Ministry of JUSTICE

FAMILY PROCEDURE RULE COMMITTEE

In the Judge's Conference Room, 1st Floor Mezzanine, Queen's Building, Royal Courts of Justice At 10.30 a.m. on Monday 12 September 2016

Members

Mrs Justice Theis	High Court Judge	(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	
Dylan Jones	Solicitor	
Hannah Perry	Solicitor	
Her Honour Judge Raeside	Circuit Judge	
William Tyler QC	Barrister	

Announcements and Apologies

1.1 Mrs Justice Theis welcomed all members to the meeting and thanked those present for making themselves available to accommodate a meeting in September following the cancellation of the 12 July 2016 meeting.

1.2 The Chair welcomed a new MoJ policy official who had recently joined the department and was observing the meeting.

1.3 Apologies were received from Lord Justice McFarlane, Mrs Justice Pauffley, Judge Waller and Michael Horton.

Minutes of the last meeting: 13 June 2016

2.1 One amendment to the minutes of the meeting on 13 June 2016 had been notified to the Secretary in advance of the meeting.

2.2 The amendment was to the fourth sentence in paragraph 4.26. The sentence has been amended to read: **"***District Judge Darbyshire noted that someone must be present."*

2.3 Subject to this amendment, the minutes were agreed as a correct and accurate record of the meeting on 13 June 2016.

Matters arising
Family Procedure (Amendment No. 2) Rules 2016 and Practice Direction amending document

3.1 Mrs Justice Theis thanked all members who signed the Family Procedure (Amendment No. 2) Rules 2016 out of Committee, especially during the summer period. The Amendment Rules have

been signed by the Minister, Dr Lee, and will be laid in Parliament on the 12th September, to come into effect on 3 October 2016. The Minister has also signed the supporting Practice Direction amending document.

Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) (Amendment) Order 2016

3.2 The Order has been signed by the Minister, Sir Oliver Heald, on 5 September 2016. This Order will also come into effect on 3 October 2016. Mr Justice Baker will be the Judge in charge of appeals to the Family Division of the High Court.

3.3 Officials are working with the President and Mr Justice Baker to prepare the required forms and associated guidance for use in family appeals to the Family Division of the High Court. Once the forms have been finalised an amended Practice Direction 5A will be submitted to the President and Minister (Dr Lee) for signing.

Amending the constitution of the Family Procedure Rule Committee to include a member of the Welsh Judiciary

3.4 Officials have met with Mr Justice Moor, the Wales Family Division Liaison Judge, and with officials from the Welsh Government. There is consensus that the Courts Act 2003 should be amended to include a member of the judiciary sitting in Wales to represent the interests of Wales. Officials are working together to consider the same for CAFCASS Cymru.

3.5 The timescales for this cannot be confirmed at this time as resources need to be considered but officials are aware it is a priority for the Welsh Government and the Committee.

3.6 Dylan Jones questioned whether thought had been given to setting up a sub-committee within the Family Procedure Rule Committee to deal with matters relating to Wales to adopt a similar approach as being adopted by the Civil Procedure Rule Committee. MoJ Policy explained that all the available options had been taken into account, including that one; however, it was felt that permanent representation on this Committee on a long-term basis was the better option as it would enable discussion on issues as they arise. By contrast, in the civil jurisdiction the sub-group will be looking at a discrete piece of Welsh legislation that needs to be addressed.

3.7 Action: Officials to prepare a timetable for proposed implementation prior to October 2016 meeting for implementing amendments to the constitution of the Committee

Freedom of Information Publication Scheme for the FPRC

3.8 The Chair drew Members' attention to Paper 3 and annexes 3a and 3b, which had been circulated to the Committee.

3.9 The Secretary updated Members that a query had been raised as to the operation of the revised guidance in relation to the distribution of minutes. The Secretary clarified that the scheme only applied to members of the public seeking information or specific documents relating to or about the work of the Committee and not to Members themselves. Therefore, the proposal to stop sending emails of minutes did not apply to Members, but to a distribution list of individuals who sought approved minutes to be distributed each month. Instead, in the event of the Committee approving this revised scheme, those individuals would in the future be directed to the Committee's website.

3.10 Richard Burton questioned whether the FPRC website would be maintained monthly, especially if this was to be the main source of information to which individuals are directed. The Secretary confirmed that this was the case.

3.11 Members agreed the revised guide to information.

3.12 Conclusion: Members adopted the Information Commissioner's Office Model publication scheme and the revised guide to information of the FPRC which will be published on the FPRC website.

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

4.1 The Lawyer for CAFCASS Cymru and the Welsh Government dialled in to the meeting for this agenda item.

4.2 Members took into account Paper 4 and annexes Papers 4a – 4e.

4.3 Members noted that Dr Lee had only received advice on the draft Rules and draft Practice Directions on 6 September 2016. This was the earliest opportunity for officials to refer advice to the Minister following the meeting of the Committee's Children and Vulnerable Witness Working Group on 2 August 2016. Officials are unable to proceed to issue a consultation until a decision from the Minister has been received.

4.4 MoJ Policy anticipated receiving a response from the Minister soon. The Minister's views have been sought on the content of the draft Practice Directions and on whether he agrees to consult on them as well. The resource implications have also been raised with the Minister for his views, particularly in relation to Practice Direction 3AA on children which officials believe are substantially greater than in relation to vulnerable witnesses. This was endorsed by the Deputy Director of MoJ Policy who noted the department is trying to encourage the Minister to reach a decision on the advice as soon as possible.

4.5 District Judge Darbyshire confirmed with officials that the Minister has received advice on the version of the Practice Directions that Members are being asked to consider, and potentially amend, at this meeting. He questioned whether, if further amendments were made at this meeting, there would need to be further consideration by the Minister before a final decision could be taken, resulting in further delay. The Deputy Director of MoJ Policy explained it would depend on the nature of any changes agreed by Members today. Substantive changes would require officials to take the draft Practice Directions back to analysts to consider the changes and potential resource implications of implementation.

4.6 District Judge Darbyshire raised concerns about being asked to consider the Practice Directions prior to a decision being made by the Minister.

4.7 The Deputy Director of MoJ Policy accepted this was a concern, however, felt that it was useful for Members to consider the draft Practice Directions, especially given the work by the Working Group and officials over the summer to bring them into a point they were today. She further noted that if the amendments agreed by Members are not too great, officials would need to consider what the differences were, if any, and what impact they made to the resource implications. She further noted that the Practice Directions were not a final version as they are being prepared for consultation so there is still work to be done even if a version for

consultation is agreed on. Richard Burton questioned the timescales for consultation and implementation of the Rules and Practice Directions and this was endorsed by Mrs Justice Theis. MoJ Policy explained the proposed timescale for consultation is six weeks, however, officials will need time to analyse the responses received and allow time for Members to discuss the responses and possibly update the draft Practice Directions following the consultation responses. It is still possible to implement the Rules and Practice Directions for April 2017, however, officials are aware the President of the Family Division would like to work to a speedier timetable if possible.

4.8 Marie Brock questioned officials' views that the resource implications are greater in relation to children than in relation to vulnerable witnesses. She noted the implications of cross-examination of vulnerable witnesses and measures required to assist this could have greater resource implications as there are likely to be more vulnerable witnesses than there are children wanting to meet the judge in practice. MoJ Policy recognised that both Practice Directions have resource implications, but considered the costs of Practice Direction 3AB are not as great as Practice Direction 3AA given it does not have the same impact on agencies such as CAFCASS. Marie Brock conceded that Practice Direction 3AA has resource implications for CAFCASS and other agencies, however considered there were still resource implications in relation to vulnerable witnesses.

4.9 Mrs Justice Theis raised concern if there was any further delay in relation to progressing these Rules and Practice Directions, given they have been under consideration for approximately 15 months. The Deputy Director of MoJ Policy accepted that officials are aware of the delay but noted that there are new Ministers in the Department and this is the first opportunity officials have had to put a substantive version of the Practice Directions to the new Minister with advice on the associated costs.

4.10 Members agreed in the interests of avoiding delay to consider the draft Practice Directions and the questions raised by officials to enable any drafting amendments to be made prior to the October meeting with a view to consultation as soon as a decision has been made by the Minister.

4.11 MoJ Legal explained to Members that there are some issues that cannot be re-drafted until a Ministerial decision has been made particularly in relation to resource concerns some of which were raised by the lawyer on behalf of CAFCASS Cymru and the Welsh Government. However Members' views were sought on other issues within the two Practice Directions.

4.12 MoJ Legal explained to Members how the current versions of the Practice Directions differed in structure from the draft prepared by Ms Justice Russell. The overall structure is different as any duplication has been removed and there is an attempt to make a closer link to the draft Rules. MoJ Legal thanked members of the Children and Vulnerable Witnesses Working Party for attending the meeting on 2 August 2016 to prepare the draft versions before the Committee today.

<u>PD3AA (children)</u>

Paragraph 1.3

4.13 Officials are waiting for the President of the Family Division's views on whether it would be better to provide guidance on the procedure to be followed when children meet judges in the

Practice Direction or whether there should be an updated version of the Family Justice Council Guidelines which can reflect and discuss the case law more easily.

4.14 District Judge Darbyshire questioned whether the Family Justice Council's agreement was needed for their guidance to be superseded by a Practice Direction. MoJ Legal explained that the intention is that the Practice Direction provisions should supersede the FJC Guidelines, and the drafting was simply trying to make it clear that this was the case. District Judge Carr considered that a Practice Direction has more statutory authority than guidance so the latter must be superseded. MoJ Legal agreed, but thought it would be preferable to expressly make this point. Will Tyler noted the President of the Family Division's views on how to proceed is crucial as this section may require substantial re-consideration pending on the view formed.

4.15 Action: MoJ Legal to re-send the email to Legal Secretary of the President of the Family Division to obtain his views on guidance by the Family Justice Council

Paragraph 1.6

4.16 MoJ Legal noted that there were mixed views in the Working Group as to whether or not there should be an Annex listing out other potentially relevant Rules and Practice Directions, and on balance the favour was for an Annex. Marie Brock noted that Members need to take into account that the Practice Directions also needs to be accessible to litigants in person and the list as drafted can be daunting and if removed into an Annex the remainder of the Practice Direction flows smoothly. This was endorsed by District Judge Darbyshire. District Judge Carr favoured its inclusion within the body of the Practice Direction.

4.17 The majority of members preferred an Annex.

4.18 Conclusion: MoJ Legal to redraft this section with an annex and present it to the Committee at the October meeting for consideration.

Paragraphs 3.1 and 3.2

4.19 The Lawyer on behalf of CAFCASS Cymru and the Welsh Government had nothing to add to what was in paper 4d. He noted that in relation to children expressing their views, CAFCASS Cymru are concerned this could lead to an increase in the volume of section 7 reports being ordered and an increase in the level of detail required during those visits. CAFCASS Cymru are also concerned as to the mechanism which would permit Cafcass and CAFCASS Cymru to become involved where no section 7 report has been ordered by the court. It was conceded that public law proceedings are very different.

4.20 Mrs Justice Theis recognised that there are resource implications but noted that the judiciary would need to be creative in their use of resources to get this information before the court.

4.21 Melanie Carew endorsed the points made on behalf of CAFCASS Cymru and the Welsh Government and noted that there is a grey area in relation to section 7 reports. She considered it would be a step back for the court to start requesting wishes and feelings reports in every case and this would be impossible for Cafcass to resource. She further endorsed concerns about the vires for Cafcass to speak to directly affected (non-subject) children as this would apply equally to England and Wales, noting that current resources do not permit Cafcass to do what the judiciary appear to expect within the draft Practice Directions. She concluded that this was a real concern and, unless the Practice Direction explicitly stated other methods of getting the child's views before the court other than through Cafcass / CAFCASS Cymru, the question of resources will continue to be an issue.

4.22 Will Tyler acknowledged comments in the feedback from the Judicial College that parents cannot be relied on to provide an impartial and dispassionate portrayal of the children's views which therefore only realistically leaves options b) and c) in this paragraph.

4.23 Judge Raeside noted that there are cases where parents will agree on what is in the children's interests and therefore what the child's views are. In such cases, the child's views will not be the main issue in the case. She considered that the Children Act 1989 requires the judiciary to take children's wishes and feelings into account. She suggested this could be done either through Cafcass or CAFCASS Cymru or it could be done independently; however she acknowledged the latter option would involve completely revolutionising how courts do things and involve judges doing it. She referred to an interesting article in Family Law Journal – *'Six good reasons why judges should meet children in appropriate cases [2016] Fam Law 320* – which suggested there are six good reasons for why children should meet judges in family law cases and advocated the judge taking a more inquisitorial role in the proceedings. She noted that the President of the Family Division was clear from the start of this process that implementing these measures would not be cost neutral and considered the realistic options were Cafcass and CAFCASS Cymru, the judiciary or not doing it at all.

4.24 District Judge Carr questioned the purpose of meeting children and how judges can independently find out children's wishes and feelings. He noted wishes and feelings do not need to be obtained in every case but consideration must be given to them in every case. Will Tyler observed that, in practice, it will be every case when you consider the legislation and Convention duties. District Judge Darbyshire noted it is a huge investment to provide a Guardian and Solicitor for the child in proceedings in order to comply with our Convention duties.

4.25 Melanie Carew noted that 60% of cases in private law do not proceed beyond the first hearing and these children are not being seen or heard. She reinforced that to now make provision for these children to have their views taken into account is a substantial increase in demand which Cafcass do not have the resources to provide for.

4.26 Judge Raeside raised concerns about directly affected children and how Cafcass / CAFCASS Cymru will speak to children who are not parties to the proceedings. Marie Brock considered that of the 40% of cases that do not agree an outcome at the FHDRA, the Practice Direction would only apply to those cases where a section 7 report is sought in line with current practices. Judge Raeside considered that the Practice Direction was intended to bring about a change of practice to stop adults making decisions for children without allowing children the opportunity to express their views. District Judge Carr noted that there are many different stages in the proceedings at which point the parents may reach an agreement and settle; and the question then remains of where the line is drawn on when the child's view is not sought. Will Tyler noted it is not this Committee's job to specify any restrictions on when a child's view no longer needs to be sought in proceedings. This was endorsed by District Judge Darbyshire who considered any such decision to be a judicial decision.

4.27 Marie Brock questioned if there is a push for mediation to facilitate out of court settlements between parties then why is it different when an agreement is reached at FHDRA which requires the child to have the opportunity to be heard in the proceedings. Mrs Justice Theis considered that having looked at the Rule, these provisions will not apply in the vast majority of cases before the courts, because in many cases the court will be satisfied having looked at the terms of the agreement reached by the parties, that it will not be necessary to obtain the child's views as per draft Rule 3A.3.

4.28 Marie Brock and Jane Harris endorsed Judge Raeside's alternative drafting to paragraph 3.2 3) c). They considered it to be extremely well worded and felt that it made clear to court users that it will not always be appropriate for the child's parents to give the court the child's views. This is especially as the wider judiciary and Committee members have all expressed concerns about the viability of parents giving children's views in the course of proceedings. District Judge Darbyshire noted that it reflects the judiciary's views about what they would like to happen in practice. Mrs Justice Theis noted it reflects how parents cannot be excluded from the proceedings but courts will be encouraged to consider whether there is anyone else who can impartially gather the children's views and put them before the court. This drafting was also endorsed by District Judge Carr and Richard Burton.

4.29 MoJ Legal noted inclusion of the drafting in the Practice Direction can be done for October, however there may be a problem in terms of the resource implications and the wording needs to make sure it does not suggest there is a power to ask Cafcass or CAFCASS Cymru or Local Authorities to become involved in cases where there is no power to order a section 7 report.

4.30 The Lawyer on behalf of CAFCASS Cymru and the Welsh Government noted there would be no power to order a section 7 report if the request does not relate to the subject child because the report can only focus on matters concerned with the welfare of the child who is the subject of proceedings. District Judge Darbyshire and Marie Brock noted that the request for information about directly affected children would be drafted to request information as to how the issues impact on the subject child which would facilitate the making of a Section 7 report. Marie Brock noted that a section 7 report is always about the subject child but that there may also be other children around whose views might also need to be taken into consideration by the court. Will Tyler noted that it does leave a potential gap if there is no parent or other alternative person to provide the information and Cafcass or CAFCASS Cymru do not have the resources and there is no alternative agency to obtain this information.

4.31 Members agreed a directly affected (non-subject) child cannot be the subject of a section 7 report because that would be separate proceedings. Mrs Justice Theis noted the difficult situation would be where the directly affected child is not related to the subject child and questioned in such a situation how the court might obtain this information.

4.32 Judge Raeside questioned the purpose of obtaining the information from a directly affected child because the court is not concerned with the views of the directly affected child but only with how the directly affect child affects the relationship with the subject child. She questioned the purpose and usefulness of obtaining such views.

4.33 Richard Burton concluded this issue will not be resolved today as a Ministerial decision needs to be made on resources. It is necessary to make the Practice Direction fit for purpose in order to undertake a consultation. This was endorsed by Jane Harris.

4.34 **Conclusion: Members agreed for Judge Raeside's drafting on Paragraph 3.2 to be incorporated into the Practice Direction subject to the resource implications being raised with the Minister and a Ministerial decision being made.**

Paragraph 3.3

4.35 Judge Raeside suggested that there should be a provision for the court to receive updating information. Ms Justice Russell's recommendations were that statements by a child should be revisited at different stages of the proceedings. Officials questioned whether there should be an inclusion of a request for updating information. Mrs Justice Theis agreed that it would be helpful if the court were kept updated in the course of proceedings as information can change.

4.36 <u>Conclusion:</u> **Members agreed that there should be a provision for the court to be kept updated in relation to public law proceedings.**

Paragraph 4.1

4.37 Officials questioned whether a "welfare consideration" ought to be built into this paragraph, and, if so, whether there should be a presumption that a child should be given information, unless their welfare pointed otherwise, or whether there should be a more "neutral" provision saying welfare has to be taken into account when deciding whether a child should be given information. Jane Harris believed there was no harm in reminding people about the need to consider the welfare of the child. Mrs Justice Theis favoured the more neutral proposal as this is intended to bring about a change of culture. She believed that it is not always appropriate to force a child to hear about the proceedings but in some cases it may be better for the child to have some information, even limited information, instead of no information at all.

4.38 Judge Raeside questioned whether, if the welfare consideration is to be incorporated into the Practice Direction, should it not be incorporated into the whole Practice Direction rather than just in the section about giving information about proceedings to the child. District Judge Darbyshire concurred with this. Mrs Justice Theis noted than any decision made by the court activates the welfare consideration including a decision of whether to apply a Practice Direction. District Judge Carr concluded on this analysis it is not necessary to include a welfare consideration in this part.

4.39 Will Tyler noted that in informing children about the proceedings there is a presumption that direction will be made taking into account the child's welfare. Hannah Perry considered that information should be available, in some cases at a later date if the child is going through therapeutic services, so the court will always consider what information should be made available in the future. District Judge Carr considered there is a need for caution in talking about a presumption of telling children about something that affects them unless certain exceptions apply because what are the exceptions? Marie Brock noted that most parents are adamant children should not be told about proceedings so a presumption that children should be told about the proceedings is a change in culture. Melanie Carew noted the guardian has a role to inform the child of the outcome of proceedings but this separates those children who have a guardian in the proceedings.

4.40 Hannah Perry considered that the inclusion of a welfare consideration will apply to those cases that don't apply the welfare checklist such as financial remedy cases, non-molestation cases etc. This was endorsed by District Judge Darbyshire and District Judge Carr. Mrs Justice Theis considered it could complicate the paragraph to include the welfare consideration as the court will be exercising a discretionary jurisdiction with the option to opt out in paragraph d) unless the order specifies that it shouldn't happen.

4.41 District Judge Darbyshire considered it to be more a question of how the information is imparted to children. He noted that sometimes parents try to involve the children in the proceedings but courts must try to avoid them discussing at great length what has been going on with the children. The judiciary should discourage that from happening with children involved in the proceedings. Members agreed that the aim is not to have parents discussing their case with children otherwise they are asking children to make decisions in favour of their case. Hannah Perry considered each case will be specific in terms of judicial consideration. She noted the greater the involvement of the children the more apparent it will be to the court how best it is to share the information with them.

4.42 Conclusion: sub-paragraphs c) and d) are to remain but there is no need to include a welfare consideration within this paragraph

Paragraph 4.2

4.43 Members agreed this should be re-drafted to reflect the similar wording agreed for paragraph 3.2 based on the drafting proposed by Judge Raeside.

4.44 Melanie Carew noted that there are even more difficulties in requesting Cafcass and CAFCASS Cymru to undertake this role especially in a case they have not been involved in and there will be real difficulties in cases where there is no alternative other than the parents. She strongly endorsed the need for the judiciary and the Judicial College to be clear about the resource position when delivering training. Hannah Perry noted that in terms of the conclusion of proceedings, parents may be able to agree on someone neutral to inform the child of the outcome of proceedings and therefore this may be a less contentious issue.

4.45 Conclusion: Members agreed for Judge Raeside's drafting on Paragraph 3.2 to be reflected in this paragraph in the interests of consistency but this paragraph is also subject to the resource implications being raised with the Minister and a Ministerial decision being made.

Section 5

4.46 MoJ Legal invited comments on re-drafting section 5 to be sent by e-mail prior to the October meeting as further work on this section is needed. Members were invited to provide any comments for consideration at the meeting.

4.47 Will Tyler suggested amending paragraph 5.3 c) to apply solely to a welfare officer to avoid any conflict to the role of the Children's solicitor. This was endorsed by Hannah Perry. He further suggested adjusting the order of paragraphs 5.7 to 5.12 to reflect the order of the process of what should happen when the child wishes to meet the judge.

4.48 Marie Brock suggested an amendment to 5.5 so it reads that a meeting will only occur with the judge if the child wants this clearly, giving the child the choice.

4.49 District Judge Darbyshire suggested an amendment to paragraph 5.2 to clarify its intended meaning.

Paragraph 5.10

4.50 Judge Raeside referred Members to the recent article in Family Law and read out what Lady Hale suggests are 6 reasons why children may want to meet the judge. The reasons provided are:

1. The child becomes a "real person" not just 'the object of other people's disputes'
2. The child can have 'a clear idea of what is right' despite the conflicting views of the parties
3. A meeting allows the judge to 'learn more about the child's wishes and feelings than is possible at second or third hand'
4. 'The child will feel respected, valued and involved, as long as the child is not coerced or obliged to make choices that she does not wish to make'
5. It will help the child to understand the 'rules' of the proceedings, and thereby make them 'more inclined to comply with the decision' of the court
6. Parents will be more likely to be 'reassured that the court has been actively involved rather than simply rubberstamping the professionals' opinions' with the added 'effect of sharpening the professionals' practice'

Judge Raeside said it would be helpful if these reasons could be incorporated in some manner into paragraph 5.10.

4.51 Mrs Justice Theis noted that paragraph 5.10 needs to be read in conjunction with paragraph 5.11. District Judge Carr noted that paragraph 5.11 is uncontroversial and does not require amendment. Will Tyler suggested that 5.10 a) could be expanded to incorporate the inclusion of procedure and timetable. He further suggested that b) could be expanded to include making the child feel respected and valued.

4.52 <u>Conclusion:</u> **Paragraph 5:10 to be amended in light of the discussions.**

Paragraph 5.13

4.53 Officials questioned whether parties or their representatives should have the opportunity to respond to the content of a child's meeting with a judge, whether by way of oral evidence or submissions. Marie Brock questioned whether this would only be appropriate where the child has revealed new evidence. Mrs Justice Theis suggested incorporating the words "if appropriate" at the end of a new paragraph so the court has discretion in the circumstances. This was agreed by Committee Members.

4.54 <u>Conclusion:</u> **Words "if appropriate" to be added to a draft new paragraph so the court has discretion to decide whether further evidence and / or submissions should be adduced in the proceedings after a child's meeting with a judge.**

Paragraph 6.1

4.55 Officials are still waiting for the President of the Family Division's views on whether Re W guidance should be included within the Practice Direction or not. The Working Group's view was that such guidance should not be in the Practice Direction.

4.56 <u>Action:</u> **MoJ Legal to re-send the email to Legal Secretary of the President of the Family Division to obtain his views on whether a short paragraph about Re W is to be included in the Practice Direction or more comprehensive guidance is to be drafted.**

Paragraph 6.2

4.57 Officials are still waiting for the President of the Family Division's views about whether the Practice Direction should include anything about the types of cases where a child may be likely or less likely to give evidence.

4.58 <u>Action:</u> **MoJ Legal to re-send the email to Legal Secretary of the President of the Family Division to obtain his views on whether the Practice Direction should specify the types of cases when a child is likely or less likely to give evidence.**

Paragraph 6.3

4.59 Officials questioned the purpose of this paragraph. Melanie Carew and Marie Brock recommended its removal. Will Tyler also endorsed its removal as he envisaged difficulties in favouring evidence in other ways that could reflect the child's wishes and feelings.

4.60 Judge Raeside favoured its retention as in the event of future developments there may be a method of evidence which the court wants to adopt but is unable to.

4.61 Mrs Justice Theis noted that the purpose of the Rules and Practice Directions are to set a structure by which the process should happen. She did not endorse having a paragraph that then allowed courts to move away from the agreed process. Hannah Perry, although not sure of

the necessity of this paragraph, suggested that if the paragraph were to be retained could the words "approved by the courts" be included. Will Tyler noted the Rules and Practice Directions provide for how evidence should be adduced making this paragraph redundant.

4.62 The consensus was for the paragraph to be removed.

4.63 **<u>Conclusion:</u> Paragraph 6.3 to be omitted.**

Paragraph 6.4

4.64 MoJ Legal included a sentence stating this paragraph did not apply when the child's evidence is only given in writing.

4.65 Mrs Justice Theis considered that an older child might have questions put to them in writing and recommended removal of this last sentence. Judge Raeside noted that a Re W hearing could incorporate a ground rules hearing and therefore the paragraph is misleading.

4.66 Members agreed this last sentence should be removed.

4.67 **<u>Conclusion:</u> The last sentence to be omitted from this paragraph.**

Paragraph 6.7

4.68 Hannah Perry questioned whether the reference to "the number of advocates" should be removed as in private law proceedings there may be no legal representatives or advocates.

4.69 On the terminology of "legal representatives" and "advocates", District Judge Carr noted that this is a crucial distinction which is developing because at a ground rules hearing judges want to speak to the advocate who will be conducting the examination of the witnesses not the legal representative with conduct of the case.

4.70 Jane Harris suggested merging paragraphs 6.7 and 6.9 if possible because this is helpful from the child's perspective. Mrs Justice Theis and Hannah Perry endorsed Jane Harris' suggestion to merge paragraph 6.7 and 6.9. Mrs Justice Theis also noted that the terminology also needs to be amended to include people who are not legally qualified. District Judge Darbyshire noted that a person with a McKenzie Friend is still a litigant in person even if the McKenzie Friend is allowed to address the court or given leave to examine the witnesses.

4.71 Judge Raeside questioned whether there should be inclusion of the power of judges asking questions to witnesses where there are aggressive litigants in person. Mrs Justice Theis raised concerns about this as the Court of Appeal often change their mind about court procedure. Judge Raeside stated this was a statutory power. MoJ Legal referred to Section 31G (g) Matrimonial and Family Proceedings Act 1984 which allows the court to "put or cause to be put" questions in specified circumstances. However, officials stressed that this power is to be used sparingly, especially as the Court of Appeal has made it clear that this section cannot be used to order advocates to be funded at public expense.

4.72 **<u>Conclusion:</u> Paragraph 6.7 and 6.9 to be merged and to include in the new paragraph reference to the possibility of the judge putting questions "if appropriate".**

<u>Paragraph 6.8</u>

4.73 The draft Practice Direction refers to an expectation that advocates will undertake certain training. Will Tyler noted that a Practice Direction cannot impose a requirement to undertake

training for advocates. Mrs Justice Theis noted the wording in brackets needs to be removed. These amendments were agreed by all Members.

4.74 <u>Conclusion:</u> **Amend to remove the reference to training expectations in this paragraph**

Paragraph 7.1

4.75 Officials will consider this further once a Ministerial decision has been received. Hannah Perry noted the difficulties in the wording as feedback from the Judicial College indicated that one judge gave up sitting in public law cases due to lack of resources. Members agreed the first paragraph should be amended to state all "available" resources, rather than "local".

4.76 Melanie Carew sought to include reference to the overriding objective as it reminds all parties and the judiciary to deal with cases expeditiously and efficiently. Members agreed it was unnecessary to refer to the overriding objective in this specific paragraph (as it applies throughout in any event).

4.77 <u>Conclusion:</u> **amend to refer to all available resources and remove reference to the overriding objective.**

Definition of "intermediary"

4.78 Ms Justice Russell's original draft had defined "intermediary". Officials noted that the term was not used in this Practice Direction, but was used in the draft new Part 3A FPR, so if there were to be a definition it would be best placed in the FPR. Officials favoured including a definition, for clarity.

4.79 Will Tyler noted some tweaking was needed to ensure the draft definition reads properly.

4.80 <u>Conclusion:</u> **the next draft of Part 3A FPR should include a definition of "intermediary".**

The Lawyer for CAFCASS Cymru and Welsh Government left the meeting at this point.

<u>**PD3AB (vulnerable witnesses)**</u>

Paragraph 1.2

4.81 MoJ Legal recommend the removal of this paragraph as it appears to be a mission statement about the purpose of the Practice Direction more suitable to an explanatory memorandum.

4.82 Marie Brock and Janie Harris favoured its removal.

4.83 Mrs Justice Theis considered it helpful to set out their purpose considering the length of time the Practice Directions have been worked on. This was endorsed by District Judge Carr. Members agreed on its retention.

4.84 <u>Conclusion:</u> **Paragraph 1.2 to be retained**

Paragraph 1.3

4.85 MoJ Legal recommend the removal of this paragraph as it goes beyond explaining what the Rules and Practice Directions do and is more about underlying rationales and is therefore unsuitable for the Practice Direction.

4.86 Mrs Justice Theis considered it helpful to retain especially taking into account the issues with resources and the expectation of cooperation and collaboration on all parties. She noted other

examples such as the public law outline which led to a change in culture to encourage collaboration and co-operation and believed there would be no harm in conveying that message again through this Practice Direction. This was endorsed by District Judge Carr who believed unrepresented parties would find it helpful to be pointed to something tangible by the judge in court. Members agreed on its retention.

4.87 <u>Conclusion:</u> **Paragraph 1.3 to be retained**

Paragraphs 1.3 and 1.4

4.88 Hannah Perry suggested that paragraph 1.4 should be moved before paragraph 1.3. This was agreed by members.

4.89 Will Tyler noted that the words "as defined" should be removed in paragraph 1.3 (as currently drafted) as there is no definition of vulnerability provided in the Rules or Practice Directions. He further noted that the Judicial College had raised concerns that vulnerability is subjective.

4.90 Marie Brock noted that vulnerability is not always easy to identify. Judge Raeside considered it is good practice for the parties to assist the court in identifying any party or witness who is a vulnerable party. This was endorsed by Mrs Justice Theis who considered it was for the parties to raise any issues of vulnerability if necessary.

4.91 Judge Raeside suggested the paragraph could be amended to talk about potential vulnerability. Hannah Perry noted the complication is that there may be cases where a vulnerable person does not realise that they are vulnerable which causes added complexity for the court.

4.92 <u>Conclusion:</u> **Members agreed paragraph 1.4 should be moved before 1.3 and reference to "as defined" should be removed as vulnerability is not defined in the Rules or Practice Directions.**

Paragraph 1.5

4.93 Officials questioned whether this should be in an Annex.

4.94 Members agreed in the interests of consistency with Practice Direction 3AA this should be in an Annex

4.95 <u>Conclusion:</u> **MoJ Legal to redraft this section with an annex and present it to the Committee at the October meeting for consideration.**

Paragraph 2.1

4.96 Officials have amended this paragraph to only list those matters which are not contained within the draft Rules. Members endorsed this approach.

4.97 As far as this paragraph related to the Rules, Marie Brock questioned the Rules at 3A.11 (h) and whether it should include a reference to the maturity and understanding as well as age to be applicable to children and vulnerable witnesses. This was endorsed by Mrs Justice Theis.

4.98 Members agreed that 2.1 (a) could be removed from this paragraph as it is contained with the draft Rules.

4.99 Will Tyler noted that the duty is on all the parties in the proceedings to identify any vulnerable persons. He further noted that at no stage in the draft Rules or Practice Directions is the court asked to identify a vulnerable person. He asked Members whether they all agreed to the draft provisions (Rules and Practice Directions) never requiring the Court to explicitly question whether a person is vulnerable in the course of proceedings especially with there being no agreed definition of vulnerability.

4.100 MoJ Legal conceded that the provision does not require the court specifically to consider the issue of vulnerability. Jane Harris noted this duty on the court is provided for within Paragraph 1.1. Marie Brock noted that such a duty is a continuing duty of the court. Judge Raeside noted the vulnerability involves considering constantly changing factors as noted by the President of the Family Division in the case of Re S-A. District Judge Carr considered that court's main consideration is how to get the best evidence before the court. Hannah Perry noted that paragraph 3.2 tried to provide the judiciary and practitioners a guide towards how vulnerability is considered in terms of the proceedings. Mrs Justice Theis considered this may be an issue to be considered within the consultation on which stakeholders views may need to be sought. Judge Raeside endorsed this noting that provisions could provide for the court to record its decision on the order that it has considered vulnerability and whether special measures to protect the vulnerable person are required. MoJ Legal noted that this requirement is already provided for is Rule 3A.13.

4.101 <u>Conclusion:</u> **Members agree to the amended list of the Practice Direction only referring to matters not contained with the Rules**

Paragraph 3.1

4.102 Officials questioned whether this paragraph should be retained, raising concerns about it being a mission statement of the purpose of the Practice Directions and being too wide in its link to the draft Rules.

4.103 Marie Brock endorsed its removal as it is a repetition of what has already been included with the Practice Direction. This was endorsed by Mrs Justice Theis, District Judge Carr, Will Tyler and Jane Harris.

4.104 Members agreed this paragraph should be removed.

4.105 <u>Conclusion:</u> **Paragraph 3.1 to be removed.**

Paragraph 3.2

4.106 Officials questioned whether the second sentence in this paragraph should be omitted as it appears to go further than the requirements in the Rules in requiring "all parties" to assist the court when considering whether factors set out in the rules make it likely that the participation of a party or witness is likely to be diminished by reason of vulnerability.

4.107 Hannah Perry questioned whether the assistance of all parties would be required in practice, especially where there were risk issues. Mrs Justice Theis agreed that only relevant parties needed to be present and the sentence could be amended to reflect that. It was agreed that "all parties" should be amended to "relevant parties".

4.108 <u>Conclusion:</u> **Paragraph 3.2 to be amended to require the assistance of "relevant parties".**

Section 4

4.109 Judge Raeside questioned whether paragraph 4.3 in relation to ground rules hearings should mirror the wording agreed in relation to ground rules hearings for children in Practice Direction 3AA for consistency. This was agreed by all Members.

4.110 Hannah Perry questioned if there is any reference to intermediaries within the Practice Direction. MoJ Legal noted that the reference to intermediaries is contained within the Rules not the Practice Directions.

4.111 **<u>Conclusion:</u> Paragraph 4.3 to be amended to be consistent with ground rules hearing paragraph in Practice Direction 3AA.**

Paragraph 6.1

4.112 Marie Brock questioned whether there is a need to include a reference for provision by personal service not to be effected by the applicant handing over papers to the respondent. Hannah Perry considered this to be unnecessary as there is no requirement for personal service. Judge Raeside considered that reference to service in these provisions means service by post. This was endorsed by District Judge Carr. Members agreed this paragraph did not require amendment.

4.113 Judge Raeside questioned whether there is a need for an application for special measures for a vulnerable witness. She considered whether the court would insist on an application where it was apparent that a party was vulnerable in the proceedings and required a special measure. Mrs Justice Theis noted that such applications would be considered in the same way as an application for experts. MoJ Legal noted that an application will not always be needed as the court has a continuing duty to consider vulnerability and as a part of this duty could make directions where appropriate, but the draft rules do set out the procedure for any application that to be made under the Part 18 procedure, as modified.

4.114 **<u>Conclusion:</u> Rule 3A.14 to be amended to make the need for a Part 18 application to be subject to the discretion of the court**

4.115 In relation to the draft Rules, it was agreed that draft Rule 3A.12 (6) should be removed.

4.116 Members thanked MoJ Legal for the time and effort taken to revise the draft Rules and Practice Directions. Officials will wait for the Ministerial decision to consider how best to proceed for the next meeting, but officials were asked to revise the draft Practice Directions in light of discussions at this meeting in any event.

4.117 The Deputy Director of MoJ Policy confirmed officials have prepared an outline draft consultation document but this can only be further considered once a Ministerial decision has been made and will need further revision to take into account amendments made by the Committee at this meeting. Officials confirmed the amendments agreed by members were not of a substantial nature that required the Minister to be further updated at this stage.

4.118 Members were informed that the MoJ Policy official currently leading on Children and Vulnerable Witnesses will shortly be leaving the department and this work will be taken over by another member who previously used to work in the Court of Protection policy area. A handover will be occurring to avoid further delay in progressing the matter. The MoJ Official involved in this work was thanked for all her work and efforts in this matter.

4.119 **Next Steps:** **Once a Ministerial decision has been made, officials will consider how best to progress the revised drafts of the Rules and Practice Direction amendments. In the meantime, revised drafts to reflect today's discussion will be prepared.**

Service of Non-Molestation and Occupation Orders and Missed FGM Protection Order Consequential Provisions

5.1 Members took into account paper 5.

5.2 HMCTS noted that the existing Rule provisions do not prohibit an applicant from serving documents on the respondent. The confusion is around the term "personal service" as people think they need to do it themselves instead of the respondent being required to receive the documents personally. HMCTS acknowledged the resource implications of requiring bailiff service in all cases which is why the proposed amendments provide clarity to applicants seeking a protective order whilst also not requiring bailiff service in every case.

5.3 Members agreed the proposed nature of the Rule amendments in relation to non-molestation orders and occupation orders.

5.4 Mrs Justice Theis noted the President of the Family Division considered amendments should also be made at the same time in relation to Female Genital Mutilation Protection Orders and Forced Marriage Protection Orders in the interests of consistency in respect of the procedure employed by applicants seeking a protective order in all types of cases. This was endorsed by Hannah Perry so individuals seeking any type of protective order would be clear as to the procedure.

5.5 MoJ Policy noted that there is currently no business need to justify changing the position in respect of Female Genital Mutilation Protection Orders and Forced Marriage Protection Orders at this time. This is especially taking into account that the Court retains a discretion in the Rules to direct service by a bailiff in these types of applications as an alternative measure where an applicant is acting in person. It was noted that often applicants for these orders are not the person who would be protected by the order – the applicant might be the police or a local authority, so the same risks around vulnerable applicants handing over papers would not exist.

5.6 Judge Raeside noted the problem in practice is that litigants in person do not know that they can ask a bailiff to serve these documents and some District Judges do not know that they can make these orders so the reality is that litigants in person may end up serving applications and orders on the person they are meant to be protected from. District Judge Darbyshire noted that whilst he had no objection in principle to service by bailiff, the practice would be that bailiffs are primarily allocated to the civil jurisdiction therefore the time it takes for these orders to be served could be problematic in practice and that is an issue that cannot be resolved though the Rules. HMCTS noted that the draft rule amended were proposed in a manner that still permit bailiff service without making it mandatory to avoid increasing the workload to an extent that service could not occur within a timely manner.

5.7 MoJ Legal noted that in respect of Forced Marriage Protection Orders and Female Genital Mutilation Protection Orders, there can be third party applicants in addition to the individual at risk who may not seek service by a bailiff so the Rules would need to be drafted to reflect this position.

5.8 **Conclusion:** **Members agreed all protective orders should be amended to provide clarity in the procedure for personal service; however, forced marriage protection orders and female genital mutilation protection orders would have differences to reflect third party applicants.**

These amendments will also include the missed consequential provisions in relation to Part 11 FPR.

Financial Remedies Working Group Update

6.1 Judge Waller is taking this work forward with the Financial Remedies Working Group and officials. He has not been able to take things forward over the summer and members agreed that the matter be deferred until the October meeting.

Use of Serial Numbers in Applications for Adoption

7.1 Members considered Paper 7 and annex 7A.

7.2 Mrs Justice Theis noted that this policy change has been proposed by HMCTS. HMCTS confirmed that the Standard Operating Procedure (SOP) issued requiring staff to automatically assign a serial number to all adoption applications has been withdrawn.

7.3 HMCTS explained this request for a rule amendment arose out of a recent data loss which has had serious financial implications to the agency. It was something HMCTS have sought to do previously but were unable to do so because the process would not comply with the Family Procedure Rules. When an application for adoption is received, staff have to choose whether to allocate a serial number or not. This is a manual process which always carries a risk of human error. There are checks in place, but despite these, errors are sometimes still made. As a result of human error, the impact financially and more importantly on the adoptive family is so significant that the Committee are asked to endorse the proposed Rule change for automatic assignment of serial numbers in all applications for adoptions. HMCTS noted the further advantage of this approach is that as the courts service moves to a digital future it removes the risk of applicants inadvertently not requesting a serial number. If approved, HMCTS believe the digital changes to the Familyman system can be implemented by April 2017.

7.4 Jane Harris endorsed the proposed Rule change. She noted that the potential of data loss is not only financial or re-location of adoptive families but could also lead to the breakdown of the adoptive placement. She questioned whether additional changes could be implemented to ensure that when the Court makes orders no additional identifying information about the child is contained within the order. Mrs Justice Theis noted that this is wider than the remit of the Family Procedure Rules and more about the judiciary in court. Judge Raeside was asked by Mrs Justice Theis to feed this back to the Judicial College so it could be taken into account when planning training for the judiciary. Judge Raeside endorsed this approach and will look into how this can be incorporated into the materials.

7.5 Richard Burton also supported the proposed Rule change noting that courts have taken precautions such as only listing adoptions in certain courts to prevent files leaving the building to ensure no human error and this change will assist with risks of data loss.

7.6 Dylan Jones questioned why a serial number is needed in adoptions involving a step-parent or a relinquished child. HMCTS noted that as a manual process is used to enter data there is a chance for errors to be made. Jane Harris noted that in these types of cases the applicants would already have the information so the anonymising of the information would make no practical difference. She further considered it would protect those cases where the risk was significantly higher. This was endorsed by Marie Brock. MoJ Legal noted the Rule does allow the serial number to be removed.

7.7 <u>Conclusion:</u> **Members agreed the draft Rule 14.2. Members considered the implications of data loss to be so serious with high risk that this should be an exceptional statutory instrument to be laid as soon as possible.**

Part 7 FPR 2010 – Statements of Truth and amendments to the D8 Petition

8.1 Members considered Paper 8 and annexes Papers 8a – 8c.

8.2 HMCTS updated members that this relates to the Committee's request to incorporate a statement of truth into the paper D8 petition. HMCTS noted that the inclusion of a statement of truth to the D8 petition will require Rule amendments and Practice Direction amendments. The D8 petition will be amended to the paper version independently of progress made as part of the Online Divorce Reform projection.

8.3 Members raised concerns over the proposed timescales and questioned whether this could be done in conjunction with the online digital divorce project. Officials assured the Committee that the two projects were distinct and required separate timetables. As such, in relation to incorporating a statement of truth into the paper D8 petition Members were still required to consider and approve Rule and Practice Direction amendments for the paper process used in the divorce process as this will remain in use even when the online facilities are made available to the public. Members endorsed the proposed timetable for amendments to the paper D8 petition incorporating a statement of truth to come into effect in April 2017.

8.4 Members questioned officials on the progress of the Online Divorce Reform project. HMCTS explained that the wider online divorce project is looking at a new way of working and developing projects in an agile manner. For this reason it is proposed that pilot Practice Directions will be used as part of the online divorce project. The Committee will be updated on the progress of the online divorce project at the October meeting. Members requested officials to provide an analysis of what Rule and Practice Directions amendments are required for the online divorce reform project.

8.5 <u>Next Steps:</u> **Officials to prepare an analysis of Rule and Practice Direction amendments required as part of the online divorce reform project for the October meeting. Officials will draft Rule and Practice Direction amendments relating to the paper forms for April 2017 and return to the Committee for consideration.**

Any Other Business

9.1 Melanie Carew noted that in May 2016 she asked the Committee to consider whether Rule amendments were required to permit Cafcass to disclose information to a person at their request where they were not a party to proceedings although they were the subject child at the time. This issue was not taken further as the President of the Family Division was due to hand down judgment in a case that considered this issue. The Legal Secretary of the Family Division would make further enquiries about the progress of this case and liaise with the Secretary to consider how to progress this matter further.

9.2 Will Tyler noted that the IFLA Children's arbitration scheme is now in effect but there are no Rules or Practice Directions on arbitration in family matters and sought members views on whether this was something that should be on the Committee's agenda. Officials noted their intention to have a discussion with the President about the Arbitration Act 1996 and the uses of

its powers in a family context. Will Tyler offered to produce a paper for the October meeting and officials noted that it would be helpful if that paper could be seen in advance by officials to assist in the forming of views. Officials discussed their views and concerns with Will Tyler in more detail following the meeting.

9.3 This remains an ongoing piece of work for officials.

Date of Next Meeting

10.1 The next meeting is 10 October 2016 at 10:30 am in the Conference Suite, 2nd Floor Mezzanine at the Royal Courts of Justice.

Secretary

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