.2) R 2009 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 the legislative changes described in the paragraphs above to make amendments to existing Rules in the meantime.

8. Consultation outcome

Human Fertilisation and Embryology Act 2008

8.1 The Government conducted an extensive consultation on the policy underlying the Human Fertilisation and Embryology Act 2008. The Human Fertilisation and Embryology Act 2008 were subject to considerable public scrutiny. The Science and Technology Select Committee carried out an inquiry into reproductive technologies and the law and made recommendations many of which were reflected in the Bill. In addition, the draft Bill was scrutinised by a Committee of both Houses prior to introduction.

8.2 A public consultation on the key policies in the Bill and how they may be updated ran from August to November 2005. A total of 535 responses were received from a wide range of stakeholders and individuals. The consultation and response document are available from the Department of Health on the following link:

http://www.dh.gov.uk/en/Healthcare/Fertility/DH_080475

8.3 In view of the fact that the rule amendments in FP(A)(No.3)R 2009, the FPC(Misc A)(No.2)R 2009 and the amendments to the Parental Responsibility Agreement Regulations 1991 in the PRA(A)Regs 2009 in respect of the 2008 Act are limited and are purely consequential it was considered that a full public consultation on the amendments themselves was not required on this occasion. The Government intends to hold a public consultation on the more significant rule changes required for implementation of the provisions of the 2008 Act in respect of parental orders.

Child Support Act 1991

8.4 The power to deduct money direct from the accounts of non-payers of child maintenance was included in proposals set out in the White Paper: *A new system of child maintenance* published by the Department of Work and Pensions in December 2006. In relation to deduction orders, the White Paper proposed that the Government would explore the scope for legislation to enable the Commission, once established, to authorise financial institutions to pay maintenance owed from a non-resident parent's account. Responses were invited from a number of organisations including the Justices Clerks Society, Resolution, the Law Society of England and Wales and the Magistrates' Association. Comments were also invited from members of the public. There was a mixed response to the proposal: some welcomed the proposal whilst others raised concerns over possible implications for human rights.

8.5 The British Bankers Association and the Building Societies Association were also informally consulted separately and had no objections to the proposals.

8.6 The Government decided to proceed with its proposals for deduction orders on the basis that both the primary legislation and regulations would provide safeguards in order to ensure that human rights are protected and these are set out in paragraphs 7.3 and 7.4 above.

8.7 The Department for Works and Pension and the Ministry of Justice consider that no further consultation on the contents of this instrument is required because the amendments are a consequence of an Act of Parliament (the Child Maintenance and Other Payments Act 2008). The Department for Works and Pension has consulted closely with major stakeholders, including the British Bankers' Association, the Building Societies Association and individual banks and building societies in the development of both the Regulations and supporting processes.

8.8 A copy of the White Paper and the response document are at: White Paper – A new system of child maintenance and Summary of responses to the White Paper

Children and Young Persons Act 2008

8.10 The Children and Young Persons Act provides legislative reforms to implement the Care Matters programme. The changes to residence orders and special guardianship orders are in sections 36-38 of the Act. The Act followed extensive public consultation about the Care Matters programme overall in the green paper *Care Matters: transforming the lives of children and young people in care,* and the white paper *Care Matters: Time to deliver for children in care.*

8.11 In particular, the *Care Matters* white paper sets out the planning framework for ensuring that as many children in care as possible have the opportunity to experience a loving family and strong connections to adults who have a long term commitment to them. This is described as providing children with permanence. Residence orders provide an important route to permanence by which relative carers can acquire parental responsibility for a child for whom they are caring on a long term basis. Responses to the consultation indicated support for the broad proposals to encourage and support the use of family and friends care. The amendments to Form C13A in FP (A) (No.3) R 2009 and the FPC (Misc A) (No.2) R 2 are consequential only on the provisions of the primary legislation and it is considered that no further consultation on these amendments is necessary.

Childcare Act 2006

8.12 There has been extensive public consultation on the arrangements for the new regulatory framework for childcare. The consultations showed that many respondents thought that the proposed arrangements struck the right balance between providing reassurance that the provision will safeguard children and being proportionate and manageable. The consultation report can be found at:

www.**dcsf**.gov.uk/**consultations**/downloadableDocs/**Childcare**%20**Bill**%20**Consultation**.pdf

8.13 In view of the fact that the amendments to the Form C28 in respect of section 79 of the 2006 Act simply carry through, for the purposes of applications under section 79 of the 2006 Act, the provisions in the rules which already apply to applications under section 102 of the 1989 Act, it was considered that a full public consultation on the amendments themselves was not required.

Forced Marriage (Civil Protection) Act 2007

8.14 The Ministry of Justice issued a consultation in 2008 *Forced Marriage (Civil Protection) Act 2007 – Relevant Third Party* about the role of the relevant third party under the 2007 Act. The consultation asked for responses on what need there was for relevant third parties, what type of people or organisations should act and what safeguards were needed. A consultation response was issued in November 2008, which set out that local authorities would be specified to act as relevant third parties. The FLA1996 (FM) (RTP) O 2009 gives effect to this intention.

8.15 In view of the fact that the rule amendment in the FP (A) (No.3) R 2009 substituting the application form (the FL401A) for a forced marriage protection order with one which contains provision for relevant third party applications in respect of the 2007 Act is limited it was considered that a full public consultation on this amendment was not required on this occasion.

9. Guidance

9.1 Information about these changes will be published on the judicial website and the HMCS website when the Statutory Instruments are laid in Parliament.

10 Impact

The Human Fertilisation and Embryology Act 2008

10.1 A regulatory impact assessment was completed for the Human Fertilisation and Embryology Bill when it was first introduced into Parliament and a link to the assessment is attached below:
http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Regulatoryimpactassessment/DH_080209

10.2 It is not anticipated that the consequential amendments included in the three Statutory Instruments (the FP (A) (No.3) R 2009, the FPC (Misc A) (No.2) R 2009 and the PRA (A) Regs 2009) will have a significant impact on any single group or will have any significant impact on public expenditure. It is not anticipated that any large number of additional applications to court will arise from the implementation of these provisions of the 2008 Act.

Child Support Act 1991

10.3 An Impact Assessment has not been prepared for this instrument because it has no impact on businesses, charities or voluntary bodies.

10.4 This instrument has no impact on the public sector.

Child and Young Persons Act 2008

10.5 An overall impact assessment for the Children and Young Persons Bill was published in 2007. It is available in the impact assessment library at http://www.ialibrary.berr.gov.uk/ .

10.6 DCSF and the Ministry of Justice will analyse changes to the profile of applications and the impact on the courts and legal aid budgets.

Childcare Act 2006

10.7 The amendments are not anticipated to have any significant impact on the sector as they are not new but instead carry through, for the purposes of warrants under section 79 of the 2006 Act, the provisions in the rules which already apply to applications under section 102 of the 1989 Act. During

consultations on the arrangements for the new childcare registration system there were no comments on these provisions.

10.8 The Regulatory Impact Assessment for the Childcare Bill can be found at the following link:
http://www.dcsf.gov.uk/everychildmatters/publications/0/1476/

Forced Marriage (Civil Protection) Act 2007

10.9 A full Regulatory Impact Assessment was produced for the passage of the 2007 Act through Parliament. This considered the benefits, costs and risks of introducing the forced marriage provisions. This also considered the impact of local authorities being specified as relevant third parties and is still up to date.

11 Regulating small business

Human Fertilisation and Embryology Act 2008

11.1 The legislation does not apply to small business.

Child Support Act 1991

11.2 A full impact assessment was published with with the affirmative statutory instrument which implements deduction orders.

Children and Young Persons Act 2008

11.3 The legislation does not apply to small businesses.

Childcare Act 2006

11.4 The legislation does not apply to small businesses.

Forced Marriage (Civil Protection) Act 2007

11.5 The legisaltion does not apply to small businesses.

12 Monitoring & review

Human Fertilisation and Embryology Act 2008

12.1 The operation of the policy and its effect will be monitored, including applications brought to court.

Child Support Act 1991

12.2 The intention is to carry out a full evaluation of policy on deduction orders and this will include monitoring and analysing appeals brought in a county court.

Childcare Act 2006

12.3 The childcare registration arrangements will be reviewed in 2010. Arrangements for how this will be conducted have not been finalised but will include work with childcare provider stakeholder organisations.

Children and Young Persons Act 2008

12.4 MoJ and DCSF will conduct an internal review of the impact of the changes to residence orders and special guardianship orders in the Children and Young Persons Act 2008 on the number of applications for residence orders and special guardianship orders, the number of children who cease to be looked after by virtue of a residence order or special guardianship order and the number of children between 16 and 18 for whom residence orders continue to apply.

Forced Marriage (Civil Protection) Act 2007

12.5 Forced marriage cases are already subject to monitoring, and applications made by relevant third parties will be monitored as part of that. The impact of the relevant third party provisions will be subject to internal review 12 months following implementation and any necessary changes to the application form will be considered as part of that process.

13. Contact

In relation to the Human Fertilisation and Embryology Act 2008, the Child Support Act 1991 (Court Rules), the Childcare Act 2006 and the Children and Young Persons Act 2008 please contact Philip Dear, Matrimonial and Children's Proceedings Branch, Family Law and Justice, Ministry of Justice, 4.23, 102 Petty France London SW1H 9AJ. Tel: 020 3334 3125. e-mail: philip.dear@justice.gsi.gov.uk.

Jodie Smith at the Ministry of Justice Tel: 020 3334 5232 or email: Jodie.smith@justice.gsi.gov.uk can answer any queries regarding the Forced Marriages (Civil protection) Act 2007.

For the Child Support Act 1991 and the Child Maintenance and Enforcement Commission please contact Holly Greig, Child Maintenance and Enforcement Commission, Room 612, 6th Floor, Stockley House 130 Wilton Road, London SW1V 1LQ 02078538073 or e-mail: holly.greig1@childmaintenance.gsi.gov.uk