



Ministry of
JUSTICE

Ministry of Justice Response: DNA Testing in private family law (children) cases

Blood Tests (Evidence of Paternity)
Regulations 1971: Consultation on
possible changes to the definition of
“sampler”, and what a sampler must do

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JUSTICE

DNA Testing in private family law (children) cases

This information is also available on the Ministry of Justice website:
www.justice.gov.uk

About this consultation

- Purpose:** This technical consultation related to proposed changes to the Blood Tests (Evidence of Paternity) Regulations 1971 (“the 1971 Regulations”)¹. The consultation was specifically in relation to possible changes to the definition of “sampler”, and what a sampler must do. The consultation was undertaken to inform possible amendments to the 1971 Regulations to support the roll-out of a scheme for the funding of DNA testing in private family law (children) cases in England and Wales.
- Duration:** The consultation ran from 24 July to 21 August 2015.
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¹ <http://www.legislation.gov.uk/uksi/1971/1861/made>

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Introduction

This document is the post-consultation response to the Ministry of Justice consultation paper '*DNA Testing in private family law (children) cases*'.

It covers:

- the background to the consultation paper;
- a summary of the responses to the consultation paper;
- a detailed response to the specific questions raised; and
- the next steps following this consultation.

Further copies of this response and the consultation paper can be obtained by contacting 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 contact details as set above.

Executive Summary

The Ministry of Justice (MoJ) technical consultation in respect of proposed amendments to the regulations setting out procedures for DNA testing ordered by the court in private family law (children) cases ran from 24 July to 21 August 2015. Nine responses were received which covered the MoJ accredited laboratories and one other laboratory who although not accredited expressed an interest in the initial pilot work undertaken to investigate the feasibility of providing DNA testing in specific case types when ordered by the court. The MoJ are grateful to all respondents.

The resulting amendments to the procedural regulations will be based around removing the need for only medically trained staff to undertake DNA sampling and instead additionally allowing appropriately trained Cafcass staff² or people appointed by a testing laboratory to undertake DNA sampling by mouth swab. **Any amendments to the regulations will be formally laid before Parliament.**

Background

This paper sets out the MoJ response to the technical consultation on procedures for DNA testing when ordered by the court in civil cases. The paper also confirms the policy intention to amend the Blood Tests (Evidence of Paternity) Regulations 1971 (“the 1971 Regulations”) based on the consultation responses and to lay these amendments before Parliament in autumn 2015.

In June 2014 the MoJ undertook a pilot project in two Designated Family Judge Areas in the South West of England that provided funding for the provision of DNA evidence to establish parentage and testing to ascertain whether a parent had abstained from drugs and/or alcohol in private family law (children) cases. Private law cases are brought by private individuals, generally in connection with divorce or parental separation. These are cases, for example, under section 8 of the Children Act 1989, which can be used to settle where a child lives or issues around parental contact with a child.

The pilot aimed to provide evidence on practice, process and indicative costs to inform any decision to provide funding for a national roll-out of these tests in 2015. MoJ analytical services undertook an evaluation of the pilot in co-operation with HMCTS and Cafcass and their report was published on 16 February 2015 and can be found at:

<https://www.gov.uk/government/publications/process-evaluation-of-the-private-law-children-cases-expert-evidence-pilot>

² The Children and Family Court Advisory and Support Service provides the Judiciary with the advice, information and recommendations they need to make a decision about a child’s future in family courts. Where appropriate such references are intended to cover Cafcass Officers and Officers of CAFCASS Cymru (often referred to as Welsh Family Proceedings Officers).

Purpose of the consultation

The relevant legislation

If a parentage dispute arises in any civil 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 Family Law Reform Act 1969). The detail of how these tests are to be carried out is set out in the 1971 Regulations. The 1971 Regulations set out who may be a “sampler”, and what a sampler must do, as well as who may be a “tester” and what a tester must do.

In the 1971 Regulations, currently “sampler” means:

- a registered medical practitioner,
- a person who is under the supervision of such a practitioner and is either a registered nurse or a registered biomedical scientist, or
- a tester.

A “tester” means an individual employed to carry out tests by a body which has been accredited for the purposes of section 20 of the Act either by the Lord Chancellor or by a body appointed by him for those purposes and which has been nominated in a direction to carry out tests. The MoJ and HMCTS currently maintain a list of accredited testers. The current definition of “sampler” means that sampling is undertaken in accordance with the 1971 Regulations by persons who may or may not be employed by the tester.

Proposals for amendment to the 1971 Regulations

The 1971 Regulations provide for a sampler to take a DNA sample from the party whose parentage is in dispute, and/or from the putative parent(s). In the past, this would have involved taking blood samples. Most often now, a sample is taken by a mouth swab. This means that arguably there is no need for a “sampler” to be medically qualified.

Following on from the evaluation of the pilot, Cafcass proposed that their officers (rather than only a medically qualified person) should be capable of being “samplers”, as part of its plans for the roll-out of the scheme for Cafcass funding court ordered DNA testing. They also proposed that non-medically qualified people appointed by the testers could act as samplers on an occasional basis when the need arose. We therefore sought the views of testing laboratories as to whether the definition of sampler should be opened up to include Cafcass officers, and whether it could cover others too.

Cafcass also proposed that the sampler should be able to supervise a subject taking their own sample, rather than the sampler actually taking the sample. The sampler would ensure that the sample was then sealed appropriately and delivered to the tester’s laboratory (as is already required by the 1971 Regulations). Again we sought the views of the testing laboratories on this.

To enable these proposed changes to take place the 1971 Regulations would need to be amended to redefine “sampler” and to amend the detailed role of the sampler.

Consultees

We were aware that test providers on the MoJ accredited list, and providers who may potentially wish to join the accredited list, would have an interest in these issues. We therefore decided to consult providers on potential changes to the 1971 Regulations. The consultation was also extended to laboratories who expressed an interest in the pilot. The consultation also provided details of how to apply for accreditation which can be found at:

<https://www.gov.uk/get-laboratory-accreditation-to-carry-out-paternity-tests#apply-for-accreditation>

The consultation sought views on proposals to amend the 1971 Regulations to allow a wider definition of who can take the sample and the procedures to be followed e.g. supervising DNA self-sampling by mouth swab using a kit provided by an approved tester and to arrange for the delivery of the sample to the tester.

In particular we were interested in views on whether the current definition of “sampler” is too restrictive given the now widespread use of DNA testing using non-invasive methods such as mouth swabs. We wanted to know if testing providers considered whether Cafcass officers, or anyone else, should be able to undertake these roles.

It is vital that the court can rely on the evidence with which it is provided. We, therefore, also welcomed views on whether any changes could undermine the current protections provided by the definitions and procedures in the 1971 Regulations. We were keen to hear views on whether, in the event of any changes, any additional safeguards would be needed to maintain and protect the credibility of the sampling process.

Summary of responses and Ministry of Justice response

A total of 9 responses to the consultation paper were received. Responses were received from MoJ accredited laboratories (out of a total of eleven accredited laboratories) and 1 currently non accredited laboratory. A summary by question is set out below.

1. Do you agree with the proposal to widen the scope for those able to supervise DNA sampling to Cafcass officers and the “testers”?

There was unanimous support for this proposal providing the necessary training was provided for the sampler with one respondent stating *“This is long overdue”*.

Training was considered a priority to ensure the samples were taken correctly to avoid re-testing, which would create delays in producing testing reports and increase the overall costs. Training was a recurrent theme in the response and further suggestions are included with the individual answers below. Annual assessments for samplers were also a recurrent theme.

It was proposed the training should include the chain of custody procedure³ and that consent documentation⁴ needed to be copied to the testing laboratory. It was also suggested a colleague may be required to witness the sampling procedure.

Ministry of Justice response

We agree with the responses that appropriately trained Cafcass officers and other people appointed by the testing laboratories should be permitted to supervise DNA sampling. As already required by the 1971 Regulations the consent (or otherwise) of the person being tested (or an appropriate adult) should be documented and the chain of custody procedure followed.

We consider the proposal to have a witness to the sampling to be an unnecessary cost and complication and trained samplers should not require it. We are also not aware of other similar situations where a “witness” is used.

Q2. Do you agree with the proposal for the sampler to supervise self-sampling?

Although three of the responses agreed in principle to this proposal under certain conditions the remainder were against with one respondent stating *“We do not understand the benefits of self-sampling, considering the supervisor would have to*

³ By “chain of custody” we mean the documentation, photographs and tamper proof envelopes used in the sampling process, which mean that the laboratory can be sure who the sample belongs to and that it has not been contaminated.

⁴ Generally, a test will not be undertaken without the consent of the adult being tested and each adult is required to sign a consent form. For a child, a person with care or control of the child will need to sign a consent form. The court can order that the sample be given even if there is no consent.

be present at all times during the collection.” It was also pointed out the sampler would need to take the mouth swab from babies and young children.

The key risk identified was that of poor sampling. Although the procedure is relatively simple mistakes can be made resulting in an unacceptable sample. Concerns were also expressed around the potential for fraud by the person being sampled if they took their own swab, and the need for avoiding any cross contamination in packaging the sample.

Ministry of Justice response

Although we accept that there can be certain risks to self-sampling, in the cases where Cafcass officers are to be samplers, Cafcass are proposing to mitigate against these through the following steps:

- Theoretical and practical training of staff by a tester, or under arrangements made by a tester, with certification and performance monitoring, and annual refresher training.
- Sample supervision will only be undertaken by trained staff, with on line and telephone support.
- All Cafcass sample supervisors will be Health and Care Professions Council (HCPC) registered Social Workers; Cafcass intend to use a limited group of nominated Social Workers in Enhanced and Management positions
- Contract management with the testing laboratory appointed to undertake the tests which Cafcass is funding, to consider responses to patterns of poor sampling.
- Use of straightforward sample kits, consent and chain of custody processes in controlled environments.
- Possibly second sampling by a person appointed by the tester in cases where paternity is not proved by the first samples.
- Use of samplers appointed by the tester where there is doubt about sample supervision being sufficient (highly litigious cases, very small or timid children, cases where the Cafcass sample supervisor has any doubt about the validity of the sample taken).
- Monitoring and stakeholder feedback throughout the year to apply lessons learned and adjust practice as necessary.

We note the widespread availability of self-sampling kits for ‘peace of mind’ testing by parents, which gives confidence that self-sample collection is reliable. The use of a sample supervisor is to assure the correct procedures are followed to satisfy the court. Cafcass are of the view that the supervision role is appropriate for a Social Worker, and well within their competence to deliver.

Given the concerns raised we intend to draft the changes to the 1971 Regulations so that there are two new categories of testers, namely trained Cafcass officers (who will be able to supervise mouth swab sampling) and trained people appointed by a tester (who will be able to supervise or take mouth swab samples). Cafcass officers will only be able to be samplers in cases where the court has ordered DNA tests of its own initiative in a case under section 8 of the Children Act 1989. In essence, these will be cases in which Cafcass is funding the costs of the DNA test.

A non-medically qualified person appointed by a tester will be able to be a sampler in any case where DNA testing is ordered by the court under section 20 of the Family Law Reform Act 1969, as long as the person is trained and as long as the sample is to be taken by way of a mouth swab.

Q3. Do you have any comments on whether the sampler needs to be medically qualified?

There was unanimous agreement that the sampler did not need to be medically qualified with a typical response being “*There is no requirement for people taking mouth swabs to be medically qualified as this is a non-invasive procedure...*”.

The key issue again was the need for the sampler to be appropriately trained to an agreed level of competence. However, it was pointed out that in some albeit very rare circumstances the donor may insist on a blood sample for a variety of reasons and if this situation arises the current procedures will need to be followed. The point was also made around the need for a sensitive and understanding approach to be taken by the sampler (particularly with children) and the need for an “unbiased” party.

Ministry of Justice response

We agree that where a sample is to be by way of a mouth swab the sampler does not need to be medically qualified. Issues were raised by respondents around the need for additional skills over and above the sampling technique and recording procedures, such as sensitivity to the situation and working with children. This was one of the reasons behind the proposal to use experienced Cafcass officers who are skilled in working with families and children who may find themselves in these highly charged and emotional situations. Indeed the families being tested may already be working with Cafcass. HCPC registration of all Cafcass sample supervisors will ensure that staff are working within a strong ethical and professional framework.

We agree that on the rare occasions there are specific reasons an individual will only agree to a blood sample then current sampling procedures will need to be provided by the testing laboratory.

Q4. Are there any safeguards that need to be maintained or inserted in to the Regulations if the definition and role of a “sampler” were to change?

A number of suggestions were made not least of all in respect of training in which common theme was “*samplers should be required to undergo training by a testing laboratory*” to address issues such as legalities around taking DNA samples; donor identity verification and chain of custody; knowledge of the Human Tissue Act; and recording consent. Other issues raised were appropriate child safety checks for samplers and the avoidance of the term “saliva” in relation to mouth swabs as this is **not** what is being tested.

Ministry of Justice response

We agree with the common theme in response to this question, and across all the questions, namely the need for thorough initial training for the sampler and annual “refresher” training.

In the case of Cafcass officers who are “samplers”, this will be fully covered in the contract between Cafcass and the testing laboratory appointed to undertake the tests in cases where Cafcass is funding the cost of the test. It is intended that the safeguards will ensure compliance with the 1971 Regulations and will include:

- Samplers verifying the identity of the person being sampled (including attaching photographs to documentation) and completion of the appropriate documentation as required by the 1971 Regulations and as agreed with the testing laboratory;
- The sampler being independent and having no personal interest in the outcome of the test;
- Samplers following the agreed collection process and chain of custody;
- Ensuring that samplers are aware of the legalities around DNA testing (including knowledge of the Human Tissue Act) and the issue of **informed consent** through appropriate training;
- Samplers meeting the required safeguarding legislation e.g. DBSCR B checked. This would be met by the plan to use Cafcass officers who are already acceptable to the courts in terms of dealing with sensitive or court related matters; and
- On the rare occasion that DNA collection has to be by another source apart from mouth swab, this being undertaken according to the requirements for that sampling method e.g. blood sampling will still require a suitably qualified medical person.
- The misleading term “saliva” not being used in the regulations of any supporting training material.

In the case of “samplers” appointed by testers, the testing laboratory must ensure that all staff performing or supervising 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

If a Cafcass officer or a laboratory appointed person has not taken the sample 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.

Q5. Are there any other specific issues you would like to raise in relation to DNA testing and the proposed new system in private family law (children) cases?

The main theme again in response to this question was around training with a typical response being *“We support the proposed changes with the provision that there is appropriate educational and practical training and appropriate security and safety measures are in place to ensure and maintain the chain of custody process.”*

It was also suggested that there needs to be a better understanding of the science behind DNA sampling to ensure the testing results are interpreted correctly and this again should form part of any training.

A query was also raised around the future timetable for rolling-out DNA testing.

Ministry of Justice response

Responses to this question again focused on the need for appropriate training and agreed documentation, which we fully support. We will further explore the options for training with Cafcass including the initial programme, annual updates and the possibility of web-based training. We also agree that this training should include an understanding of the reports that are produced.

As to the timing, steps will now be taken to amend the 1971 Regulations in accordance with the responses to the consultation, as set out above. Our aim is to lay the amendments to the Regulations around the same time this document is published towards the end of October.

Overview

There was an overwhelmingly positive response to the proposal to update the provisions about “samplers” in the 1971 Regulations. Respondents agreed there is no need for the sampler to be medically qualified as currently defined in the 1971 Regulations and that DNA sampling by mouth swabs can be undertaken by appropriately trained Cafcass officers or samplers appointed by the testing laboratory.

A key driver to the success of these changes will be the training for those taking or supervising the taking of samples. We particularly welcome the detailed suggestions for training provided by the respondents and Cafcass will now take these forward with the testing laboratory it appoints to undertake tests in the cases Cafcass is funding.

Cafcass will be arranging the delivery of training by their appointed testing laboratory to selected groups of staff across England and including Cafcass Cymru staff where appropriate. This training will be mandatory to those nominated groups of staff prior to undertaking any sample supervision. Performance reviews, refresher training and updates will also be mandatory for all sample supervisors. Cafcass will also monitor performance and delivery on the contract it enters into with a testing laboratory.

Conclusion

The recommended amendments are:

- The current definition of a sampler will be changed. Those who may currently be “samplers” (being a medically qualified practitioner, or a person who is under supervision of such a practitioner and is either a nurse or a registered biomedical scientist, or a tester) will remain, but additions will be made.
- The additions will mean that an appropriately trained Cafcass officer may also be a sampler in cases where the sampling will be by mouth swab where a court has, of its own initiative, ordered DNA testing in a case under section 8 of the Children Act 1989. Such a Cafcass officer will be able to supervise the giving of mouth swab samples.
- The additions will also mean that an appropriately trained person appointed by a tester will be able to be a sampler where the sampling will be by mouth swab. Such a sampler will be able to take the sample, or supervise the sample being given.
- Those undertaking sampling must receive appropriate training from a “tester” or under arrangements made by a tester. A tester is a person employed to carry out tests by a body that has been accredited for those purposes by the MoJ.

The MoJ are grateful for all of the comments and views received during this consultation. DNA testing is a very specialist area and the development of the amendments to the 1971 Regulations is therefore not something that the MoJ, or Cafcass, could have proceeded with in isolation.

We have paid careful attention to all of the responses received and they have helped us refine our proposed next steps for these amendments.

We must be clear that these amendments to the 1971 Regulations have been developed with the aim of improving outcomes for parents and children in family proceedings by reducing delay and cost and improving the availability of expert evidence.

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