CONSULTATION REPORT – CASE MANANGEMENT OF FAMILY AND CIVIL PARTNERSHIP ACTIONS IN THE SHERIFF COURT

Purpose

1. To provide the Committee with a report on responses to the consultation on the case management of family and civil partnership actions in the sheriff court.

Background

2. The consultation on the case management of family and civil partnership actions ran from 31 May until 22 August 2018. Twenty responses were received from a range of consultees, broken down as follows: 6 judiciary; 4 professional legal bodies; 3 third sector; 2 national public bodies; 2 arbitration/mediation bodies; 1 law firm; 1 academic researcher; and 1 member of the public.

3. This report presents a high-level summary of the responses. A paper with policy discussion and recommendations for policy decision by the Committee will be prepared for the next appropriate meeting. An overview of the responses is provided at **Annex A.** A list of respondents who gave permission for their response to be made public is provided at **Annex B**.

Summary of responses

Recommendation 1: The scope of application of new provisions for case management

4. 17 respondents answered this question: 13 respondents agreed with the recommendation, 3 disagreed, and 1 was not sure.

5. The majority of respondents agreed that more effective and proactive judicial case management of family and civil partnership actions is required, and that cases involving divorce or financial craves should be subject to the same case management rules as cases with a crave for a section 11 order. One respondent commented that attempts to implement case management in cases other than those involving a crave for a section 11 order are being hampered by the lack of rules at present.

6. Two respondents agreed with the recommendation but qualified their support by suggesting that it is essential that there is a defined point in the process when the

pleadings are in their final form and that the powers contained in the existing rule 33AA(4) should be preserved.

7. Of those who disagreed, one respondent argued that the current rules are adequate and the issue is lack of sufficient funding and facilities to allow more time to be taken over each case. Another was concerned that the abolition of Chapter 33AA would remove the pre-hearing conference, which was described as a potential settlement tool for agents.

8. One was not sure that the recommendation would help increase the safety of women, children and young people experiencing domestic abuse.

Recommendation 2: The structure of hearings in family and civil partnership actions

9. 17 respondents answered this question: 9 respondents agreed with the recommendation and 8 disagreed.

10. In this case, the numbers of "agree" and "disagree" responses alone are not particularly informative. Respondents who agreed with the recommendation overall did not support certain elements of it, and vice versa. For that reason, this summary focusses on the main themes that emerged from the responses.

Removing options hearings and pre-proof hearings

11. Some respondents were concerned about the proposal to remove options hearings without there being a fixed time limit for the adjustment of pleadings and submission of a record. Although this point requires further analysis, it is worth noting that at present, there is no requirement to have an options hearing in a case where the only matter in dispute is a crave for a section 11 order.

12. Some respondents submitted that the pre-proof hearing should be retained as it has a distinct purpose that cannot be covered by a case management hearing.

The first child welfare hearing

13. The proposal that the first child welfare hearing should not normally be fixed until the initial case management hearing raised some concerns. Respondents suggested that this could have the unintended consequence of creating procedural delay in two ways: firstly, decisions on interim orders for children could be delayed by a period in excess of 12 weeks; and secondly, the sheriff may need to assess the parties' behaviour at an early child welfare hearing in order to make effective case management decisions.

Combining the child welfare hearing with the initial case management hearing

14. A number of respondents expressed support for combining the child welfare hearing and initial case management hearing. It was suggested that the initial case management hearing should not require too much time and so the impact on court programming of combining these hearings would not be great.

The timing of hearings and for adjustment of pleadings

15. Some respondents, who supported early judicial involvement by way of an initial case management hearing followed by a full case management hearing, also noted that the initial case management hearing should be fixed earlier than the recommendation proposes. It was suggested that the 28 day limit on fixing a continued hearing is unrealistic.

16. Concerns were noted about the feasibility of expecting agents to adjust pleadings in a period of around 28 days between the initial and full case management hearings, given that 10 weeks is currently permitted in the rules. It was suggested that the period for adjustment should commence when defences are lodged.

17. One respondent said the proposal that a proof diet should be fixed only when the sheriff is satisfied that the matter is ready to proceed will only be effective if courts can provide an early proof date. Impetus will be lost if the date is several months away.

The two-track structure

18. A number of respondents took issue with the proposed two-track structure. This may be due, in part, to terminology. One respondent noted that due to the nature of litigation, cases on the *proof track* may frequently conclude before cases on the *fast track* so different names should be used.

19. However, the main concerns were that the proposed two-track structure is needlessly complex and that it is not always possible to separate the issues raised at child welfare hearings from those raised at case management hearings.

Recommendation 3: The pre-hearing conference and joint minute

20. 17 respondents answered this question: 10 respondents agreed with the recommendation, 5 disagreed, and 2 were not sure.

21. Respondents who supported this recommendation welcomed the removal of a procedural step that may be unnecessary, and suggested that it could result in more sensible case management, greater flexibility and a reduction in litigation costs.

22. Those who disagreed argued that the pre-hearing conference and joint minute are valuable procedural tools which focus parties on the relevant issues in

dispute. One respondent said that attendance at procedural hearings and options hearings do not bring home the seriousness of litigation to parties in the way that attendance at a pre-hearing conference does.

23. One respondent commented that it is wrong to assume that section 11 cases are, by definition, likely to be the less complex family actions given that some may have a domestic abuse background.

24. Some respondents who were not supportive of the recommendation suggested that an alternative approach might be for the pre-hearing conference and the joint minute to remain mandatory, but that the sheriff should have the power to dispense with them.

Recommendation 4: Keeping the number of child welfare hearings under review

25. 17 respondents answered this question: 7 respondents agreed with the recommendation and 10 disagreed.

26. Many respondents felt that part (d) of this recommendation is unnecessary. Two selected the "disagree" answer due to part (d), even though they indicated support for parts (a), (b) and (c). One agreed with the recommendation but said point (d) is unnecessary.

27. One respondent favoured a finite number of child welfare hearings but recognised this might not give the court sufficient flexibility. Another welcomed the proposal which enables the sheriff to "call in" a case to review progress as a way to address unnecessary delay and drift, which is not only contrary to the best interests of children but has significant cost implications.

28. Respondents who disagreed with this recommendation were forthright in expressing their concerns. One respondent could not understand the reasoning behind the proposals, stating that the child welfare hearing already serves as a means to consider exactly where the case stands and how it should be progressed. Another commented that the proposals are "*unnecessary, inflexible and…restrict the sheriff's ability to manage a case appropriately*".

29. There was opposition to the proposal that there should be a fixed timescale for the resolution of cases or a set number of child welfare hearings. It was suggested that the proposals run the risk of discouraging the use of a series of child welfare hearings to effectively manage a case to conclusion and may lead to more cases proceeding to proof.

Recommendation 5: Sisting family and civil partnership actions

30. 17 respondents answered this question: 12 respondents agreed with the recommendation, 4 disagreed, and 1 was not sure.

31. While there was broad support for this recommendation, it was noted that the proposals may not work well for hard to resolve cases which may not have been allocated to the proof track. It was suggested that parties must retain the ability to request the court to recall a sist earlier should there be a material change in circumstances. The procedure ought to permit a joint motion (or motion of consent) to be made, asking the sheriff to extend the sist and discharge the review of sist hearing in order to avoid an unnecessary court hearing.

32. One respondent was concerned that the proposals will significantly increase the workload of courts and that the *review of sist hearing* risks inflaming or re-igniting issues the parties may be in the process of resolving. Another felt the proposals could cause unnecessary pressure in cases where the parties are genuinely motivated to resolve issues but require adequate time to do so.

33. Two respondents said that the court should have the power to sist the case without setting a time limit but should periodically check sisted cases administratively.

34. One respondent suggested that the sheriff should be able to fix a child welfare hearing at a review of sist hearing.

Recommendation 6: Abbreviated pleadings

35. 17 respondents answered this question: 10 respondents agreed with the recommendation, 4 disagreed, and 3 were not sure[1].

36. A number of respondents who supported this recommendation said that in family and civil partnership actions there is a problem with the pleading of evidence rather than fact. Some suggested that practitioner training or guidance or a court practice note would be an effective way to address this problem, rather than making provision in court rules.

37. One respondent supported the recommendation, "*provided the rules make provision that a party must give clear notice in their pleadings of any line they intend to take at proof".* That respondent suggested the wording of the Sheriff Principal's Practice Note No. 1 of 2018 for Glasgow and Strathkelvin for Children's Referral cases at para 4.21 might provide a way to address the 'fair notice' issue.

38. The main concerns about this recommendation were as follows:

[1] In the 'not sure' total, we have included one respondent who ticked both the 'disagree' and 'not sure' boxes, but whose comments were more in line with a 'not sure' response.

- knowledge and understanding of what has occurred in a family are relevant to determining the future welfare of the children affected and there is a risk that issues that are highly pertinent to the welfare of the child, which the court should be aware of, may not be put to the court;
- one respondent said that *"it is safer to aver too much than too little in case one is stopped from leading evidence"*;
- case management provisions, if properly utilised, should allow sheriffs to deal with irrelevant pleadings, and the court timetables should allow sufficient time for case management hearings to allow this to be done;
- without sufficient factual background, it may be very difficult for the court to decide whether a case ought to proceed down the proof or child welfare hearing route;
- limiting the narration of the long-term impact of domestic abuse would be wholly inappropriate and risks omitting crucial detail about the perpetrator's persistent and varied behaviours which are contrary to the child's welfare and best interests.

Recommendation 7: Witness lists

39. 17 respondents answered this question: 14 respondents agreed with the recommendation, none disagreed, and 3 were not sure.

40. Although there was no disagreement with this recommendation, some respondents raised concerns that stating in 'brief general terms' what each witness is going to speak to may not give the sheriff enough information to decide whether a witness is relevant, and risks valuable evidence being lost. It was suggested that care would have to be taken that solicitors are not unduly pressurised by the court not to call witnesses.

41. One respondent was not sure whether the recommendation would be counter-productive in cases involving domestic abuse. They saw a potential risk in witnesses becoming unwilling to give evidence if perpetrators of domestic abuse knew in advance the likely nature of the evidence.

42. One respondent suggested that the witness list should also include an estimation of the duration of each witness's evidence.

Recommendation 8: Judicial continuity

43. 18 respondents answered this question: all 18 respondents agreed with the recommendation.

44. All of the respondents who answered this question supported the recommendation. Some acknowledged the practical difficulties in achieving sustained judicial continuity, along with the need for training to ensure consistency in judicial decision making. Some pointed out that consideration would need to be given on a case by case basis as to whether the sheriff who presided over the child welfare and case management hearings should also preside over the proof.

Recommendation 9: Alternative Dispute Resolution

45. 18 respondents answered this question: 11 respondents agreed with the recommendation, 3 disagreed[2], and 4 were not sure[3].

46. Respondents who agreed with this recommendation suggested that parties must be allowed to address the court on the appropriateness of mediation; that no one should be pressured into mediation, particularly where there are allegations of domestic abuse; and that no adverse inference should be drawn from a party's unwillingness to attend mediation. One respondent proposed allowing a referral to arbitration as well as mediation.

47. Two alternative approaches were suggested:

- in their pleadings, parties could be required to outline what steps they have taken to settle the dispute extra-judicially, which would allow ADR to be considered at the warranting stage;
- rules could require the sheriff to ask parties' views on ADR at the initial case management hearing

48. One respondent disagreed with the recommendation on the basis that the absence of a power to refer parties to mediation does not prevent the court from exploring ADR if it is considered it might be of assistance.

49. The strongest opposition came from a respondent who asserted that "*the majority of family mediators are not trained in family law*" and another who expressed concerns that there would continue to be "*inappropriate referrals*" to mediation of cases with a domestic abuse background.

Recommendation 10: Expert witnesses

[2] In the 'disagree' total, we have included one respondent who did not tick any box, but whose comments aligned with a 'disagree' response.

[3] In the 'not sure' total, we have included one respondent who ticked both the 'disagree' and 'not sure' boxes, but whose comments were more in line with a 'not sure' response.

50. 17 respondents answered this question: 11 respondents agreed with the recommendation, 5 disagreed, and 1 was not sure.

51. One respondent commented that this recommendation has the potential to provide a sheriff with greater case management flexibility but that any rules must be framed in such a way that it is clear the sheriff can encourage but not compel the joint instruction of experts. Others qualified their support by noting that there will be situations where more than one expert will be required.

52. A respondent who disagreed said that this recommendation could put an *"unnecessary restriction*" on the ability of parties to "*elicit such evidence as they see fit to advance their case*" and "*encourage a shift towards a more inquisitorial process*. *It can be appropriate for a party to an action to seek to challenge opinion evidence from one expert and to lead contradictory opinion evidence from another expert. In these circumstances it is appropriate that both opinions are heard"*.

53. Another respondent had concerns that this recommendation could have a negative impact on cases involving domestic abuse in case the joint instruction of a single expert led to domestic abuse not being given proper consideration.

Recommendation 11: Minutes of variation

54. 17 respondents answered this question: 13 respondents agreed with the recommendation, 3 disagreed, and 1 was not sure.

55. There was broad support for the idea that the procedure in principal proceedings should also apply to post-decree minutes for variation. However, those who disagreed felt that there might be delay if an initial case management hearing, rather than a child welfare hearing, had to be fixed on the lodging of a minute, given that the variation is likely to relate to the child's welfare. Some also felt that the initial case management hearing should only be fixed when answers are lodged.

Question 14 – a 'fast track' for cases without a crave for an order under section 11 of the Children (Scotland) Act 1995

56. 17 respondents answered this question: 3 respondents agreed that there should be a separate fast track for cases without a section 11 crave, 11 said there was no need for a separate fast track, and 3 were not sure.

57. There appeared to be confusion among some respondents as to the meaning of this question. Some answered the question as if it were asking for views on the issue of a fast track in section 11 cases, rather than in cases without a section 11 crave. However, the majority of respondents did not see any need for a fast track.

Additional comments by respondents

58. Question 15 asked if respondents had any additional comments. The following issues were raised:

- Decoupling S.11 craves from financial and divorce craves
- Evidential child welfare hearings
- Appealing a case can hold up progress in the lower court
- The risk of family case management hearings being dealt with in a perfunctory way in general civil courts
- Hearing the voice of the child
- Ensuring that survivors/victims of domestic abuse are protected
- The need for drastic alteration of the legal aid payment regime if an options hearing will no longer be held
- Lack of clarity on the Rules Rewrite Project.

59. This list is not exhaustive, and further analysis will be required in order to identify points which have a bearing on the recommendations, or which fall out with the scope of the Committee's work on case management.

Publication of responses

60. 16 responses were published on the Council's website on 13 September 2018.

Next steps

61. The secretariat and LPPO will carry out further analysis of the responses and prepare a paper with policy discussion and recommendations for policy decision for the next appropriate meeting.

Recommendation

62. **The Committee is invited to note this consultation report and provide initial views on the responses.**

Scottish Civil Justice Council Secretariat
October 2018

ANNEX A: OVERVIEW OF RESPONSES

	Agree	Disagree	Not sure	No answer	Total
Recommendation 1	13	3	1	3	20
Recommendation 2	9	8	0	3	20
Recommendation 3	10	5	2	3	20
Recommendation 4	7	10	0	3	20
Recommendation 5	12	4	1	3	20
Recommendation 6	10	4	3	3	20
Recommendation 7	14	0	3	3	20
Recommendation 8	18	0	0	2	20
Recommendation 9	11	3	4	2	20
Recommendation 10	11	5	1	3	20
Recommendation 11	13	3	1	3	20
Question 14	3	11	2	4	20

ANNEX B: LIST OF RESPONDENTS WHO GAVE PERMISSION TO PUBLISH THEIR RESPONSE

(In alphabetical order)

- **Abused Men in Scotland**
- **Brodies LLP**
- **Dr Kirsteen Mackay**
- **Faculty of Advocates**
- **Families Need Fathers Scotland**
- **Family Law Arbitration Group Scotland (FLAGS)**
- **Glasgow Bar Association**
- **Law Society of Scotland**
- **Maureen McVey**
- **Relationships Scotland**
- **Scottish Courts and Tribunals Service**
- **Scottish Legal Aid Board**
- **Scottish Women's Aid**
- **Sheriffs' Association**
- **Sheriffs' Working Group on Family Law for Sheriffdom Of Tayside Central and Fife**
- **Society of Solicitor Advocates**