SCOTTISH CIVIL JUSTICE COUNCIL: FAMILY LAW COMMITTEE

POLICY PAPER BY THE SCOTTISH GOVERNMENT

FAMILY JUSTICE MODERNISATION STRATEGY

CASE MANAGEMENT IN FAMILY ACTIONS

Introduction

1. This policy paper by the Scottish Government proposes changes to improve case management in family actions.

2. This is an open paper.

3. In preparing this paper, the Scottish Government has drawn on a number of sources, including:

- The Report of the Scottish Civil Courts Review, published in September 2009.[1] [The Scottish Civil Courts Review, chaired by Lord Gill, is referred to in this policy paper as "the SCCR". There are some references in the SCCR to district judges: this was the original name for what became summary sheriffs].
- The Supreme Court case of *NJDB v JEG*[2] and the subsequent European Court of Human Rights case.[3]
- The Supreme Court case of *ANS v ML*.[4]
- The Court of Session case of *SM v CM*.[5]
- The report to the Lord President by the Joint Working Group on Family Actions, set up to consider the comments made by the Supreme Court in *NJDB v JEG* and *ANS v ML,* produced in March 2013. [The Joint Working Group on family actions is referred to in this policy paper as "the JWG"].
- The Family Justice Modernisation Strategy Summit held by the Scottish Government in 2016[6]. [The Family Justice Modernisation Strategy is referred to in this policy paper as "the FJMS"].

4. The Scottish Government is also aware that the research for the Family Law Committee by Dr Richard Whitecross on case management in family actions is expected shortly.

5. The focus of this paper is on family actions which involve children. In preparing this paper, the Scottish Government has borne in mind the key principle that the welfare and wellbeing of the child should be paramount.

[1] https://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform
[2] https://www.supremecourt.uk/decided-cases/docs/UKSC_2011_0173_Judgment.pdf
[3] http://hudoc.echr.coe.int/eng#{"itemid":["001-158160"]}
[4] https://www.supremecourt.uk/cases/docs/uksc-2012-0105-judgment.pdf
[5] https://www.scotcourts.gov.uk/search-judgments/judgment?id=434c27a7-8980-69d2-b500-ff0000d74aa7

[6] The outcomes of the Summit are at http://www.gov.scot/Resource/0050/00507357.pdf

Time for implementing recommendations

6. Many of the areas where the Scottish Government has made recommendations are not straightforward and would take time to consider and implement.

The priority is the sheriff court

7. The vast majority of family actions are heard at first instance in the sheriff court rather than in the Court of Session: the statistics suggest that just over 1% of family actions are in the Court of Session[7]. As a result, the recommendations below concentrate on the sheriff court.

Time taken in family actions

8. It has been recognised for some time that some family actions in the courts can take longer than is desirable and that there can be undue delay in some actions. As the courts have laid down on a number of occasions, delay in family actions involving children runs contrary to the child's best interests. Annex A to this paper provides a summary of quotes from relevant judgements and reports. Annex A is just a brief summary of relevant quotes: it is not to be regarded as comprehensive.

9 The Scottish Government and the Scottish Courts and Tribunals Service do not hold statistics on how long family actions take. Anecdotally, the Scottish Government understands that, for example, a disputed contact case or a disputed permanence order case can take around 18 months. We also understand that there are varying practices across Scotland in relation to case management in family actions. The Scottish Legal Aid Board does have some statistics on how long family actions take and these are outlined in Annex B. Annex B also provides some statistics on correspondence received by the Scottish Government on contact and residence.

Summary

10. For convenience, a summary of the recommendations in this policy paper is at Annex C. When they appear in the main body of this paper, the recommendations are in a box.

11. The Scottish Government is aware that the Rules Rewrite Committee (the RRC) is considering issues in relation to case management generally. The Scottish Government understands that there will be a presentation on the work of the RRC at the FLC meeting on 8 May. Areas which the Scottish Government understands are being taken forward by the RRC, and which are directly relevant for case management in family actions, are outlined in Annex D.

12. There are some areas which are directly relevant for case management in family actions where the Scottish Government is making no recommendations. These areas are listed in Annex E.

Child Welfare Hearings and undue delay

13. Child welfare hearings were established in 1996. They are held if the granting of an order under section 11 of the Children (Scotland) Act 1995 is opposed or if the sheriff considers a child welfare hearing should be heard. The Scottish Government commissioned research (published in 2010) on "Understanding Child Contact Cases in Scottish Sheriff Courts" which included material on

[7] Statistics on family actions are at http://www.gov.scot/Publications/2016/03/6429/21 (Court of Session) and at http://www.gov.scot/Publications/2016/03/6429/22 (Sheriff Court).

child welfare hearings[8] and carried out research (published in 2011) on child welfare (bar) reports, which also included some material on child welfare hearings.

14. The Scottish Government recognises the benefits which child welfare hearings can have. One of the points made at the Family Justice Modernisation Strategy Summit was that the concept of child welfare hearings works. In contact and residence cases, the parties may well be entrenched and not have a good relationship with each other. Child welfare hearings can enable parties to be heard in a more informal setting and can help to bring them together. The simple abolition of CWHs (by revoking the rules) would be likely to lead to more cases going to proof unnecessarily.

15. However, the Scottish Government does have some concerns that CWHs may in some cases contribute to undue delay, given the number of hearings: On this:

- The research on Understanding Child Contact Cases in Scottish Sheriff Courts noted in paragraph 4.4 that "some sheriff clerks were of the opinion that CWHs tended to result in relatively long family actions".
- This research also said (paragraph 4.37) that "some pursuers appeared to feel lost in a cycle of hearings" and that "many pursuers were concerned about an apparently open-ended sequence of hearings".
- This research noted that out of 52 cases, "there were instances of people attending up to twelve" CWHs (paragraph 4.2) and "the median number of CWHs per case recorded on the CMS [Case Management System] was 2, with a range from 0 to 12. In 49 per cent of cases there had been three or more CWHs, and in 21 per cent there had been six or more." The Scottish Government has received correspondence suggesting that in some cases there are more CWHs.
- The FJMS summit noted that "procedural hearings can be beneficial – but they need to be managed appropriately and there are often too many of them."

16. There have been previous attempts to tackle undue delay in this area. Chapter 33AA of the Ordinary Cause Rules, on expeditious resolution of certain causes, was put in place following *NJDB v JEG* in the Supreme Court and following the recommendations of the JWG. Under Chapter 33AA.1, these rules apply "where a cause is proceeding to proof or proof before answer in respect of a crave for an order under section 11 of the Children (Scotland) Act 1995 (court orders relating to parental responsibilities etc.)".

17. Previous research commissioned by the Scottish Government suggested that relatively few of these cases actually proceed to proof[9]. As a result, the practical impact of Chapter 33AA is likely to be limited.

18. The Report of the SCCR said generally [recommendation 59, contained in paragraph 74 of Chapter 5] that "a case management hearing will be heard two weeks after defences are lodged and will normally be conducted by telephone or video conferencing. It will be open to parties to request that the case management hearing takes place in open court". Recommendation 67 [contained in paragraph 91 of Chapter 5] said that "the first case management hearing would also fulfil the function of a Child Welfare Hearing".

19. This type of issue was considered further by the Court of Session in SM v CM. In paragraph 67, the Court said:

[8] http://www.gov.scot/Publications/2010/12/08145916/7
[9] http://www.gov.scot/Publications/2010/12/08145916/8

" we see no reason in principle why, in most cases, whether at the first Child Welfare Hearing under Rule 33.22A of the Ordinary Cause Rules, if one is held, or (if there is no Child Welfare Hearing) on the earliest occasion on which the matter comes before the court, the sheriff should not lay down a strict timetable for all steps leading up to a fixed hearing date of a fixed duration (to come on within a matter of weeks or, at most, a few months) and give such further directions as regards witnesses, affidavits, reports, admissions and the like as are needed to ensure not only that the case comes to a hearing at the identified date but also that it will conclude within the time fixed for that hearing without the need for adjournments or the allocation of additional hearing days. At the same time it should be made clear that the court will expect parties to adhere to this timetable except only on further order made in exceptional circumstances; that interim contact orders are to be obeyed; and that instances of non-compliance will be dealt with promptly without impinging on or delaying the substantive proceedings. It seems to us that, in a case where a Child Welfare Hearing takes place, the Sheriff Court already has such powers under Rule 33.22A(4) of the Ordinary Cause Rules as presently in force. Similar case management powers, albeit exercisable at a later stage of proceedings, are conferred by the provisions of Chapter 33AA of the Ordinary Cause Rules. We understand that the case management tools presently available in family actions are under review by the Scottish Civil Justice Council. We welcome such a review".

20. Making provision in rules to ensure that child welfare hearings do not lead to undue delay would also appear to deal at least in part, and in relation to actions under section 11 of the 1995 Act, with recommendation 68 of the SCCR. This said [paragraph 92 of Chapter 5] that:

"We do not consider it necessary to introduce a formal pre-action protocol for family proceedings in Scotland[10], but believe the same result can be obtained by the sheriff or district judge taking a firm approach and making the requirement for full and early disclosure at the first case management hearing. Active case management throughout the case should include firm action to deal with failure to comply with time limits and control of the use of expert evidence."

21. In light of the points above, the Scottish Government suggests rules be made so that:

21.1 The first hearing in a section 11 case should be a combined case management hearing and Child Welfare Hearing. Key aims of this first hearing would be to clarify and list the issues in dispute (and those about which parties agree) and to set a timetable for the case. (If issues are subsequently resolved at future CWHs, it may be possible to remove them from the list of issues in dispute).

[The Scottish Government appreciates it may not always be straightforward to establish the issues in dispute, particularly, perhaps where there is a party litigant. But it makes sense to try and do this as early as possible in the action]

21.2 A child welfare (bar) reporter cannot be appointed until after a case management hearing has taken place. This means a reporter could only be appointed at the end of the first hearing or at subsequent hearings.

[The Scottish Government can see the argument against this approach – it may be clear from the initial papers that a report will be needed. On balance, however, it seems preferable to include the

[10] Paragraph 92 of Chapter 5 of the Scottish Civil Courts Review noted that in England and Wales a pre-application protocol had been in place since 2000 for family proceedings where there is a claim for periodical payments or a lump sum.

consideration of whether a report is needed in the initial case management hearing so that **all** case management issues can be considered early in the process].

21.3. When there is a fifth hearing (of any description other than a proof) in an action where there is a section 11 crave, the rules should require the court to consider if the case should go to proof. (This may require changes to any previously agreed timetable). The key test for the court must be what would be best for the child.

[It would be possible to have alternative approaches, such as considering the issue every three hearings or considering the issue after a fixed period of time. One possible argument against using a fixed period of time is the action may have been sisted to allow the couple to reach agreement out of court and the couple might have reached such an agreement].

Options hearings

22. The FJMS summit also suggested that Options Hearings should be taken out of family court proceedings. Ordinary Cause Rule 9.2(1A) does already provide that:

"(1A) where in a family action or a civil partnership action –

(i) the only matters in dispute are an order in terms of section 11 of the Children (Scotland) Act 1995 (court orders relating to parental responsibilities etc.); or

(ii) the matters in dispute include an order in terms of section 11 of that Act,

there shall be no requirement to fix an Options Hearing in terms of paragraph (1) above insofar as the matters in dispute relate to an order in terms of section 11(2) of the Children (Scotland) Act 1995"

23. Given the terms of OCR 9.2(1A), the Scottish Government recommends the Family Law Committee consider if there are issues in relation to Options Hearings and family actions which need to be addressed.

Child welfare hearings and domestic abuse

24. The Scottish Government has received correspondence from domestic abuse victims concerned at having to sit at the same table as the abuser at CWHs The Scottish Government has also received correspondence on being excused from attending CWHs (Ordinary Cause Rule 33.22A(5) provides that "All parties (including a child who has indicated his wish to attend) shall, except on cause shown, attend the Child Welfare Hearing personally"). For example, a recent correspondent, who had been the victim of domestic abuse, indicated that she had to obtain a note from her GP to be excused from having to attend child welfare hearings. She contrasted that unfavourably with her experience in the criminal justice system, which had gone to considerable lengths to protect her.

25. In light of the above, the Scottish Government recommends:

25.1 When the court is aware of domestic abuse or violent conduct being alleged or proved in a case, the rules should lay down that the court must take steps to protect the parties at any child welfare hearing. This may formalise arrangements already in place locally. It may, perhaps, be possible for any rules to be based in part on whether there are relevant criminal cases or convictions

or interdicts in place[11].
25.2 Greater clarity in the rules on what "cause shown" means.

26. In the longer term, there may be a need for primary legislation in this area. The Scottish Government intends to consider issues about protecting vulnerable parties in family actions in its forthcoming review of the Children (Scotland) Act 1995. In particular, the Scottish Government intends to consider if there is any need in Scotland for a ban on the personal cross-examination of domestic abuse victims by their abusers, as is planned in the Prisons and Courts Bill south of the border[12].

Expert witnesses

27. Recommendation 117 of the SCCR [paragraph 78 of Chapter 9] said that "we recommend that the provisions in relation to expert evidence which apply to adoption proceedings should be extended to all family actions and children's referrals". The report drew attention, for example, to paragraph 4.3.3.2 of Practice Note 1 of 2006 of the Sheriffdom of North Strathclyde[13]. This provides that

"The sheriff should discourage the unnecessary use of expert witnesses. If expert evidence is essential, the sheriff should encourage the joint instruction of a single expert by all parties. If one party instructs an expert report, it should be disclosed to the other parties with a view to the agreement of as much of its contents as possible."

28. The Scottish Government recommends that rules be introduced to discourage unnecessary use of experts and to require disclosure of information provided by experts to the other parties in an action.

29. There are other recommendations on expert witnesses in Annex D, for the Rules Rewrite Committee.

Curators *ad litem*

30. In *NJDB v JEG,* the Supreme Court commented on the need for clarity on the role of curators *ad litem* [paragraphs 35 to 37 of the judgment refer]. The SCCR also commented on this area (see paragraphs 100 to 113 of Chapter 5). The Joint Working Group said in paragraph 18 of its report that "the Scottish Government has set up a Working Group to consider the role of bar [child welfare] reporters and it may be that those recommendations can be applied to curators also. The JWG agrees that change is necessary but waits to see the outcome of the recommendations put forward by the Scottish Government's Working Group".

31. The proposed scheme put to the Lord President and the Sheriffs Principal on training which child welfare reporters should have would cover curators *ad litem* too.

[11] The Scottish Government is aware of planned rules and a proposed practice direction on vulnerable witnesses in family proceedings south of the border: https://www.gov.uk/government/consultations/vulnerable-witnesses-practice-direction

[12] See clause 47 of the Prison and Courts Bill, as introduced: https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0145/cbill_2016-20170145_en_6.htm#pt2-pb8-l1g47 The UK General Election may impact on this Bill.

[13] Practice Note 1 of 2006 of the Sheriffdom of North Strathclyde is at https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/sheriff-court/north-strathclyde/pn01_2006ns.pdf?sfvrsn=9

32. The replies from the Lord President and the Sheriffs Principal have indicated general support for the scheme but that powers to regulate child welfare reporters and curators *ad litem* are needed. The Scottish Government's initial views on the way ahead on this are:

- The forthcoming review of the Children (Scotland) Act 1995 does provide an opportunity to consider the introduction of powers to regulate child welfare reporters and curators *ad litem* in private family law cases.
- However, this will take some years given the need to consult, find a slot for primary legislation in the Scottish Parliament, take a Bill through Parliament, and then carry out implementation work.
- One option might be to provide in any primary legislation that the courts could only appoint persons to act as child welfare reporters and curators *ad litem* if the persons have qualifications, experience and training laid down by the Scottish Ministers by way of Statutory Instrument.
- The courts could also be empowered not to appoint a person to act as a child welfare reporter or curator *ad litem* (even if the person had the necessary qualifications, experience and training) if the court had concerns, based on previous experience, about a person's performance in that role.
- Existing powers to appoint child welfare reporters and curators *ad litem* in primary legislation and at common law could be removed and replaced by new statutory powers.
- The opportunity could be taken to clarify roles in this area and, perhaps, replace the term "curator *ad litem*" with a term that is more user-friendly for litigants and children.

33. Rules are being made on curators *ad litem* appointed to defenders in family and civil partnership actions, following a policy paper by the Mental Welfare Commission and the Scottish Government.

34. As indicated above, the Scottish Government intends to consider issues on curators *ad litem* as part of its review of the Children (Scotland) Act 1995.

35. However, it does appear to the Scottish Government, based on recent work on child welfare reporters and curators *ad litem* in divorce and dissolution actions, that some work could be taken now in advance of any primary legislation to clarify the remit of curators *ad litem* appointed to children in section 11 cases.

36. Therefore, the Scottish Government recommends rules be made so that:

- Interlocutors appointing a curator *ad litem* in a section 11 case provide the reasons for the appointment and the duties of the curator *ad litem.*
- The court keeps under review the need for the curator *ad litem's* initial appointment. One potential way an appointment of a curator *ad litem* could be kept under review would be to say that after a specified number of hearings (of any description), such as 5, or a specified number of months, such as 6, the appointment should be reviewed.

Alternative Dispute Resolution (ADR)

37. The Scottish Government intends to send this Committee a general policy paper on ADR in family actions and how the use of ADR can be encouraged in appropriate cases. In particular, this is likely to look at:

- provision of information to parties on ADR;
- whether the courts could seek to refer more cases to ADR;
- when ADR may not be appropriate (eg in domestic abuse cases);
- whether court forms and rules could do more to promote ADR;
- consistency of practice.

38. The Scottish Government will also consider the use of ADR in family actions in its review of the Children (Scotland) Act 1995. The Scottish Government will also provide more public-facing information, on mygov.scot, on using minutes of agreement[14], as this is a further way of diverting cases away from court, where that is appropriate.

39. In the meantime, the Scottish Government considers it would be useful to address recommendation 77 of the SCCR which said that "Rule 33.22 of the Ordinary Cause Rules should be broadened to allow referral to mediation of any matter arising in a family action."

40. Ordinary Cause Rule 33.22 currently provides that " In any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may, at any stage of the action, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation". [Currently, the Law Society of Scotland and Relationships Scotland are approved by the Lord President for the purposes of the Civil Evidence (Family Mediation) (Scotland) Act 1995][15].

41. Ordinary Cause Rule 33A.22, for civil partnership actions, is along the same lines, as is Court of Session rule 49.23.

42. The Scottish Government supports the SCCR recommendation and therefore recommends that rule 33.22 and the similar rules for civil partnership actions in the sheriff court and for actions in the Court of Session be amended accordingly to allow referral to mediation of any matter arising in a family action.

43. The Scottish Government suggests, though, that this change will not lead to a major shift. At the moment, the rules refer specifically to "parental responsibilities or rights" which covers the bulk of what family mediation bodies do. However, extending the rule could mean that, for example, any financial issues arising in the course of a family action could be sent to mediation, if appropriate. It seems reasonable to ensure that the rules are wide enough to allow this to happen.

44. The Committee may wish to consider if the rule should be extended to cover other forms of ADR (such as arbitration and collaborative law) as well. One potential issue with that is the Civil Evidence (Family Mediation) (Scotland) Act 1995 (on confidentiality) just extends to mediation conducted by a person accredited as a mediator to an organisation which is approved for the purposes of the 1995 Act by the Lord President.

[14] Mygov.scot is at https://www.mygov.scot/

[15] Relationship Scotland figures for 2015/16 show that there were 153 court referrals to family mediation. This is 6% of the total number of mediation referrals to Relationship Scotland bodies. 33% of mediation referrals come from solicitors or the courts. It does appear that because the court rules are in place, some solicitors will encourage their clients to go to mediation prior to going to court, on the basis that the sheriff/judge will refer them at a later stage if not. So the number of referrals as a consequence of the rule is higher than the 6% which come directly from the courts.

Conclusion

45. The Family Law Committee are invited to note the contents of this policy paper; agree the recommendations; and instruct rules accordingly.

Family and Property Law
Scottish Government
April 2017

ANNEX A: QUOTES FROM RELEVANT JUDGEMENTS AND REPORTS

White v White [2001]

Paragraph 30 of the Court of Session's decision[16]:

" Finally, the time between the lodging and the hearing of this appeal is unacceptable. Cases like this, which involve the welfare of a child, should be heard with the minimum of delay. The Rules of Court already provide for many such appeals to be heard quickly. If necessary, the Rules should be amended so as to ensure that this particular kind of case is also dealt with in that way".

Report of the Scottish Civil Courts Review

Paragraph 82 of Chapter 5 on a new Case Management Model said:

" The Consultation Paper did not ask any questions specifically about family cases, but there were a significant number of responses from practitioners, groups and individuals who had an interest in this field. The written responses and meetings with family practitioners revealed a fairly consistent view about the problems with the current system and what is needed to improve it. Concerns centred round the adverse effect of criminal business on the programming of family cases and difficulties caused by a lack of judicial continuity. Judicial continuity and consistency in family cases were considered by many to be absolutely essential. Lack of knowledge of the case and the inconsistent approaches of different sheriffs could increase parties' anger and exasperation, especially if sensitive information had to be repeatedly provided. Many believed that sheriffs specialising in family cases needed an understanding of family dynamics and the issues surrounding separation, abuse etc, as much as expertise in black letter law. Inquisitorial case management was proposed by many as the way to reduce the number of actions going to proof and to reduce costs by ensuring early disclosure with regard to financial matters and early focusing of the issues in dispute. There was also support for greater judicial control over the use of expert evidence. For situations where a hearing is required, it was suggested that specialist sheriffs should travel between the courts and/or use videoconferencing, particularly for procedural matters."

NJDB v JEG in the Supreme Court

There were various comments on procedures in the sheriff courts. Paragraph 21 of the judgement included the sentence:

"The glacial pace of the proceedings was itself inimical to the best interests of the child."

NJDB v the United Kingdom

Paragraph 45 includes the following:

"The Court has established in a number of cases, including those brought against the United Kingdom, its practice concerning complaints of excessive delay in family proceedings"

Paragraph 38 made reference to a declaration provided to the court by the UK authorities which provided details of steps taken to address issues on the duration of proceedings in the civil courts in Scotland:

[16] http://www.bailii.org/scot/cases/ScotCS/2001/48.html

"As Lord Reed observed in the UK Supreme Court, the dispute in this case took so long to resolve 'only because the court allowed the parties to determine the rate of progress'. Concrete steps have been and are being taken to address this. New Rules of Court were made in April 2013 providing for enhanced judicial case management powers in certain family cases, including cases involving applications for orders under section 11 of the Children (Scotland) Act 1995. Most of the changes were made to address concerns raised in the present case.

The Scottish Government has embarked upon a major programme of reform of the civil courts in Scotland. That programme of reform is directed inter alia to minimise problems with delay. It follows the Civil Courts Review, headed by Lord Gill, and mentioned by Lord Reed in the decision of the Supreme Court. In particular, the Review recommended: (i) that cases should, in general, be subject to judicial case management; (ii) that a docket system should be introduced, with a view to securing judicial continuity; and (iii) that there should be greater specialisation in the sheriff court, with one of the areas of specialism being family law.

The Scottish Government have consulted on the proposals in the Civil Courts Review. The Scottish Civil Justice Council (which will have the responsibility for keeping the civil justice system under review and for framing necessary rules of court) has been established. The Scottish Government have introduced into the Scottish Parliament the Courts Reform (Scotland) Bill, with a view to making the structural reforms proposed by the Civil Courts Review and allowing for formal specialization on the part of sheriffs.

At its first meeting, in June 2013, the Scottish Civil Justice Council established a Family Law Committee. The remit of that Committee is to consider the procedure to be followed in family actions and children's referrals with a view to ensuring that such actions are dealt with as expeditiously as possible. The remit refers specifically to the Supreme Court decision in the present case. The Committee has already recommended that when an appeal is taken to the Inner House against an order made under section 11 of the Children (Scotland) Act 1995, it should be mandatory to seek urgent disposal of the case and Rules of Court have been made to implement this recommendation."

<u>*ANS v ML* in the Supreme Court</u>

Again, there were various comments on procedures in the sheriff courts. The last sentence in paragraph 50 of the judgement is:

"More generally, considering this appeal soon after the case of NJDB v JEG [2012] UKSC 21, where this court was critical of the procedure followed in a dispute over contact, it is difficult to avoid the impression that further efforts require to be made to encourage active and firm judicial case management of family proceedings in the Sheriff Court".

<u>The report to the Lord President by the Joint Working Group on Family Actions</u>

Paragraph 5 of this report said:

" There is unanimity amongst the members of the JWG that there is a pressing need for reform of current family law procedures as the present procedures are too cumbersome and give rise to the potential for long and expensive cases, such as those heard by the Supreme Court. The JWG feel that changes must take cognisance of party litigants and the need to ensure that the views of the child are taken into account. SLAB is supportive of these proposals."

SM v CM in the Court of Session

The Court made a number of comments on time.

"[64] We cannot leave this case without commenting specifically upon three matters of concern in these proceedings.

[65] The first relates to the length of time taken up by the proceedings in the Sheriff Court. This is not a matter which arises directly in this appeal. But it is important that we should express our concern as to the time taken for these proceedings to be resolved. For a contact action which commenced in January 2010 only to come to a conclusion in October 2013 is unacceptable. The child was just one-year-old when the action began. By the time judgment was delivered in the contact action he was only three months short of his fifth birthday. Though difficult to resolve, the issues in dispute between the parties were not complex. With proper case management, they could have been resolved expeditiously and without delay. The same point can be made about the contempt proceedings. By the time they had been brought to a conclusion a year and a half later, the child was well past his sixth birthday. This Court has repeatedly emphasised the need for expedition in dealing with cases involving children. The Supreme Court has said the same thing: see, in the context of a contact dispute, NJDB v JEG 2012 SC (UKSC) 293, per Lord Reed at paragraphs 20-23 and 33-34 and, in the context of adoption proceedings, ANS v ML 2013 SC (UKSC) 20, per Lord Reed at paragraphs 50-56 and per Lord Hope at paragraphs 63-65. So has the European Court of Human Rights: see, most recently, Malec v Poland 2016 ECHR 588 at paragraphs 66 and 67. The problems arising from delay are obvious. The longer a dispute about contact goes on, the more difficult it is likely to become; and the more the life of the child will be overshadowed by the continued and protracted nature of the proceedings. The passage of time can have irremediable consequences for relations between the child and the parents, particularly the non-cohabiting parent seeking contact or greater contact. Delay in resolving the proceedings may result in a de facto determination of the issue before the court. Such problems are real enough where the only matter before the court is the question of contact, but are aggravated when combined with an equally long-running dispute about contempt of court, with the risk of one parent being found to be in contempt and sentenced to a period of imprisonment.

[66] The time taken to resolve disputes about contact should be measured not in years but in weeks or, at most, months. We recognise that there may be subsequent applications to vary contact arrangements, but the initial decision should be capable of being made, following a short well-organised evidential hearing, within this time-frame. If disputes about child abduction, often involving evidence of foreign proceedings as well as direct evidence from the parents, can be resolved, as they have to be, within a period of six weeks (c.f. the Child Abduction and Custody Act 1985, Schedule 1, Art 11) a similar regime could be made to apply to contact disputes. We do not suggest that in contact actions there is quite the same requirement for urgency as in cases of child abduction. But there is no reason why contact disputes also should not be dealt with within a short timetable. The issues are seldom complicated, albeit that the decision will often be an anxious and difficult one. As has been said on numerous occasions, there is a tendency for evidence to be led on all manner of issues thought to be of relevance, when all that is required is evidence going to the question of what is in the best interests of the child.

[67] We cannot say precisely where the problem lies. It may lie in the workload of the Sheriff Court and we do not underestimate the difficulties that that may cause and the pressure it places on the sheriffs in any particular court. It may be difficult in many if not most courts to allocate the case to a particular sheriff who will then take responsibility for seeing it through from start to finish. We recognise that the challenges of programming court business make such allocation (judicial

docketing) very difficult. But it would undoubtedly make a difference. Case management is vitally important but, unless it comes at the right time and the case is case-managed from beginning to end by the same judge so as to ensure consistency, it is unlikely to provide a complete solution. Quite apart from the question of judicial docketing, we see no reason in principle why, in most cases, whether at the first Child Welfare Hearing under Rule 33.22A of the Ordinary Cause Rules, if one is held, or (if there is no Child Welfare Hearing) on the earliest occasion on which the matter comes before the court, the sheriff should not lay down a strict timetable for all steps leading up to a fixed hearing date of a fixed duration (to come on within a matter of weeks or, at most, a few months) and give such further directions as regards witnesses, affidavits, reports, admissions and the like as are needed to ensure not only that the case comes to a hearing at the identified date but also that it will conclude within the time fixed for that hearing without the need for adjournments or the allocation of additional hearing days. At the same time it should be made clear that the court will expect parties to adhere to this timetable except only on further order made in exceptional circumstances; that interim contact orders are to be obeyed; and that instances of non-compliance will be dealt with promptly without impinging on or delaying the substantive proceedings. It seems to us that, in a case where a Child Welfare Hearing takes place, the Sheriff Court already has such powers under Rule 33.22A(4) of the Ordinary Cause Rules as presently in force. Similar case management powers, albeit exercisable at a later stage of proceedings, are conferred by the provisions of Chapter 33AA of the Ordinary Cause Rules. We understand that the case management tools presently available in family actions are under review by the Scottish Civil Justice Council. We welcome such a review.

[68] We said earlier that case management is important. The instant case illustrates the problems that may occur if a firm grip is not taken from the outset. The action was sisted for nearly six months for (unsuccessful) mediation immediately after it was raised in January 2010. The procedural and/or Child Welfare Hearings were continued on a number of occasions. The lack of substantive progress resulted in interim contact orders being made, breach of which simply fuelled the contempt proceedings running in parallel. A hearing in the contempt proceedings was fixed and discharged. The contact action was sisted on at least one occasion when it looked as though the parties might be able to work something out amicably. A hearing in the contact action was discharged because of the holiday commitments of one of the agents. In due course, it was decided that the contact action and the contempt proceedings should be heard together, a decision which may also have contributed to the lack of progress. We appreciate that all such matters are case management decisions for the sheriff to deal with on their individual merits; but we cannot help wondering whether the court was too ready to accede to applications which, in the event, collectively caused so much delay. Ultimately the hearing was fixed for one day in January 2013. It was allocated to a visiting sheriff. This created its own problems. As a visiting sheriff, her availability was limited, so that after the first half day in January the hearing had to be adjourned to July and was only concluded in August 2013, with judgment being given in October.

[69] A related point of concern is the rule by which, when an appeal is taken to the Inner House, the whole process is removed from the Sheriff Court, with the result that (so we were told) no further progress is possible in the action in the Sheriff Court until disposal of the appeal. It may be possible for the parties to apply for the process to be remitted to the Sheriff Court for some application to be made there, and then sent back to the Inner House after that matter has been dealt with, but this is a cumbersome procedure which places unnecessary obstacles in the way of parties seeking, for example, to vary contact orders previously made or to make special provision for particular occasions. The difficulty is not unique to contact actions or, indeed, family proceedings generally, but its impact is felt most acutely in such proceedings where parties frequently need the assistance of the Court on an ongoing basis and, sometimes, at relatively short notice. We would suggest that the Scottish Civil Justice Council might wish to give consideration to revising the

relevant Rules of Court to allow steps to be taken in the Sheriff Court even though one particular matter in the process is under appeal to the Inner House."

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ANNEX B: STATISTICS FROM THE SCOTTISH LEGAL AID BOARD ON LENGTH OF CASES AND INFORMATION ON MINISTERIAL CORRESPONDENCE RECEIVED BY THE SCOTTISH GOVERNMENT

SLAB statistics

1. The Scottish Legal Aid Board holds statistics on how long cases take from the grant of civil legal aid to submission of the nominated solicitor's main account. The actual case duration will be slightly shorter allowing for the time to prepare the case (if pursuer) and to submit accounts for payment.

2. The following durations are based on payments made for contact and parentage cases in 2014-15 (parentage will cover actions where the main aim is to seek a parental responsibilities and rights order but it does not include residence). Contact only cases comprise 72% of all cases in this category:

- Overall average duration: one year and five months.
- Up to 80% of cases are dealt with in two years and two months.
- Up to 95% of cases are dealt with in four years and one month.

3. Case cost comparison between longer and shorter running cases based on an 80/20 split shows that the 80% (2,500 grants) making up the shorter running cases had an average cost of £2,468 with the grant at the 80th percentile costing £3,785.

4. This compares with an average case cost of £5,950 for the 20% (622) of longer running grants.

Scottish Government ministerial correspondence statistics

5. The amount of correspondence received by the Scottish Government on contact and residence is around 150 to 200 pieces a year. The correspondence raises a large number of issues, including:

- Contact for fathers and grandparents and suggested changes to section 11 of the Children (Scotland) Act 1995.
- Domestic abuse and contact.
- Legal aid issues.
- Judicial continuity.
- Child welfare reporters.

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ANNEX C: SUMMARY OF RECOMMENDATIONS IN MAIN BODY OF THIS POLICY PAPER

Para in paper	Issue	Recommendation	Origin of issue/recommendation
21.1	Child Welfare Hearings	The first hearing in a section 11 case should be a combined case management hearing and Child Welfare Hearing. Key aims of this first hearing would be to clarify and list the issues in dispute (and those about which parties agree) and to set a timetable for the case. (If issues are subsequently resolved at future CWHs, it may be possible to remove them from the list of issues in dispute).	Comments by Court of Session in *SM v CM.*
21.2	Child Welfare hearings	Child welfare (bar) reporter cannot be appointed until after a case management hearing has taken place. This means a reporter could only be appointed at the end of the first hearing or at subsequent hearings.	The Scottish Government
21.3	Child Welfare Hearings	When there is a fifth hearing (of any description other than a proof) in an action where there is a section 11 crave, the rules should require the court to consider if the case should go to proof. (This may require changes to any previously agreed timetable). The key test for the court must be what would be best for the child.	Suggestion made to the Scottish Government
23	Options Hearings	The Committee consider if there are issues in relation to Options hearings and family actions.	Point raised in FJMS summit.
25.1	Child Welfare Hearings	When the court is aware of domestic abuse or violent conduct being alleged or proved in a case, the rules should lay down that the court must take steps to protect the parties at any child welfare hearing. This may formalise	The Scottish Government

		arrangements already in place locally. It may, perhaps, be possible for any rules to be based in part on whether there are relevant criminal cases or convictions or interdicts in place	
25.2	Child Welfare Hearings	Greater clarity in the rules on what "cause shown" means	The Scottish Government
28	Expert witnesses	Rules to discourage unnecessary use of experts and to require disclosure of information provided by experts to the other parties in an action.	SCCR – recommendation 117
36	Curators *ad litem*	Rules be made so that: • Interlocutors appointing a curator *ad litem* in a section 11 case provide the reasons for the appointment and the duties of the curator *ad litem.* • The court keeps under review the need for the curator *ad litem's* initial appointment. One potential way an appointment of a curator *ad litem* could be kept under review would be to say that after a specified number of hearings (of any description), such as 5, or a specified number of months, such as 6, the appointment should be reviewed.	The Scottish Government, following comments by the Supreme Court in *NJDB v JEG;* recommendations in the SCCR and comments by the JWG.
42	ADR	Rule 33.22 and similar rules for civil partnership actions in the sheriff court and for actions in the Court of Session be amended to allow referral to mediation of any matter arising in a family action.	SCCR

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ANNEX D: AREAS WHERE THE RULES REWRITE COMMITTEE OF THE SCOTTISH CIVIL JUSTICE COUNCIL MAY BE TAKING THE LEAD

Introduction

1. This annex covers areas where the Scottish Government understands the Rules Rewrite Committee, rather than the Family Law Committee, may be taking the lead.

Judicial continuity

2. Paragraph 9 of the report by the JWG said that:

"The JWG recommend that so far as possible a family case should be dealt with throughout by the same judicial office holder. The JWG notes however that save for Glasgow, Edinburgh and one-sheriff sheriff courts, a docketing system may be difficult to implement. This is a matter that needs to be further considered with the Sheriffs Principal in the context of civil court reform generally".

3. This followed recommendation 50 in the SCCR which said [paragraph 45 of Chapter 5] that "the docket system should operate on the basis that a case is allocated to a judge or sheriff prior to the first case management hearing. There should be a presumption that, wherever practicable, all procedural and substantive hearings in the case will thereafter be dealt with by that judge or sheriff. In the sheriff court, if the case is in a specialist area, it should be allocated to a designated specialist sheriff."

4 The Scottish Government recommends that rules be made for family actions to introduce a docket system and judicial continuity on the lines of recommendation 50 of the SCCR

5. Lack of judicial continuity in many family actions in many courts is a regular point made in correspondence received by Ministers and was a key feature in *NJDB v JEG*.

6. Anecdotally, we have heard of cases having been considered by as many as 14 different sheriffs. The Scottish Government agrees with the point made in paragraph 44 of Chapter 5 of the SCCR that "the benefits of expeditious decision making, consistency of approach and experience in the particular field are fundamental to successful case management".

Structure of pleadings

7. The JWG said in paragraph 10 of its report that

"instead of traditional pleadings the procedure should be based on the use of forms, requiring up front disclosure of information. This would assist in saving costs and may be more user friendly to party litigants. It is anticipated that the forms could be made available in public places including Citizens Advice Bureaux and libraries. A list of the types of form and a brief outline of content is set out at Annex F."

The areas covered by Annex F of the JWG report included:

- Divorce/nullity of marriage/dissolution of civil partnership/separation (clearly, there are already plans to extend simplified divorce and dissolution to cases where there are children under 16 and no dispute about their welfare).

- Applications for section 11 orders. [The Scottish Government does receive occasional queries from prospective litigants seeking an application form in this area, reflecting that a form of this nature[17] exists in England and Wales].
- Orders for financial provision.
- Alimentary orders.
- Protective orders.
- Post decree applications.
- Cohabitant claims.
- International child abduction.
- Applications for financial provision following an overseas divorce, annulment or dissolution.
- Recognition of non-recognition of a relevant foreign decree.
- Defender's response forms.

8. At the FJMS Summit, reference was made to "move away from archaic pleadings system which entrenches parties' positions".

9. Other English-language jurisdictions make use of forms[18], as do the Scottish courts in relation to, for example, simplified divorce and dissolution and permanence and adoption.

10. The Scottish Government recommends that for both the Court of Session and the Sheriff Court:

- rules be made and forms created along the lines of Annex F in the JWG report;
- the forms should ask whether any other relevant court cases – civil or criminal – have taken place or are taking place;
- the forms ask the applicant about relevant criminal convictions;
- the forms ask what steps have been taken to resolve the issue out of court (eg by use of mediation or other forms of ADR) and what the areas of dispute and agreement are;
- where appropriate, forms should ask if jurisdiction could be held elsewhere in the United Kingdom or overseas[19].

11. The Scottish Government recognises that implementation of this recommendation will take some time. The Scottish Government also recognises that more guidance notes may be needed.

12. There is an alternative approach, put forward by the SCCR. Recommendation 116 [paragraph 60 of Chapter 9] said that:

"For all actions in the Court of Session and sheriff court, we recommend that pleadings should be in an abbreviated form. A docketed judge or sheriff should determine whether adjustment of the pleadings is necessary to focus the issues in dispute and should have the power to determine what further specification is required and how that should be provided."

[17] The main form used in England and Wales [the C100] is at https://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=2253

[18] For example, the New Zealand form generator is at http://www2.justice.govt.nz/careofchildrenform/

[19] The Form C100 used in England and Wales asks about cases with an international element. The Scottish Government has asked UK Government counterparts to consider amending this to cover cases with a potential Scottish or Northern Irish element as well as a potential international element. This reflects the concerns expressed in the Family Law Committee and elsewhere on procedures in cross-UK border family actions.

13. If the Scottish Civil Justice Council disagrees with the establishment of forms to replace pleadings in family actions, it may wish to consider whether steps should be taken for family actions in relation to the SCCR recommendation for abbreviated pleadings.

14. We understand the Rules Rewrite Committee has received a suggestion from a member of the public that pleadings be replaced by one electronic document which is exchanged between the parties.

Structure of judgements

15. One of the key court decisions on delays was *NJDB v JEG* in the UK Supreme Court. This, amongst other points, was critical of the structure of sheriff court judgements. The main criticism of the Supreme Court in this area was that having to outline detailed findings in fact and in law distracts sheriffs from the key requirement on the courts in section 11 of the Children (Scotland) Act 1995 to regard the welfare of the child as their paramount obligation.

16. There have been changes to the Rules since *NJDB v JEG.* What was Ordinary Cause Rule 12.2(3) is now found in rules 12.3 and 12.4. Paragraph 12 of the JWG said: "there is a need to consider how best to revise the rules, and if need be, change primary legislation, to address the current practice of requiring findings in fact and findings in law about each issue raised in evidence".

17. There is relevant provision in Section 32(4) of the Court of Session Act 1988 which provides that:

" Where such an appeal is taken to the Court from the judgment of the Sheriff Appeal Court or, as the case may be, the sheriff principal proceeding on a proof, the Court shall in giving judgment distinctly specify in its interlocutor the several facts material to the cause which it finds to be established by the proof, and express how far its judgment proceeds on the matter of facts so found, or on matter of law, and the several points of law which it means to decide."

18. In *NJDB v JEG*, the UK Supreme Court said, in paragraph 44, that:

"In practice the Court of Session finds it convenient to adopt the findings in the sheriff's interlocutor, with such alterations or modifications as it finds to be necessary in the light of the evidence."

19. It appears, therefore, the reference to "proof" means a Court of Session proof and that section 32(4) of the 1988 Act does not make direct provision on the content of sheriff court interlocutors.

20. The Supreme Court also noted in paragraph 45 of its judgment that "judges sitting in the Outer House of the Court of Session are not, and never have been, required to follow the same practice."

21. In the light of this and of the comments by the Supreme Court in *NJDB v JEG*:

the Scottish Government recommends that the requirements in Ordinary Cause Rules 12.3 and 12.4 for sheriffs to outline findings in fact and in law be removed.

22. We would be grateful for views from the Committee about what, if any, other provision should be made on the structure of judgments in the courts in family cases.

Language used by the courts

23. In addition, the Scottish Government recommends this Committee and the full Council consider if other changes could be made to interlocutors to make them more user-friendly for litigants (including party litigants) and children.

24. The Scottish Government is of the view that interlocutors are often written in "legalese" with excessive use of Latin and are not easily understood by lay people or by children. Examples of changes include use of plain English; avoiding the use of Latin where possible and the adoption of child friendly language. One possible option is the establishment, through rules, of style interlocutors in plain English.

Failure to comply

25. A failure to comply with an order (such as a contact order or a contact arrangement situated in a permanence or an adoption order) may be contempt of court:

The Scottish Government recommends that rules be added so that relevant interlocutors in family actions make that clear.

26. This could, for example, cover interlocutors in actions under section 11 of the 1995 Act where parties need to take steps to comply with the decision of the court (in some instances, such as where a person is given Parental Responsibilities and Rights or has them removed, no steps may be needed and so no warning note may be needed). Adding a warning note to relevant interlocutors may be useful generally in making it clear to parties what they are expected to do[20]. In addition, it appears in line, in broad terms, with recommendation 132 of the SCCR [paragraph 168 of Chapter 9] that at any case management hearing the court should explain to a party litigant the requirements of any order made and the sanctions for non-compliance.

27. Paragraph 70 of the opinion in *SM v CM* commented on the <u>form</u> in which a sentence of imprisonment for contempt of court was made. This noted that:

" There was no interlocutor signed by the sheriff. Instead, the sentence was simply recorded in a court minute. The terms of the minute were akin to those used in sentencing in criminal proceedings. Thus, in one court minute, there was reference to an adjournment in terms of section 201 of the Criminal Procedure (Scotland) Act 1995. In the sentencing process, as noted in the court minute, the sheriff ordered the preparation of a Criminal Justice Social Work Report, and she followed this up on a later occasion by ordering a further updated report. The court minutes all bear a procurator fiscal reference. They refer to the defender as the "Accused". This is entirely inappropriate for a case where a person is being sentenced to imprisonment for civil contempt. This is not a problem simply about paperwork. Mr McAlpine pointed out that this had practical consequences. As a result of the way in which the order was recorded, when she was taken to prison the defender was placed in the Hall for convicted prisoners rather than in the remand Hall where those sentenced for civil contempt should be placed. She stayed there for 15 days until granted interim liberation by this court on 4 June 2015. To prevent this problem recurring, steps should be taken to ensure that all sentences resulting from the findings of civil contempt are dealt with by an interlocutor in the proceedings begun by the Minute".

28. In the light of the last sentence in paragraph 70 of the opinion in *SM v CM:*

[20] It would also be in line with existing work by the Scottish Legal Aid Board: http://www.slab.org.uk/providers/mailshots/2015/newsfeed/Contact_letter

the Scottish Government recommends rules be made[21] to lay down that when a person is sentenced to imprisonment for civil contempt (such as failure to obtemper an order under section 11 of the 1995 Act) this sentence is provided for in an interlocutor which makes it clear the person is being sentenced to imprisonment for civil contempt.

29. The Scottish Government's understanding is that civil imprisonment is rare[22].

30. In the context of its review of the 1995 Act, and following public petitions in the Parliament, the Scottish Government held a round table on 25 January 2017 on possible future options for enforcing contact orders. This is a policy matter and a potential point for primary legislation and, therefore, the Scottish Government is making no recommendations to this Committee on this particular point. The Scottish Government intends to publish a note of the round table discussion on 25 January.

Expert witnesses

General discussion

31. `The SCCR made a number of recommendations in relation to expert evidence. Paragraph 63 of Chapter 9 of the SCCR said that "those involved in family law cases argued that the court should have a more proactive role in controlling expert evidence. There is clear evidence that numerous cases involving children are prolonged unduly by contested expert evidence."

32. There are some general points which the Scottish Civil Justice Council may wish to consider in relation to family actions:

- Whether, in practice, experts are appointed for child welfare hearings or just for proofs.
- Whether, in practice, parties sometimes commission expert evidence without seeking sanction from the court.

Advance lodging of statements

33. Recommendation 115 of the SCCR said, at paragraph 47 of Chapter 9, that:

"the advance intimation and lodging of witnesses statements is particularly helpful in the case of expert evidence. It gives the judge a proper opportunity to prepare and it shortens the proof. Rule 47.11(1)(b)(vii) of the Court of Session Rules provides that the commercial judge may make an order requiring the reports of skilled persons or witness statements to be lodged in process. At the procedural hearing the commercial judge may determine, in the light of any witness statements, affidavits or reports produced, that proof is unnecessary on any issue. [Court of Session Rule 47.11(2)(d)]. We consider that these are useful provisions which should apply generally to all types of action that are subject to active judicial case management".

[21] There is an existing Act of Sederunt (SSI 2011/388) on contempt of court in civil proceedings: http://www.legislation.gov.uk/ssi/2011/388/contents/made

[22] For some statistics on civil imprisonment, please see http://www.gov.scot/resource/0039/00396363.pdf (see table A.1 on page 24; page 23 explains that the asterisk means under 0.5) and http://www.gov.scot/Resource/0049/00491398.pdf (see table A.8).

34. The Committee should be aware of arguments against this approach. Page 19 of the report on the FJMS summit[23]noted that "Court of Session case management works well and has achieved changes in all parties' practice on how to manage their cases" but also noted that "use of affidavits a good time saving in court – but expensive and time consuming for parties and solicitors".

35. The Scottish Government agrees with recommendation 115 of the SCCR and recommends that provision requiring the advance intimation and lodging of witness statements be added to rules.

36. It may be that provision of this nature is not needed in Court of Session rules, given the paper agreed by the Family Law Committee on case management in family actions in the Court of Session at its meeting on 13 February 2017.

Joint instruction of expert witnesses

37. Recommendation 118 of the SCCR made further recommendations on expert witnesses. Paragraph 80 of Chapter 9 noted that "there is clearly a problem in child cases where children are sometimes over-interviewed by experts, which our recommendations above should address.".

38. Paragraph 81 went on to say that:

"in those cases subject to the active judicial case management model, parties should be required to consider whether it would be appropriate to instruct one or more joint experts in relation to either liability or quantum and should be in a position to address the court on this issue at case management hearings. Where the court thought it appropriate to do so it could order the parties to instruct a joint expert".

39. The Scottish Government recommends that rules be added requiring parties, if they intend to lead expert evidence, to consider if one or more joint experts could be instructed and empowering the court to order the parties to instruct a joint expert.

40. Changes may be needed to Ordinary Cause Rule 33AA.4(1)(f) [on expeditious resolution of certain causes]. This currently refers to the sheriff ascertaining the scope for joint instruction of a single expert. Adopting the SCCR recommendation would require more proactive encouragement of the instruction of a single expert.

Overriding duty of expert witness to assist the court; Code of Practice; disclosure of instructions and remuneration

41. Recommendation 120 (paragraph 86 of Chapter 9) of the SCCR said that a rule should be introduced which clarifies that the overriding duty of an expert witness is to assist the court. It also recommended that a code of conduct and guidance on the format and information to be contained in expert reports should be adopted and that parties who wish to rely upon an expert report should be obliged, on request, to disclose all written and oral instructions to the expert and the basis upon which the expert is remunerated.

42 The Scottish Government agrees that a rule should be introduced to clarify that the overriding duty of an expert witness is to assist the court and recommends that rules be made accordingly.

[23] http://www.gov.scot/Resource/0050/00507357.pdf

43. It appears to the Scottish Government that the introduction of a code of conduct and guidance on the format and information to be contained in expert reports for the courts is an operational matter for the judiciary and the SCTS. The Scottish Government would be happy to participate in any work in this area, if that would be helpful. There is already a Law Society of Scotland code of practice[24]. There will be examples of codes of conduct in other jurisdictions[25].

44. The Scottish Government is uncertain about the recommendation that parties who wish to rely upon an expert report should be obliged, on request, to disclose all written and oral instructions to the expert and the basis upon which the expert is remunerated. The Scottish Government can understand where this recommendation is coming from. However, there may be issues in this area of client confidentiality. The Scottish Government suggests the Scottish Civil Justice Council may wish to consider further.

Experts required to confer, exchange opinions and prepare a note on what can be agreed and on reasons for disagreements

45. Recommendation 121 of the SCCR (paragraphs 88 and 89 of Chapter 9) says that in all cases to which the active case management model applies, the court should have the power to require experts to confer, exchange opinions, and prepare a note on what can be agreed and the reasons for their disagreements. This recommendation follows practice in the Court of Session in commercial actions.

46. The Scottish Government agrees and recommends that rules be made so the court has the power to require experts to confer, exchange opinions, prepare a note on what can be agreed, and the reasons for their disagreements.

Limits on oral evidence by experts

47. Recommendation 122 of the SCCR (paragraph 91 of Chapter 9) recommends that "a rule should be adopted to introduce a presumption that an expert's report would be treated as his evidence in chief and that oral evidence would be restricted to cross examination or to comment on the terms of any other expert reports lodged in process or spoken to in evidence".

48. The Scottish Government agrees and recommends that rules be added to introduce a presumption that an expert's report would be treated as evidence in chief and that oral evidence would be restricted to cross examination or to comment on the terms of any other expert reports lodged in process or spoken to in evidence.

[24] https://www.lawscot.org.uk/members/expert-witness-directory/expert-witness-code-of-practice/

[25] See, for example, https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-25b-the-duties-of-an-expert,-the-experts-report-and-arrangements-for-an-expert-to-attend-court (England and Wales); http://www.legislation.gov.hk/blis_ind.nsf/CURALLENGDOC/AF1356F1911449974825758A000FE9D3?OpenDocument (Hong Kong)

Summary of recommendations for the Rules Rewrite Committee

49. The table below summarises recommendations for the Rules Rewrite Committee.

Paragraph no. in Annex D	Issue	Recommendation	Origins of recommendation
4	Judicial continuity	Rules be made for family actions to introduce a docket system and judicial continuity.	SCCR – recommendation 50
10	Structure of pleadings – more use of forms	For both the Court of Session and the Sheriff Court: • rules be made and forms created along the lines of Annex F in the JWG report; • the forms should ask whether any other relevant court cases – civil or criminal – have taken place or are taking place; • the forms ask the applicant about relevant criminal convictions; • the forms ask what steps have been taken to resolve the issue out of court (eg by use of mediation or other forms of ADR) and what the areas of dispute and agreement are; • where appropriate, forms should ask if jurisdiction could be held elsewhere in the United Kingdom or overseas.	JWG
21	Structure of judgements	Requirements in Ordinary Cause Rules 12.3 and 12.4 for sheriffs to outline findings in fact and in law be removed.	Comments by the UK Supreme Court in *NJDB v JEG.*
23	Language of the courts	This Committee and the full Council consider if other changes could be made to interlocutors to make them more user-friendly for litigants (including party litigants) and children.	The Scottish Government.
25	Failure to comply with order	Rules be made so that relevant interlocutors in family actions make it clear that failure to comply may be contempt of court.	Suggestion made to the Scottish Government.
28	Failure to comply with order	Rules be made to lay down that when a person is sentenced to imprisonment for civil contempt (such as failure to obtemper an order under section 11 of the 1995 Act) this sentence is provided for in an interlocutor which makes it clear the person is being sentenced to imprisonment for civil contempt.	Comments by the Court of Session in *SM v CM*
35	Expert witnesses	Provision requiring the advance intimation and lodging of witness statements be added to rules	SCCR – recommendation 115
39	Expert witnesses	Rules be added requiring parties, if they intend to lead expert evidence, to consider if one or	SCCR – recommendation

		more joint experts could be instructed and empowering the court to order the parties to instruct a joint expert.	118
42	Expert witnesses	Rules be introduced to clarify that the overriding duty of an expert witness is to assist the court.	SCCR – recommendation 120
46	Expert witnesses	Rules be made so the court has the power to require experts to confer, exchange opinions, prepare a note on what can be agreed, and the reasons for their disagreements .	SCCR – recommendation 121
48	Expert witnesses	Rules be added to introduce a presumption that an expert's report would be treated as evidence in chief and that oral evidence would be restricted to cross examination or to comment on the terms of any other expert reports lodged in process or spoken to in evidence.	SCCR – recommendation 122

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ANNEX E: AREAS WHERE THE SCOTTISH GOVERNMENT IS NOT MAKING A RECOMMENDATION

Introduction

1. For completeness, this policy paper includes a number of areas where the Scottish Government does not make a recommendation. These areas are listed in this Annex. The reasons why the Scottish Government does not make recommendation vary from area to area and include:

- The matter is entirely for the Lord President.
- The matter is for primary legislation, which is for the Scottish Government to promote in the Scottish Parliament.
- The matter is entirely operational.
- It appears to the Scottish Government that a decision has already been taken not to pursue the issue.
- The matter is outwith the remit of the Family Law Committee.

2. Of course, members of this Committee may wish to take different approaches in some areas, which is one reason for including them so that members can see the issues the Scottish Government has considered in preparing this policy paper.

Provision in primary legislation on cases being dealt with expeditiously

3. Paper 4.2, considered by this Committee at its meeting on 13 February 2017, discussed one of the points in the postscript to the recent Opinion in *SM v CM*. This point was the length of time taken up by the proceedings in the sheriff court. Paper 4.2 invited the Committee to consider whether it would be appropriate to address this concern by amending the rules to include a provision about avoiding delay.

4 Members thought the problem was one of *undue* delay and it may be more appropriate to include a provision about avoiding delay in primary legislation, as is the case in England and Wales, rather than in rules.

5. The Supreme Court, in *NJDB v JEG*, said, in paragraph 22 of its judgement, that "Parliament has recognised, in section 1(2) of the Children Act 1989, that "in any proceedings in which any question with respect to the upbringing of a child arises … any delay in determining the question is likely to prejudice the welfare of the child". There is no equivalent provision in the 1995 Act; but even in the absence of such a provision, the principle is obvious, and is amply demonstrated by the present case".

6. The Scottish Government will consider, as part of its upcoming review of Part 1 of the Children (Scotland) Act 1995, whether a provision along the lines of section 1(2) of the Children Act 1989 should be added to the 1995 Act. Therefore, the Scottish Government is making no recommendation to this Committee.

Unified set of rules for family actions.

7. Paragraph 7 of the report by the JWG said that:

"The JWG recommends that the longer term aim ought to be to have a unified set of family procedure rules for use in the sheriff court and Court of Session, with the rules allowing for

enhanced judicial case management. The JWG envisage that the final form of those rules will be familiar to practitioners having experience of certain Court of Session procedures. There is precedent for making one set of court rules for both sheriff court and Court of Session using the combined rule making powers, namely the Act of Sederunt (Contempt of Court in Civil Proceedings) 2011 (SSI 2011/388)."

8. The Scottish Government's understanding is that it has been decided to continue with separate rules for the Court of Session and the sheriff court and, therefore, this recommendation by the JWG will not be taken forward[26].

Publication of judgements

9. In 2016, the Justice Committee of the Scottish Parliament carried out post-legislative scrutiny of the Family Law (Scotland) Act 2006. One of the points which arose in evidence to the Committee was about the publication of judgements.

10. In the Scottish Government's response to the Committee's report, the Minister for Community Safety and Legal Affairs said, in paragraph 8, that:

"The Scottish Government has noted the points made to the Committee about the publication of sheriff court judgements. As a general rule, only where there is a significant point of law or particular public interest will a judgment be published. The Scottish Government appreciates that the publication of decisions in a developing area of law is important, if legal practitioners are to be able to advise their clients effectively. As the information contained in Annexe C of the Committee's report indicates, decisions on publishing sheriff court judgements are a matter for the sheriff who heard the case. The Scottish Government has passed on the comments on publication of judgements which were made by the Committee and in the evidence submitted to the Committee to the Lord President's Private Office."

11. This is a matter for the judiciary and the Scottish Government is making no recommendations in this paper.

Delays in judgements

12. Recommendation 140 of the SCCR recommended [paragraph 35 of Chapter 10]:

"the establishment of a register on the Scottish Courts website for those cases in which judgment has been outstanding for a period of more than three months. The rules of court should provide that if a judgment is not issued within that period the judge, sheriff or district judge should be required to provide an explanation for the delay and to indicate when the judgment is likely to be issued. This explanation should be conveyed to the parties and put on the website. Cases like this should continue to be brought to the attention of the judge, sheriff or district judge at one monthly intervals until judgment is issued. Such cases should be given the personal attention of the Lord President or appropriate sheriff principal."

13. The Scottish Government considers this to be an operational matter for the Lord President and the sheriffs principal and does not consider it appropriate to suggest rules in this area in this policy paper.

[26] See http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-pubilcations/final-report-of-the-rules-rewrite-working-group.pdf?sfvrsn=2

IT system

14. The JWG considered issues in relation to IT systems. Paragraph 13 noted that "the JWG consider that the IT system could be based on intelligent software which would, on certain answers being populated in the forms, automatically direct the applicant through the system, based upon the specifics of their circumstances." Paragraph 15 said that "the JWG understands that part of the budget derived from the recent fees uplift will be assigned to developing IT to support the court reforms programme and that part of this money could be made available to developing a bespoke IT system for family actions".

15. The Scottish Government considers this to be an operational matter for the judiciary and the Scottish Courts and Tribunals Service (SCTS) and does not consider it appropriate to make recommendations in this area in this policy paper other than to note that if the recommendation that family actions should be initiated by forms is accepted [paragraphs 7 to 14 of Annex D of this policy paper refer], there would be IT implications.

16. The SCTS has, of course, recently set up a new IT system.

Use of technology

17. The SCCR made a number of recommendations in relation to technology. Recommendation 66 [paragraph 90 of Chapter 5] said:

"in cases allocated to the docket of a family sheriff there would be a presumption that all procedural business would be conducted by telephone or videoconference (provided the parties consent) and that substantive hearings would take place in the court in which that sheriff sits. If there were special circumstances which made it unreasonable to expect parties or witnesses to travel to that court, arrangements could be made for a hearing to take place in a more convenient court or other venue. In some areas there may be scope for the court to make use of other suitable accommodation such as tribunal hearing rooms".

18. It appears to the Scottish Government that this is an operational matter for the judiciary and the SCTS and so does not make any recommendations in this policy paper.

Specialisation of sheriffs in family actions

19. Recommendation 4 in the SCCR (paragraph 64 of Chapter 4) recommends the "introduction of a system by which a number of sheriffs in each sheriffdom will be designated as specialists in particular areas of practice." (Recommendation 92, at paragraphs 162 and 163 of Chapter 5, is along similar lines for summary sheriffs). There was strong support for the establishment of specialist family sheriffs at the FJMS Summit.

20. Section 34 of the Courts Reform (Scotland) Act 2014 empowers the Lord President to determine categories of sheriff court cases which he concludes suited to being dealt with by judicial officers that specialise in the category of cases. [Once a direction is issued under section 34, the Sheriffs Principal can then designate individual sheriffs as specialists]. The Scottish Government is unaware of any intention by the Lord President to determine family actions as a specialist category. As decisions in this area are for the Lord President, it is not appropriate for the Scottish Government to make any recommendations on specialisation in this policy paper. [Under section 41 the Scottish Ministers may by order provide that the jurisdiction of a sheriff of a specified sheriffdom sitting at a specified sheriff court extends territorially throughout Scotland for the purposes of dealing with

specified types of civil proceedings. Such an order may be made only with the consent of the Lord President].

Criminal proceedings and delays in family actions

21. One of the points made at the FJMS Summit in March 2016 was that delays in criminal proceedings can have a knock on delay in civil proceedings. Points made included:

- (perhaps inevitably) there is a prioritisation of criminal over civil cases and there are more prescribed timescales for criminal cases;
- civil proofs can sometimes be split over months;
- an example was given of several proofs being scheduled for one day (with parties and agents having to attend and prepare), even though it is likely only one proof hearing will take place.

22. Recommendation 70 in the SCCR (paragraph 94 of Chapter 5) says that:

"in courts where the residential judicial officer is a district judge, who will also be dealing with summary criminal business, it will be desirable to set aside in the court programme specific days or half days for the conduct of civil business, in particular family actions. When such days or half days are programmed will depend on the volume of cases, but where practicable criminal business in courts where there is only one court room should not be programmed for those days, Deferred sentences should not be fixed for days or parts of days programmed for civil business."

23. It appears to the Scottish Government that this is an operational matter for the judiciary and the SCTS and so there are no recommendations in this paper.

Appeals and delays in family actions

24. In paragraph 69 of its opinion in *SM v CM*, the Court of Session said:

" A related point of concern is the rule by which, when an appeal is taken to the Inner House, the whole process is removed from the Sheriff Court, with the result that (so we were told) no further progress is possible in the action in the Sheriff Court until disposal of the appeal. It may be possible for the parties to apply for the process to be remitted to the Sheriff Court for some application to be made there, and then sent back to the Inner House after that matter has been dealt with, but this is a cumbersome procedure which places unnecessary obstacles in the way of parties seeking, for example, to vary contact orders previously made or to make special provision for particular occasions. The difficulty is not unique to contact actions or, indeed, family proceedings generally, but its impact is felt most acutely in such proceedings where parties frequently need the assistance of the Court on an ongoing basis and, sometimes, at relatively short notice. We would suggest that the Scottish Civil Justice Council might wish to give consideration to revising the relevant Rules of Court to allow steps to be taken in the Sheriff Court even though one particular matter in the process is under appeal to the Inner House".

25. This appears to be a point that is wider than just family actions and so within the remit of the Scottish Civil Justice Council as a whole, rather than of this Committee in particular. Therefore, the Scottish Government is making no recommendations to this Committee on this point.

Judicial training

26. Recommendation 71 in the SCCR [paragraph 95 of Chapter 5] is that:

"many respondents considered that an understanding of the dynamics of family disputes and domestic abuse and knowledge of child development were as important as good knowledge and experience of the relevant law for judges dealing with family cases. We recommend that a forum of family sheriffs and district judges [summary sheriffs] be established so that knowledge and experience can be shared and issues of common concern discussed, and that district judges should receive appropriate training when they are appointed.".

27. It appears to the Scottish Government that this is an operational matter for the judiciary and the SCTS. Judicial training is, of course, a matter for the Judicial Institute. Therefore, there is no recommendation in this paper.

Consistency across Scotland

28. One of the points which has emerged in recent years (eg through the Child Welfare Reporters Working Group chaired by the Scottish Government) is that practice in the sheriff courts (eg in relation to the role and remit of court appointments; what they are called; the types and nature of procedural hearings) can vary considerably across Scotland, even though Scotland is a small jurisdiction.

29. One way of tackling this might be to impose pro-active duties (eg on the Scottish Civil Justice Council) to make reports where there is a lack of consistency in the procedures followed in family actions across Scotland.

30. A possible model to follow might be section 4(7) of the Judicial Factors (Scotland) Act 1880. This provides that:

"It shall be the duty of the accountant [of court], when it appears to him that there is a diversity of judgment or practice in proceedings in Judicial Factories in the sheriff courts which it would be important to put an end to, to report the same to the first division of the Court of Session, specifying the proceedings in which such diversity appeared, and asking for a rule to be laid down to secure uniformity of judgment or practice in such proceedings, and the Court shall consider such report, and if they shall see fit shall lay down such a rule accordingly, which rule the several sheriffs and their substitutes shall be bound to observe".

31. The Scottish Government will consider this issue further in its forthcoming review of the Children (Scotland) Act 1995 and, therefore, is not making any recommendations to this Committee.

Summary disposal

32. Paragraph 92 of Chapter 9 of the SCCR noted that the current position is that the court, on the application of a pursuer, may grant summary decree where it is satisfied that there is no defence to the action or to any part of it to which the motion relates. After considering the issues, the Review recommended that summary decree procedures should also be available to defenders [recommendation 123 at paragraph 103 of Chapter 9]. However, as the review noted, this procedure is not available in family (and civil partnership) actions (and certain other actions) at the moment and the review recommended this should remain the position. Therefore, there are no recommendations on summary disposals in this policy paper.

Change of culture

33. The JWG recommended in paragraph 16 of its report that "in due course a family law users group should be established to outline the extent of the proposed changes and to try and tackle a change of culture at an early stage".

34. A family law users group could, as well as practitioners, include bodies with practical experience of family actions such as the Scottish Legal Aid Board and third sector bodies supporting litigants. However, the Scottish Government recommends against following the JWG recommendation, for the following reasons:

- The Family Law Committee has been established since the JWG recommendation.
- There would be staff resource implications in acting as a secretariat for a family law users group.
- The Family Law Committee can and does obtain comments and expertise from non-members when appropriate (eg it has done so in relation to the review of the F9 form).

Evidential child welfare hearings

35. There has been a recent case in the Sheriff Appeal Court at which "evidential Child Welfare Hearings" were discussed[27]. The court said, in paragraph 14, that

" There is no such process as an evidential child welfare hearing provided for in the Ordinary Cause Rules: one may have a child welfare hearing or a proof. If it were possible to have an evidential child welfare hearing, it may only be, in my opinion, with the consent of parties. The reason for this is that such a hearing, without the recording of evidence, would restrict a party's grounds of appeal to questions of law only."

36. As evidential child welfare hearings are not provided for in the rules, there seems no need for this policy paper to make any recommendations.

Summary of points in this Annex

Para in annex	Issue	Why no recommendation	Origin of issue/recommendation
3 to 6	Provision in primary legislation on cases being dealt with expeditiously	Matter for primary legislation.	Family Law Committee.
7 and 8	Unified set of rules for family actions	The Scottish Government understands it has been decided to keep separate rules for the Court of Session and the sheriff court.	JWG
9 to 11	Publication of judgements	Matter for the judiciary	The Justice Committee of the Scottish Parliament

[27] The case is at http://www.scotcourts.gov.uk/docs/default-source/sheriff-appeal-court-(civil)/2016-sac-(civ)-002.pdf?status=Temp&sfvrsn=0.6194155665580183

			considered this issue.
12 and 13	Delays in judgements	Operational matter.	The SCCR – recommendation 140
14 to 16	IT system	Operational matter.	The JWG
17 and 18	Use of technology	Operational matter.	The SCCR – recommendation 66
19 and 20	Specialisation of sheriffs in family actions	Matter for the Lord President.	The SCCR – recommendation 4 recommended specialisation generally.
21 to 23	Criminal proceedings and delays in family actions	Operational matter.	FJMS summit. The SCCR – recommendation 70
24 and 25	Appeals and delays in family actions	Matter for the SCJC as a whole	Comments by the Court of Session in *SM v CM*
26 and 27	Judicial training	Operational matter	The SCCR – recommendation 71
28 to 31	Consistency across Scotland	Matter for primary legislation	The Scottish Government
32	Summary disposal	SCCR recommendation was no change in family actions	The SCCR
33 and 34	Change of culture – establish a family law users group	• The Family Law Committee has been established since the JWG recommendation. • There would be staff resource implications in acting as a secretariat for a family law users group. • The Family Law Committee can and does obtain comments and expertise from non-members when appropriate (eg it has done so in relation to the review of the F9 form).	The JWG
35/36	Evidential Child Welfare Hearings	Not provided for in rules.	Discussed in recent Sheriff Appeal Court judgement.

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