Ministry of JUSTICE

FAMILY PROCEDURE RULE COMMITTEE
In the Conference Suite, 2nd Floor Mezzanine, Queen's Building, Royal Courts of Justice
At 10.30 a.m. on Monday 16 May 2016

Members

Sir James Munby	President of the Family Division **(Chair)**
Marie Brock JP	Lay Magistrate
Richard Burton	Justices' Clerk
Melanie Carew	Children and Family Court Advisory Support Service
District Judge Carr	District Judge (Magistrates' Court)
District Judge Darbyshire	District Judge (County Court)
Jane Harris	Lay Member
Michael Horton	Barrister
Dylan Jones	Solicitor
Hannah Perry	Solicitor
Her Honour Judge Raeside	Circuit Judge
Mrs Justice Theis	High Court Judge
William Tyler QC	Barrister

Guest Speaker

Ms Justice Russell	High Court Judge ***(item 4)***

Officials

Legal Secretary to the President of the Family Division

MoJ Legal

Deputy Director, MoJ Policy

MoJ Policy

Deputy Director, Legal Operations, HMCTS

HMCTS

Secretary to Family Procedure Rule Committee

ANNOUNCEMENTS AND APOLOGIES

1.1 The President of the Family Division welcomed all members to the meeting.

The President of the Family Division welcomed Ms Justice Russell, who attended the meeting at the invitation of the President of the Family Division and the Committee to speak to item 4 on the agenda.

The President of the Family Division also extended a welcome to the Deputy Director of Legal Operations, HMCTS who attended at the invitation of the Committee to speak to item 3b on the agenda.

1.2 Apologies were received from Lord Justice McFarlane and Judge Waller.

MINUTES OF THE LAST MEETING: 11 April 2016

2. Draft minutes from the meeting on 11 April 2016 were circulated on 6 May 2016. District Judge Carr and District Judge Darbyshire notified the Secretary of amendments in advance in the meeting. No other amendments were raised at the meeting.

On Page 4, the fourth paragraph, at the third sentence, it now reads: "*The President of the Family Division rebutted the suggestion by officials that they required the final Practice Directions in order to project the final costs as where the costs lie are known.*"

On Page 6, the fourth paragraph at the second sentence, it now reads: "*MoJ Policy confirmed these findings from the pilot are being looked at to assist them in arriving at their final conclusions.*"

On page 14 at paragraph 6.2 on the fourth paragraph at the final sentence, it now reads: "*In his opinion, it is the Designated Family Judge that should be central when considering family justices in this consultation.*"

Subject to these amendments, the minutes were agreed as a correct and accurate record of the last meeting.

MATTERS ARISING

3.1 Revised Freedom of Information Publication Scheme Update (***paragraph 4 minutes 11.04.16***)

A revised Freedom of Information Publication Scheme with minor amendments was circulated to members in advance of the meeting. No questions were raised about the proposed amendments. The amended scheme has been submitted to the Information Commissioner's Office for consideration and approval.

3.2 **Bench De-Regulation Consultation Response** (***paragraph 6.2 minutes 11.04.16***)

The Deputy Director of Legal Operations, HMCTS updated members of the outcome of the Consultation on the draft Justices of the Peace Rules 2016. The consultation paper was drawn up by a working party which comprised representative groups. All the consultation responses have now been received and are being analysed with a formal consultation response being prepared. As a result of the responses received, there will be amendments to the proposals, particularly in relation to the family court.

There are a number of alternative options under consideration. One option is that the Justices' Authorisations Approvals Training and Appraisals Committee (JAATAC) model is retained but the compromise would be that the number of family justices on the JAATAC is increased and only those who are authorised to sit in family courts would deal with family appraisals. Under this option the size of the JAATAC would be increased to a maximum of 24 from the initial proposal of 12. Another option is to have a completely separate family committee to deal with authorisations and approvals as well as to deal with family appraisals. The last option would be to completely separate family from crime and have separate committees with each committee dealing with authorisations, approvals and appraisals and the training plans for its jurisdiction.

The Deputy Director of Legal Operations, HMCTS believed that the consultation provided the working party with an opportunity to address all of the issues raised by the Family Procedure Rule Committee in their response to the consultation. He acknowledged that

there is an opportunity to provide the family courts with a degree of separation from its historical links with the criminal courts. He further accepted that this consultation provides a chance to recognise the family magistracy as a separate group of judiciary authorised to sit in the family court although some magistrates will be authorised to sit in both adult and family courts.

He noted that in many responses there was a suspicion that HMCTS wished to abolish family panels as a mechanism to reduce the amount of expenses paid through the reduction of training events used by family justices to meet, discuss and train together on relevant issues. He assured the Committee and gave undertakings that this is not the case. He made it clear that even if family panels were to be abolished, there would be a clear protocol in place setting out the arrangements for training and the payment of expenses. It was envisaged that this protocol would be approved by the President of the Family Division.

The President of the Family Division noted that the two main concerns of the Committee were the JAATAC and the proposed abolition of family panels. The President of the Family Division noted that the feedback he had received from Designated Family Judges across the country indicated that there is much concern amongst the magistracy about the abolition of family panels. In his opinion, protocols do not carry as much weight as a statutory panel. He questioned whether the abolition of family panels is a certainty under the proposals. The Deputy Director of Legal Operations, HMCTS answered that it is not a certainty as it is still an option to exclude family from these new arrangements and leave The Family Court (Constitution of Committees: Family Panels) Rules 2014 (the 2014 Rules) in place. This would mean the family magistracy would continue with its existing arrangements in the family court.

The President of the Family Division noted that the communications from Designated Family Judges disclosed opposition to the proposals. He further noted that the working party that prepared the consultation was not representative of the family magistracy or the family court. The President of the Family Division had submitted his own response to the consultation and he did not accept that the rationale behind the proposals was the reduction of “red tape”. The Deputy Director of Legal Operations, HMCTS acknowledged that family panels are organised on the basis of Local Justice Areas and then further organised around Designated Family Judge Areas. However, in the criminal jurisdiction Local Justice Areas no longer have the significance they used to; they are more concerned with the pastoral side than the work load and the geographical locations. Therefore it is possible to remove the concept of Local Justice Areas from the administration of the

criminal jurisdiction but retain it for the family jurisdiction with the 2014 Rules to support it. Decisions made by the working group are taken to the Senior Presiding Judge who makes the final decision in consultation with the Lord Chancellor.

The President of the Family Division noted that he would support the amalgamation of family panels. He further noted that if the underlying problem was the geographical division of Designated Family Judge Areas in relation to Local Justice Areas, he would be willing to reconsider re-aligning the areas if necessary.

District Judge Carr questioned whether it is necessary to consider the need for a single set of rules for the criminal and family jurisdictions now that there is a unified family court. The President of the Family Division supported this approach, especially as he was not aware of any family magistrates who were supporting the abolition of statutory family panels. Marie Brock queried whether the realignment of Designed Family Judge areas would cause any problems in the magistrates' rota for HMCTS. The Deputy Director of Legal Operations, HMCTS explained that if this were to occur then the magistrates' rota for family sittings would be compiled first before completing the rota for criminal sittings.

District Judge Darbyshire questioned how family magistrates would be appointed if the statutory basis for their appointment and authorisation were to be removed. The Deputy Director of Legal Operations, HMCTS explained that the selection and appointment of magistrates would be through the local advisory committees. Arrangements would need to be put in place to ensure that advisory committees were constituted with suitably qualified members. This would then enable anyone seeking authorisation to sit exclusively in the family court to apply to the advisory committee. These committees would need to be organised and it would be for the President of the Family Division to decide how these committees should be organised in line with any new decisions made in the future. Jane Harris noted that this involved a twin track recruitment system distinguishing between those who want to be exclusively family justices and those who want to sit in the adult and family courts. Such a system would require careful thought prior to implementation. This was endorsed by Richard Burton. This was acknowledged by the Deputy Director of Legal Operations, HMCTS but he noted that it can be implemented if such a decision were made.

District Judge Carr noted that arrangements for the family court need careful thought with input into reforms from family justices and Designated Family Judges. He believed justices needed the appropriate authorisation to sit in the family court and careful thought is

required in proposals to change the authorisation and approval processes. He did not want to see justices in the family court as an appendage of magistrates in the criminal court. The Deputy Director of Legal Operations, HMCTS acknowledged that it is possible to separate the process of approvals and authorisations for justices in the family and criminal jurisdictions. If the Committee wished this to be the case then this could be the proposed with the 2014 Rules remaining in place. District Judge Carr noted if this is the case then there needs to be consideration about updating the current Rules. The President of the Family Division endorsed this suggestion and observed that the whole system is due for review.

The Deputy Director of Legal Operations, HMCTS noted that whilst it is possible to keep the family jurisdiction separate from the proposed changes there are disadvantages of this. The main disadvantage is that another opportunity would need to be found to make changes in respect of family which could be at least one year's delay. Marie Brock noted that it was important to family justices to keep their own training and development. The President of the Family Division noted that one year's delay could be purposeful delay if it led to considered reform proposals. He proposed that at that time matters could be considered in their entirety including the re-alignment of Local Justice Areas with Designated Family Judge Areas. The intervening time could be used to look at how matters could be re-arranged in the family jurisdiction. This was endorsed by the Committee.

The Deputy Director of Legal Operations, HMCTS thanked members for their views.

The President of the Family Division thanked the Deputy Director of Legal Operations, HMCTS for attending the meeting.

4. DRAFT FPR PART 3A (CHILDREN AND VULNERABLE PERSONS: PARTICIPATION IN PROCEEDINGS AND GIVING EVIDENCE) AND DRAFT PRACTICE DIRECTIONS 3AA AND 3AB IN RELATION TO CHILDREN AND VULNERABLE WITNESSES

The President of the Family Division confirmed that all members had received the draft Practice Directions from Ms Justice Russell and the comments from the FPRC's working group. He invited members' comments on the draft Practice Directions.

Ms Justice Russell explained to members that the principal aim of the draft Practice Directions was to put in practice the President's Children and Vulnerable Witnesses' working groups' recommendations. She noted that Simon Hughes has previously spoken of the need for the voice of the child to have a more central role in family proceedings. The working group looked at the role of the child in family proceedings and the need of the child to have a voice in those proceedings. She further noted that there is no presumption in law that children do not give evidence in proceedings. She drew members' attentions to the Ministry of Justice's own figures which suggest that over 40,000 children give evidence in criminal proceedings. Research has shown that children are keen that they should be heard but understood that they did not always need to see the judge. It is from this background that the draft Practice Directions incorporated a structure for children to meet judges. In doing so, the working group took into account the recent case law from the Court of Appeal.

As far as vulnerable witnesses were concerned, Ms Justice Russell observed that the family court is trying to catch up with the treatment of vulnerable witnesses in the criminal courts. In these draft Practice Directions, the working group have tried to model some of the treatment of vulnerable witnesses in the criminal courts.

Mrs Justice Theis updated members that there had been a meeting between the Committee's working party and Ms Justice Russell. It had been helpful to talk through the issues raised at a previous Family Procedure Rule Committee meetings. The discussion had culminated in the draft Practice Directions before members today.

Melanie Carew raised that Cafcass are concerned with the content of the draft Practice Directions. She indicated that Anthony Douglas, Chief Executive of Cafcass has written to the President of the Family Division echoing these concerns. Whilst the principle of the child's voice being heard in proceedings is a notion that Cafcass applauds, the practicalities of the draft Practice Directions cause Cafcass a degree of concern. Although the draft Practice Directions do not explicitly commit Cafcass to undertake the functions contained within them, there is a dearth of alternative organisations able to do so. She predicted that it would be inevitable that the judiciary would look to Cafcass to do work which they are not currently doing. Whilst Cafcass is managing to complete work ordered by the Court presently, they are concerned about resource issues and how those functions provided for in the draft Practice Directions will happen in the future. [redacted]

She gave two examples of resource implications. Firstly the requirement for a statement to

be taken from the child. She acknowledged that this can be straight forward in some cases but it will always require some preparation which inevitably has an impact on the time and resources available to Cafcass. She raised a similar concern about the work envisaged by the draft Practice Directions which relates to children directly affected by the proceedings. She re-iterated that Cafcass does not work with children outside the role of the guardian or as Cafcass officers undertaking Section 7 reports and is unlikely to go beyond that statutory role. She again acknowledged that the draft Practice Directions do not direct that Cafcass will undertake the work but remained concerned that this would be the case in practice as a result of orders by the judiciary.

Dylan Jones questioned whether the representations from the Welsh Government in response to the draft Practice Directions raised an issue for members' consideration. The President of the Family Justice Division noted that their concerns were centred on the impact of devolution and the effect of the draft Practice Directions on the Welsh Assembly and its legislation. He will be meeting both Cafcass and Cafcass CYMRU to address their concerns on the draft Practice Directions.

Action: President of the Family Division to meet with Anthony Douglas (Cafcass) and Gillian Baranski (CAFCASS Cymru) to discuss the draft Practice Directions.

Ms Justice Russell responded to Cafcass' concerns noting that the draft Practice Directions are about children having a statement of their evidence before the court. She further noted that every other party to the proceedings has their own statement of their evidence before their court and questioned why only the child should be excluded from the process. She acknowledged that how the court obtains this statement will vary from case to case.

District Judge Darbyshire questioned whether it would fall on the guardian to obtain the child's statement. Ms Justice Russell responded that this would not necessarily be the case as the guardian could have a conflict between their own views of what it is in the child's best interests and the child's own views of what the outcome of the proceedings should be. Hannah Perry queried whether the child's solicitor would be able to obtain the child's statement. Ms Justice Russell accepted this was a possibility in practice. She further accepted that the draft Practice Directions do not cover every practical situation; however, the implementation of the draft Practice Directions would bring about a change in practice and put the child's evidence at the forefront of the proceedings.

District Judge Carr noted that the draft Practice Directions direct the court to "consider" i.e. give consideration to (apart from a couple of occasions when the word "must" is used). In his opinion, in light of how the draft Practice Directions are drafted, the training provided to the judiciary in the implementation of the draft Practice Directions will be a key consideration. He believed the training provided would determine how much of a resource impact there would be arising from the introduction of the changes. Ms Justice Russell noted that there is a training event on public law by the Judicial College on 20 June 2016. District Judges and Circuit Judges are keen to encourage those children who want to see them to be able to do so and also enable children to participate in proceedings where this is possible.

Melanie Carew raised an additional concern on behalf of Cafcass in relation to private law cases. She noted that the majority of private law cases settle, yet the draft Practice Directions require a direct piece of evidence from the child. This is a significant resource impact for Cafcass as it increases the number of cases in which Cafcass are required to have an input. She further questioned the role of Cafcass and the status of the evidence in cases where there is a lengthy adjournment for a Separated Parents Information Programme, Domestic Violence Intervention Programme or therapy and which time in these cases the direct evidence from the child to be provided to the court will be obtained. Ms Justice Russell responded that in these cases, when evidence from the child is obtained will depend on the circumstances of the case and whether the case is to be brought to a resolution. This was endorsed by the President of the Family Division who noted that the draft Practice Directions assumes that proceedings are active at the time direct evidence is obtained from the child. Melanie Carew questioned whether the draft Practice Direction could be amended so it is clear that there is no expectation on Cafcass to provide support or other resources in those cases that are in abeyance.

The President of the Family Division observed that the obligation to communicate the outcome of the proceedings to children will not be on Cafcass in all cases. He reminded members that one of the biggest complaints of young people is that in some cases they do not agree with the presentation of the facts of the case as interpreted by adults or of their wishes and feelings given by the adult speaking for them. This is particularly applicable to proceedings involving teenage children. He noted that one of the points made by the Young People's Board is that children are not prepared to accept that adults communicate all the relevant evidence to the judge deciding the case. He further noted that the family justice system remains behind the criminal justice system in enabling children to have a voice in proceedings.

District Judge Darbyshire noted that if children speak to a judge they are prevented from telling judges what their views are. Ms Justice Russell responded that children want to be heard and it is the responsibility of judges who meet children to get their evidence before the court in an appropriate manner which will vary in different cases. District Judge Carr suggested instead of a "statement" there could be a victim impact statement equivalent as there is in the criminal jurisdiction but conceded that this document is prepared by the police and there would be a resource implication if such a document were to be mandatory in all cases in the family court. Ms Justice Russell responded that the difference is that the draft Practice Direction is designed to enable children to have a voice in the proceedings and to this aim it sets a procedure in place to facilitate this which culminates in a child giving evidence if required. She acknowledged that the procedure of courts in England and Wales is different to countries such as Germany. In Germany children from the age of six and older have a right to see the judge. The President of the Family Division observed that as English courts currently have no such procedure, some German judges feel that English courts do not listen to children at all.

Judge Raeside welcomed the principles behind the draft Practice Directions, however she remained concerned about their applicability in private law cases. She questioned the role of the judge in asking Cafcass to seek the views of a child affected by an application where a non-party parent objects to Cafcass' intervention. Ms Justice Russell responded that the draft Practice Directions cannot provide for every eventuality and Judges will need to interpret them appropriately according to the facts of the case they are dealing with.

Judge Raeside also queried how the draft Practice Directions would work in financial cases where the parties have not lodged a consent order with the court. She questioned whether Cafcass would be required to obtain a statement from the child in these types of cases. In her opinion it would be resource intensive to expect such a statement in these types of cases. The President of the Family Division noted that in all cases the main issue is the welfare of the child. He accepted that there is an assumption in private law cases that what parents have agreed is in the welfare of the child, however, he questioned why that assumption is acceptable in private law cases if it is not acceptable in public law proceedings.

Judge Raeside raised concerns about litigants in person, each of whom would have their own views of the wishes and feelings of the child and the impact on proceedings in

involving an additional party to consider the wishes of the child. She believed that getting this evidence on a practical basis could be difficult despite the detail described in the draft Practice Directions owing to the resource implications. Ms Justice Russell re-iterated that the recommendations in the draft Practice Directions are to enable the judiciary to consider whether to get evidence from the child not to mandate evidence from the child in every case. She further emphasised that the judiciary will need to be creative and use locally available resources if it becomes necessary for a child to give evidence in the course of proceedings. Ms Justice Russell accepted that these measures were never cost neutral and it was never anticipated that they could be cost neutral. The President of the Family Division noted that the only way these measures would be cost neutral is if the child were to write a letter to the Judge without any of the other supporting measures proposed being implemented.

Judge Raeside further considered whether paragraph 13.3 (c) would prevent a child's statement from taking the form of a letter to the judge. Ms Justice Russell responded that the aim of the provision is to put the evidence of the child into writing and make sure the child has a voice in the proceedings. If there is other available evidence, for example an ABE interview to the police, this will already form part of the evidence. The intention behind this provision, is to enable a statement to be taken to facilitate the child's evidence being put before the court. She confirmed that the provision does not stop a child from writing a letter to the Court if they so wish. Melanie Carew suggested combining this into the paragraph so it provides consistency with the intention behind the provision. Ms Justice Russell responded that it is important to keep the provision wide and as flexible as possible and open to interpretation by the judiciary. The draft Practice Directions have been drafted so as not to be prescriptive and if this suggestion were followed other scenarios would need to be included. She noted that the provision as currently drafted does not prevent admissions or disclosures made by the child being part of the evidence adduced as hearsay evidence. The President of the Family Division noted that the draft Practice Directions are trying to provide a framework for judges by setting out a structure and formalising and identifying the issues to be considered when dealing with children and vulnerable witnesses.

Judge Raeside also noted that the reasons for children meeting the judge in draft Practice Direction 3AA – 2 at paragraph 8 do not reflect her experience. On some occasions children want to meet the Judge because they want to meet the decision maker to ensure they have all the information that the child has provided. She suggested an additional reason for the purpose of the meeting being included, this being to meet the decision maker

and ensure all the information submitted by the child is before the Court. This was endorsed by Jane Harris who noted that children, especially those over the age of ten, have clear views over what they want to happen to them. She believed that any meeting with the Judge needs to be productive point from the child's point of view. Ms Justice Russell noted that this provision will apply to all judges. The drafting of this provision is based on current guidance from the Family Justice Council. It is aimed at enabling the judge to see the child at any time but ensuring the judge keeps in mind the limitations during any such meeting with the child. The President of the Family Division noted that there may be a tension between what the judge has in their papers and what is permissible evidence and the judge then trying to obtain this evidence as a result of the meeting with the child. Further directions may be needed following the meeting with the child.

District Judge Carr conceded that he found the topic very difficult. He supports the child having a voice in the proceedings and applies the current practice and will follow these Practice Directions when they are implemented. He questioned the difference between a statement being prepared and adduced into evidence which is seen by all the parties and the child speaking to the judge and the parties being aware of what the child has said to the judge by way of a transcribed recording being made available to all parties. The President of the Family Division noted that judges cannot take evidence and children seeing the judge are not permitted to communicate to the decision-maker their wishes and feelings. This was endorsed by Ms Justice Russell who noted that where an independent statement is taken from the child parties will be sure of its independence in the proceedings. She further noted that District Judge Carr's suggestion represented the inquisitorial system adopted in Germany which is not adopted by the courts in England and Wales.

The President of the Family Division questioned how it could work in practice if the family court were to change its approach with the judge being more inquisitorial. Hannah Perry observed that the preparation work will be missing with children involved in private law proceedings as they will not be represented and she was unclear how their expectations would be managed in the course of the proceedings. Ms Justice Russell noted that the main objection from practitioners would be whether the child has been influenced by the other party particularly when dealing with cases involving difficult or thorny issues. She believed care needs to be taken if judges are going to start taking evidence in such situations. District Judge Carr noted that very few children want to see him, and those that do are usually older children. In those meetings, it is usually possible to engage the child to talk without actually much probing. In this situation, he believed that the judge would not be adducing evidence. He further noted that the family courts are becoming more inquisitorial

and a change in approach in dealing with children is appropriate as children are not part of an adversarial process. Mrs Justice Theis observed that there may be issues of the child's demeanour and the judge entering into the arena which practitioners may raise in an appeal. She recalled experiences when there were issues in ABE interviews where the demeanour of the child was an issue at the final hearing. Judge Raeside endorsed this noting the potential for the Judge to be cross-examined on the child's demeanour during the meeting with the judge and also raised concerns about the child being required to give evidence on their demeanour. However, she also noted that once the child makes a statement this also becomes evidence and the child could still be in a situation where they give evidence in the proceedings. District Judge Darbyshire observed that the issue of demeanour becomes a question of weight for the decision maker. Jane Harris questioned whether following any statement and subsequent meeting with the judge, it may become necessary to refer the child back to the professional who took the statement from the child for a further statement. This is because the child may have further views as additional matters develop. She observed there would need to be a transcript of any meeting with the judge but was unclear how this would affect timescales for the proceedings. Members concluded that a lot of thought would be needed before considering any change to an inquisitorial system.

Judge Raeside questioned what system is used by the German courts. Ms Justice Russell explained that German Judges have an inquisitorial role in the proceedings and gather the evidence. The children meet with the judge and their evidence is recorded. If such an approach is to be adopted in England and Wales, Ms Justice Russell observed that the judiciary will need training on how to speak to children.

The President of the Family Division questioned how long members met with children for. Members agreed that the average meeting with a child lasted fifteen to twenty minutes.

Judge Raeside questioned whether the word "allow" should be removed from PD3AA – 2. She understood that this was to be removed following a meeting between the Committee's working party on Children and Vulnerable Witnesses and Ms Justice Russell. This was endorsed by Melanie Carew. Ms Justice Russell noted that the word allow was retained to enable the provisions to be interpreted as flexibly as possible in all the circumstances.

Will Tyler noted that the concept of voice of a child is irreconcilable with the practice of stopping a child speaking in the course of a meeting with the judge when the child starts to

discuss their wishes and feelings. He agreed the word “allow” should be removed from PD3AA – 2 paragraph 9. He endorsed Judge Raeside’s suggestion of removing the word allow and her proposed expansion to the wording in the reasons for a child meeting a judge. It is now for judges to interpret the evidence and if an inquisitorial system is adopted it is open to some practitioners to take advantage of it in proceedings. Ms Justice Russell noted that if both parents say the child has been coached, the guardian can give evidence on this issue in public law proceedings. Mrs Justice Theis noted that this relates to the fine line between the Judge being the decision maker and the evidence gatherer. Will Tyler noted that in most cases the child wants to tell the judge what is going on and the judge is not hearing anything new. It is when the judge takes a more proactive role in the meeting that this becomes problematic. As long as it is clear in the draft Practice Directions that the judge is not to be proactive in questioning the child but that further evidence may be a product of the meeting, he did not envisage a problem. With this compromise, he did not consider it necessary to go so far as to adopt a new inquisitorial approach.

The President of the Family Division considered that directions may be appropriate for a suitable person to see the child and test what the child as said if practitioners do not intend to undermine the judge’s account of what occurred during the meeting with the child. District Judge Darbyshire noted that there may be a problem if the meeting with the child needs to be terminated because the child starts to make disclosures. Ms Justice Russell noted if disclosures are made, or are about to be made, by the child the Judge will need to consider whether they can continue to hear the case.

Judge Raeside noted that the main problem in private law cases is the lack of preparation for the child. Currently, there may be a Cafcass report, so the Cafcass officer could be asked to prepare the child and manage their expectations. She endorsed Melanie Carew’s point that in most cases Cafcass will be asked to undertake the work first. She supported the need for children to feel involved and heard in the proceedings. Where this is facilitated by Rules and Practice Directions, she believed the process needed to be as simple as possible especially in straightforward cases. Melanie Carew re-iterated the resource impact on Cafcass and that it may not be able to provide this support when the draft Practice Directions are implemented. Ms Justice Russell noted that one way of making children involved in the proceedings is to invite them to observe the proceedings so they know what is happening in their own case. District Judge Darbyshire questioned at what point the child attends in the final hearing. Ms Justice Russell responded that the Judge will need to choose the most appropriate time having regard to the subject matter.

Hannah Perry questioned what kind of training is expected for advocates and how it would work in practice if there is a delay in the roll out of training for practitioners. Ms Justice Russell noted that Mr Justice Roderick Newton was working with the advocates training council to produce the same training that is occurring in the criminal sphere. She further noted that the provision states “should” and is not mandatory as there is the alternative directive of the use of the advocates toolkits which will be the expectation for those advocates who have not undertaken the required training.

The President of the Family Division accepted that there is a need for training for judges and advocates. Judge Raeside noted that the Judicial College will not be providing additional training on this topic prior to its implementation. The President of the Family Division suggested that there may need to be a module on this subject through e-learning. Ms Justice Russell is attending a public law training course in June with the Judicial College and is hoping to get some feedback from this course. The President of the Family Division hopes that the experience of training used for the implementation of the Public Law Outline will assist in the implementation of a training schedule and the roll out of training for these Practice Directions.

Will Tyler questioned when practitioners would have sight of the draft Practice Directions. Marie Brock also questioned when the Magistrates’ Association could be shown the draft documents as they had requested an opportunity to comment on the draft Practice Directions. The President of the Family Division noted that it may be possible to release the draft Practice Directions to the judiciary and practitioners for the purposes of training. The drafts would be clearly marked drafts and not for publication or use in court and released when they are close to completion. It was agreed that drafts will be emailed to the Bar Council, the Magistrates’ Association, Family Law Bar Association, the Law Society, ALC and Resolution.

Conclusions: Members concluded that PD 3AA-2 Paragraph 9 to be amended to remove the word allow.

Members further concluded that draft Practice Direction should be amended to include an additional reason for the purpose of the meeting the child. The wording of 3AA-2 paragraph 8 (d) should reflect the reason as being for the child to meet the decision maker and ensure they have all the information submitted by the child.

Next Steps

- ***Any further drafting points to be emailed to the Legal Secretary to the President of the Family Division and the Secretary of the Family Procedure Rule Committee by 23 May 2016***
- ***Any points of principle or practicality to be emailed to the Legal Secretary of the Family Division by 23 May 2016***
- ***All amendments to the draft Practice Directions to be considered by Ms Justice Russell and the President of the Family Division***
- ***Finalised draft Practice Directions to be sent to the judiciary and practitioners for training purposes***

5. DESTINATION OF FAMILY APPEALS

The President of the Family Division prepared a short note in response to questions raised by MoJ Legal on 16 March 2016 in relation to proposed amendments to Practice Direction 30A. The President of the Family Division talked through the proposed amendments to the Practice Direction. The note prepared by the President of the Family Division was to be circulated to members after the meeting.

The President of the Family Division observed that the Court of Appeal is proposing to amend its appeal procedures to adopt a more streamlined approach. The Civil Procedure Rule Committee are currently amending its provisions.

The President of the Family Division seeks to adopt a similar streamlined approach for family appeals to the High Court. He did not accept that this needed to be delayed on the basis that there were no plans to change the appeal procedure to the High Court in the civil jurisdiction. District Judge Darbyshire noted that any changes should either be made to all courts or not at all. The President of the Family Division re-iterated that he is only focusing on changes to the appeal procedure to the High Court from the family court.

MoJ Policy noted the inconsistency between the civil and family jurisdictions if changes to family appeals to the High Court alone were to be made, and confirmed that there is currently no policy intention to change the appeal procedure from the family court to the High Court due to the inconsistency it would create. It was further confirmed that the Civil

Procedure Rule Committee will be undertaking a consultation on the proposed changes in relation to appeals in the Court of Appeal. MoJ Legal explained that the Master of the Rolls wanted the consultation to be launched this week and it will last for 5 or 6 weeks. A response is expected by the end of July 2016.

MoJ Policy noted that even if a decision were taken to reform the family appeal procedure in the High Court, this could not be undertaken before October owing to a lack of resources as staff are working on other high priority work. One of the obstacles would be difficulties in preparing a consultation document within the expected timescales. Michael Horton questioned whether additional questions can be added to the Civil Procedure Rule Committee's consultation document about proposed family appeal reforms. This was endorsed by Judge Raeside and District Judge Carr. District Judge Darbyshire noted this approach would save resources as it would prevent the need to analyse two sets of data.

Action: MoJ Policy to speak to Civil Procedure Rule Committee Secretariat to ascertain whether it is possible to include additional questions relating to family appeal reforms in the Civil Procedure Rule Committee's consultation

The President of the Family Division questioned whether an alternative option could be to use the Civil Procedure Rule Committee's consultation paper as a foundation on which to build the Family Procedure Rule Committee's consultation paper which may make it less resource intensive. MoJ Policy were unable to provide any commitment but agreed to speak to the Civil Procedure Rule Committee and update the President of the Family Division with the outcome of those discussions.

MoJ Policy updated members of the progress of the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) (Amendment) Order 2016. The 2016 Order has passed both scrutiny Committees. MoJ Policy are still awaiting debate slots from Government whips which are anticipated to be given after the Queen's speech on 18 May 2016. MoJ Legal confirmed that the 2016 Order will take effect 28 days after the Minister signs the order not from the date of the debates. The President of the Family Division noted he had hoped to implement the order on 1 July 2016 in order to have all the necessary arrangements in place prior to the summer vacation. He was concerned that if the 2016 Order is implemented in the latter part of July 2016, arrangements may not be sufficiently embedded. The Deputy Director of MoJ Policy confirmed that staff try and influence the dates of debates as much as possible but it is out of the Ministry of Justice's control. The

President of the Family Division agreed with MoJ officials that the 2016 Order will come into effect in July with supporting Practice Direction 30A amendments being made at the same time. Practice Direction amendments on the streamlined procedure for appeals to the High Court will proceed at a slower pace.

Next Steps

- ***MoJ Policy to feedback to the President of the Family Division's Office about the feasibility of linking in with the Civil Procedure Rule Committee's consultation***
- ***MoJ Legal to prepare draft Practice Direction 30A amendments for Committee's final approval at next meeting***

The meeting adjourned for 30 minutes for lunch. When re-convened, the meeting was chaired by Mrs Justice Theis.

Apologies for the afternoon were received from Sir James Munby, District Judge Carr, Hannah Perry, Dylan Jones and Jane Harris

Mrs Justice Theis queried whether enough members were present at the afternoon session for a quorum to be established to enable decisions to be made. The Secretary advised that the meeting could continue and decisions made by those present. A check would be made on the number of members required for quorum to be established and, if necessary, any decisions taken can be re-confirmed at the start of the next meeting.

Action: Secretary to confirm how many members are required to constitute quorum at the meeting.

6. SETTING ASIDE RULES AND ACCOMPANYING PRACTICE DIRECTION

Paper 6 and its annexes papers 6a and 6b were considered by members.

MoJ Legal talked members through papers 6 and the revised draft setting aside Rules. Members were content with the revisions made to the Rules since the last meeting,

Conclusion: Members agreed to the revised draft setting aside Rules.

MoJ Legal talked members through the accompanying Practice Direction. DJ Carr questioned whether "Judge" includes lay justices. MoJ Legal could see no bar in practice but further checks were required to confirm this. Michael Horton questioned whether the references to Practice Direction 30A in the Practice Direction remain correct in view of the proposed amendments to Practice Direction 30A. MoJ Legal explained they would need to clarify this and update members at the next meeting.

Conclusion: Subject to these checks, members approved the Practice Direction.

Action: MoJ Legal to check with "Judge" include lay justices

MoJ Legal to check with the reference to Practice Direction 30A paragraph 4.1 remains correct in light of the Access to Justices Act 1999 (Destination of Appeals) (Family Proceedings) (Amendment) Order 2016.

7. FINANCIAL REMEDIES WORKING GROUP

Paper 7 was considered by members.

The paper prepared by Judge Waller was circulated prior to the meeting. The paper set out a summary of the Financial Remedy Working Group's recommendations and the steps taken (or about to be taken) by the Committee's Financial Proceedings Working Party to respond to them.

Conclusion: Members agreed that a copy of this summary to be sent to Mr Justice Mostyn and the members of the Financial Remedy Working Group.

8. DECLARATION OF PARENTAGE

Paper 8 and its annexes Papers 8a – 8d were considered.

MoJ Legal talked members through the questions on which members' views were sought. Members were reminded that at the meeting in November 2015 members discussed amendments to Parts 8 and 16 of the Rules and Practice Direction 16 in relation to cases where a declaration of parentage application is made, about the party status of a child in these cases.

Part 8 FPR

Members agreed that the proposed amendments to Rule 8.20 (1) achieved the desired end regarding the party status of a child in Section 55A cases.

Members agreed that it would be helpful to include the proposed new signpost after Rule 8.20 (1). Mrs Justice Theis noted it is useful to have the signpost to help users of the Rules get to the right place. This was endorsed by Judge Raeside.

Conclusion: The proposed amendments to Part 8 of the Family Procedure Rules were agreed by all members.

Part 16 FPR

In relation to Rule 16.4 (1A) MoJ Legal have attempted to draft a new paragraph that is specific to Section 55A cases. MoJ Legal asked members if they thought a new rule is preferable to make express provision for Section 55A cases in Rule 16.4.

Marie Brock supported this approach as it was clear and understandable. Michael Horton noted that a child cannot make an application for a declaration of parentage unless they have a guardian or litigation friend. He further noted that where a child is competent to conduct litigation the conditions in Rule 16.6 would need to be satisfied before the child would be able to conduct litigation on their own without a guardian or litigation friend. He considered it irrational to find a child competent to conduct litigation yet continue to proceed to appoint a guardian. However, he considered the situation could arise where a child is competent to conduct litigation pursuant to Rule 16.6, therefore a guardian is not appointed, but the court may wish to appoint guardian later because the child is not as competent as the court initially believed them to be. In his opinion, in this situation the guardian could be appointed under Rule 16.10. Melanie Carew noted in non-subject child cases that there will not be a guardian as a guardian has a different role to a litigation friend.

Members agreed there should be an express provision for Section 55A cases as proposed.

Members were content with the draft wording of Rule 16.4 (1A), save that the reference to the child applicant in Rule 16.4 (1A) (a) (i) should be removed.

Members agreed that the wording in draft Rule 16.5 (1A) captured the child whose parentage is to be established. Will Tyler observed that the term parentage would not inadvertently capture the person whose status as a parent is to be established (as that is a question of "parenthood", not parentage").

Members agreed to the amendment suggested at the beginning of Rule 16.4 (1).

The Committee agreed that Rule 16.4 (1A) should not have a caveat as mooted by officials. Melanie Carew noted that the Rule relates to guardians and is more in parallel with Rule 16.4 than Rule 16.3.

The Committee agreed that an express provision is needed in Rule 16.5 for Section 55A cases. Melanie Carew observed that it is confusing especially for litigants in person to state that it is necessary to have a litigation friend but then provide for situations when one is not required. She noted that the whole section needed to be re-drafted but accepted this required a lot of work and resources which may not be able to be provided for at this time.

Members agreed the draft amendments proposed in relation to Rule 16.5.

Conclusion: The proposed amendments to Part 16 of the Family Procedure Rules were agreed by all members.

Practice Direction 16A

Members agreed with Mike Hinchcliffe's suggestions in November 2015 and endorsed the removal of paragraph 2.2 from Practice Direction 16A.

The Committee did not consider any amendments were essential or desirable to paragraphs 7.1 to 7.3 of Practice Direction 16A. Members did not feel there was a need to move these paragraphs to an earlier freestanding Part in the Practice Direction.

The Committee considered whether amendments were needed to paragraphs 7.2 or 7.3 of Practice Direction 16A in light of points raised by officials in the paper about the fact that in a section 55A case the court would be considering possible party status not just for a child whose parentage is in dispute, but also possibly for other children (such as a putative parent who is himself a child). The concern was whether different children could have conflicting interests and whether paragraphs 7.2 and 7.3 could be properly applied, given they were evidently drafted from the point of view of considering party status of only a subject child.

District Judge Darbyshire noted that in such circumstances the court would have to work their way around the conflict and consider the interests of each child. He further noted that a putative parent and subject child would not be represented by the same person, even where the putative parent was a child himself, and therefore no conflict would arise in that situation. Members concluded that no amendments to these provisions of the Practice Directions were required.

Conclusion: Members endorsed the removal of paragraph 2.2 but no further amendments were required to Practice Direction 16A

Next Steps

- ***MoJ Legal to liaise with the Official Solicitor and Public Trustee's office to determine the timescales for updating their guidance note in relation to litigation friends and update the Committee at the next meeting***

9. AMENDMENTS TO PRACTICE DIRECTION 12G

MoJ Legal stated that when the Committee were last updated on this proposed change, the Court of Protection Committee had not finalised the proposed changes in relation to the Court of Protection Practice Direction. The Court of Protection Rule Committee have now agreed the wording which is before the Committee for consideration today.

Conclusion: Members endorsed the wording to be included in the next round of Practice Direction Amendments.

Next Steps:

- ***MoJ Legal to make amendments to Practice Direction 12G and 14E inserting agreed wording into both tables.***

10. AMENDMENTS TO PRACTICE DIRECTION 3A

Members considered Paper 10 and the annexed Papers 10a and 10b.

MoJ Legal explained that the proposed amendments to Practice Direction 3A were as a result of a recent case which challenged the evidence required in applications for legal aid where the ground relied on was domestic violence. As the Mediation, Information and Assessment Meetings (MIAMs) exemptions in private law cases mirror the domestic violence provisions in legal aid applications, members were asked to consider proposed changes to the Practice Direction based on recent amendments to the legal aid provisions implemented on 21 April 2016 by the Civil Legal Aid (Procedure) (Amendment) Regulations 2016. Jane Harris had indicated to officials before she left that she wished to comment on this paper and would be emailing the Secretary about this. Members agreed that officials would return the matter to the next meeting if her comments made a significant difference to any decision made by members today.

Members agreed the amendment to increase the past period to which certain forms of evidence of domestic violence could relate from twenty months to sixty months preceding the issuing of the application.

Members agreed to change paragraph (j) to (ja) to remove the confusion created by having two paragraph (j)s. Members further agreed that the new paragraph (ja) should end “of domestic violence by another prospective party” in order to provide consistency with the Practice Direction provisions.

Members further agreed that the exemptions to MIAMs should incorporate the new financial abuse exemption provided for in the legal aid provisions. This would provide consistency with the other criteria for MIAM exemptions which are mirrored on the same regulations.

District Judge Darbyshire noted that the proposed amendments are in accordance with the legal aid regulations. He questioned why the proposed amendments left out the date on which the application is made which is specifically mentioned in the legal aid regulations. MoJ Legal explained that the MIAM exemptions relate to the date the application is made not the date of the legal aid application. Michael Horton questioned whether there is a specified definition of financial abuse. MoJ Legal noted that there is no definition other than what has been provided in the guidance notes which support the legal aid regulations. Mrs Justice Theis and Judge Raeside agreed that it would be helpful if there was to be some sort of signpost especially for litigants in person to know whether or not they could claim a MIAM exemption on the grounds of financial abuse. Mrs Justice Theis noted that the guidance does not necessarily need to be contained in the Practice Direction. District Judge Darbyshire endorsed this and suggested that the guidance on financial abuse could be contained in a guidance note. MoJ Legal agreed to see whether a guidance note existed. Members concluded that it would be helpful if there was a separate note or guidance as to what constituted financial abuse to assist applicants in being aware as to whether they were eligible to claim a MIAM exemption or not.

Conclusion: Members endorsed the all the proposed changes in relation to Mediation Information and Assessment Meeting exemptions in Practice Direction 3A.

Action: MoJ Legal to check whether a guidance note in relation to financial abuse exists

Next Steps

- ***MoJ Legal to liaise with the policy colleagues to confirm when the amendments will come into effect (given the need to amend forms, train court staff etc)***
- ***MoJ Legal to take into account any amendments required as a result of Jane Harris' comments and refer to next meeting if required***

11. ANY OTHER BUSINESS

Melanie Carew asked the Committee their views on disclosure of documents to a child who is not a party to the proceedings at the child's request after the proceedings have concluded. She noted the difference between public and private law proceedings. In public law, the child is a party to the proceedings and local authorities have to disclose their files; however, children who have been subject to private law proceedings have to obtain information about the proceedings from the court. Children subject to private law proceedings sometimes write to Cafcass to obtain this information. Cafcass however, directs the person back to the court. This is despite Cafcass' view being that they should be able to release information they hold to the subject child at their request. The concern is that it would be a potential contempt of court for Cafcass to disclose information without the court's prior permission, given that PD12G does not cover this situation.

Mrs Justice Theis confirmed that the current procedure is that such persons would need to make an application to the court to obtain this information. Judge Raeside noted that there is a marginal link to earlier discussions in relation to Practice Direction 3AA and Cafcass keeping the child(ren) who is not subject to the proceedings informed about the outcome of the proceedings and the reasons for the decision. She considered whether the whole of the proposed Rules on Part 3AA needed to be re-considered in light of decisions on this point. Melanie Carew noted that if that is an issue then the judge needs to consider this position when giving judgment at the conclusion of proceedings. She did not consider that an affected child should automatically have this information but noted that there was a wider issue about the disclosure of information that needed consideration by the Committee.

Mrs Justice Theis noted that there may be other wider issues to be taken into account especially in cases which involve interveners or other complications. Melanie Carew responded that the Local Authority is always in a better position to disclose information as in public law proceedings the child is always a party to the proceedings so they are permitted to have the information. However, in private law proceedings this is not the case and referring children who ask for information back to the court when Cafcass holds the information seems to make the process longer and more difficult than it needs to be. MoJ Legal noted that an amendment could be made to Practice Direction 12G but this only makes it not a potential contempt of court where the information is disclosed and gives Cafcass the discretion not to disclose to the person. Judge Raeside clarified that the reason Cafcass currently cannot disclose information, especially in private law cases is because of Practice Direction 12G and data protection reasons. Melanie Carew confirmed this to be the case and explained that they refer the person to the court for leave for disclosure but they rarely make such applications. District Judge Darbyshire noted that although an

adopted child has a right to information they still need leave from a judge to access that information. Melanie Carew responded that it may be possible to exclude adoption cases from this procedure. Mrs Justice Theis concluded that this issue required detailed consideration and suggested this be carried over as an agenda item to the next meeting. This was endorsed by all members.

Action: Melanie Carew to prepare a paper on this issue for the June meeting

Michael Horton raised an issue about time limits for pension sharing appeals. He noted that in November 2015 a blog was written about Paragraphs 14.1 – 14.3 of Practice Direction 30A titled "when the Rules break the Rules" which has recently been re-circulated. In November 2015, Judge Waller, Michael Horton and MoJ Legal agreed that the provisions on the time limits for pension sharing appeals were ultra vires and that Practice Direction amendments would be required to reflect this and remove them as soon as possible.

MoJ Legal noted that the paragraphs mentioned do not appear in the current version of the Practice Direction, however further checks would be made into this issue.

Action: MoJ Legal to look into proposed amendments to Practice Direction 30A in relation to pension sharing appeals.

Michael Horton also raised that the Family Procedure Rule Committee's website appears to be misleading. When you enter it the website suggests that it was last updated in July, however, it does actually show the recent Rule amendments. MoJ Policy noted that work is ongoing to update the website and therefore this will be looked into over the coming weeks.

Mrs Justice Theis noted that at the President's Conference, the Welsh Judiciary raised concerns about the constitution of the membership of the Family Procedure Rule Committee. The Welsh Judiciary would like there to be a representative of Wales on the Committee if possible. MoJ Policy noted that amendments to the constitution of the Committee can be considered. MoJ Policy will speak to the Welsh Judiciary and members of the Welsh Government and consider the policy position on this issue.

Action: MoJ Policy to speak to the Welsh Judiciary and Welsh Government to consider proposed amendments to the constitution of the Family Procedure Rule Committee and update the Committee at the next meeting.

12. DATE OF NEXT MEETING

The next meeting will be on Monday 13 June 2016 at 10.30 a.m. at the Royal Courts of Justice.

Secretary

May 2016

FPRCSecretariat@justice.gsi.gov.uk