Ministry of Justice

FAMILY PROCEDURE RULE COMMITTEE MEETING
In the Conference Suite, 2nd Floor Mezzanine,
Queen's Building, Royal Courts of Justice
At 10.30 a.m. on Monday 6 February 2017

Members

Sir James Munby	President of the Family Division
Mrs Justice Pauffley	Acting Chair of the Family Procedure Rule Committee
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)
Michael Horton	Barrister
Dylan Jones	Solicitor
Lord Justice McFarlane	Court of Appeal Judge
Hannah Perry	Solicitor
Her Honour Judge Raeside	Circuit Judge
Mrs Justice Theis	High Court Judge
His Honour Judge Waller	Circuit Judge

ANNOUNCEMENTS AND APOLOGIES

1.1 The Chair welcomed all members to the meeting. She thanked Dylan Jones for dialling in to the meeting.

1.2 Apologies have been received from Will Tyler QC and Jane Harris.

MINUTES OF THE LAST MEETING: 5 DECEMBER 2016

2.1 The minutes of meeting on 5 December 2016 were circulated on 30 January 2017. The minutes were approved as a correct and accurate record of that meeting.

MATTERS ARISING

- ***Family Court – Duration of Ex Parte Non-Molestation Orders***

3.1 The Chair noted that the President of the Family Division has issued new guidance on the duration of Ex Parte Non-Molestation Orders in the Family Court which took effect from 18 January 2017. The President of the Family Division thanked those members who provided their comments on the draft guidance.

VULNERABLE WITNESSES: DRAFT FPR PART 3A AND DRAFT PRACTICE DIRECTION 3AA

4.1 A draft consultation document had been prepared by MoJ officials for Committee members' consideration. The draft was circulated on 30 January 2017 and responses were invited by 2 February 2017. Members who wished to have further time to comment on the draft were invited to respond no later than 4pm on Tuesday 7 February 2017 to enable final versions to be prepared and sent out.

4.2 MoJ Policy acknowledged that a tight timescale for comments was requested of members. Officials hope to be able to make any required amendments swiftly on receipt of all comments from Members.

4.3 MoJ Policy updated members that there has not been any significant changes made the draft Vulnerable Witnesses Practice Direction since it was last considered by the Family Procedure Rule Committee. The change highlighted by MoJ Policy was the inclusion of an additional paragraph relating to the use of pre-recorded evidence in family proceedings. Once papers have been sent out for consultation, officials intend to send members a timetable for implementation. Currently, this is envisaged to be May 2017 but is subject to confirmation when the final timetable is sent to members.

4.4 The Chair acknowledged that there has been delay in progressing this matter and she was pleased that it is being prioritised as an urgent piece of work to enable a speedy resolution.

ONLINE DIVORCE REFORMS

5.1 The pilot Practice Direction (PD36D) came into force on 25 January 2017. The Practice Direction is published on the www.justice.gov.uk website. The Chair invited an update on the progress of the online divorce reforms to date and this was provided by MoJ Policy on behalf of the HMCTS digital divorce project lead.

5.2 The pilot Practice Direction commenced on 25 January 2017 in Nottingham divorce centre. The Centre has now issued its first live applications from the online system. Officials intend for the pilot Practice Direction to continue for a further one month after which MoJ and HMCTS will evaluate and consider whether there is confidence in the system to enable an expansion of this stage of the divorce reform project.

5.3 Work has started on testing the other features that customers may expect from an online system, for example online payments, online submission and the uploading of

marriage certificates. HMCTS are also undertaking work to attempt to link into the General Registry Office register and this remains a work in progress.

5.4 Now that the initial pilot Practice Direction has commenced, officials are looking at the next stage of digitalisation which includes service on the respondent, the respondent's acknowledgment of service and the application for a decree nisi. HMCTS and MoJ officials are working closely with Judge Waller and legal advisers and staff at the West Midlands divorce centre. As part of this work, there has been a discussion with HHJ Roberts at Bury St Edmonds divorce centre to discuss potential fraud factors that need to be taken into account and possible measures that could be implemented within a digital system to combat such attempts at fraud.

5.5 Dylan Jones questioned whether it would be possible for the divorce petition to be issued in a Welsh medium and whether this has been taken into account when considering a wider rollout of the system nationally.

5.6 HMCTS confirmed that this has been considered and taken into account, however, at this time, it is not possible to confirm when the online system will be commenced in Wales. There is an on-going liaison between HMCTS and colleagues in Wales and the Welsh Language Unit to ensure any final product is workable in practice. HMCTS agreed to update the Committee at the next meeting as to what work and / or plans have been discussed to date.

5.7 HHJ Waller questioned when the online divorce system will be rolled out to the public. He further questioned whether the initial stage for which the pilot is currently being undertaken will be available to the wider public prior to a pilot being implemented for the next stage of the online divorce system.

5.8 On behalf of the HMCTS digital divorce project lead, MoJ Policy responded that the wider roll out of the initial stage of the online divorce system will be considered in the coming weeks. The timetable for wider rollout will depend on the feedback received as a result of the pilot Practice Direction. The feedback received to date is that it is necessary for the questions asked to be legally correct and also to be capable of being understood by customers. Officials will use this and future feedback to ensure the questions are correct or whether any amendment is required and then consider the programme for wider roll out. There will be an assessment after the pilot Practice Direction has commenced for a longer period than to date and HMCTS will then work with MoJ Policy to then consider the next stage of the process. HMCTS are currently working on the elements needed to implement a system in which it is not necessary to print off the petition and return it to the court by post.

5.9 The President of the Family Division questioned whether there is a confirmed date by which a full online system will be accessible to petitioners and respondents which would apply to divorce, judicial separation and nullity. HMCTS confirmed that the planned date for full implementation of all stages of the online divorce system is at the end of the reform programme which is due to conclude in the first quarter of 2019. MoJ Policy noted that the product is being developed and built in an iterative

fashion. Each stage of the product will need to be subject to a pilot Practice Direction and testing before being rolled out nationally. Each stage of the product will continue to develop in parallel to existing stages as the reform programme progresses.

5.10 Judge Waller questioned whether the President of the Family Division had viewed the current timescales that the project board are working to. He confirmed that on this timescale, the first quarter of 2019 is the planned conclusion of the reform project with all interim stages being tested and implemented by this date.

5.11 The President of the Family Division noted that there have been recent articles and commentary about the pilot Practice Direction. He further noted that these articles refer to a launch date of June and questioned the significance of this date. MoJ Policy responded that they are aware of the recent legal articles and commentary but it is unclear from where this information has been obtained or what it relates to and HMCTS will wish to consider this further.

Action: HMCTS to update the Committee at March 2017 meeting as to what work and / or plans have been discussed to date to enable the online divorce petition to be completed in the Welsh medium.

DE-LINKING DIVORCE AND FINANCIAL REMEDY PROCEEDINGS

6.1 HMCTS have set out the proposed approach in relation to administrative de-linking and identified the next steps. The President of the Family Division wishes procedural de-linking to be implemented no later than the end of 2017. He considers that to be a priority piece of work for the Committee and officials. Officials intend to meet further with the Committee's Financial Proceedings Working Party to identify what work is required and to allocate timescales based on available resources to undertake this initiative.

6.2 Judge Waller updated members that there had been a meeting with officials on 17 January 2017 which was useful. He thanked MoJ Legal for preparing a note of that meeting which has been shared with Committee members. This meeting considered the benefits of implementing administrative de-linking as a starting point and concluded this can be done relatively swiftly. He considered that there is no difficulty in procedurally separating divorce proceedings from financial proceedings but recognised that rule changes and IT changes would be required to fully implement the proposed change. He further considered implementation was possible by the end of 2017.

6.3 Judge Waller considered the key questions to be as set out in paragraph 9 of paper 6 which looked at the current situation of parties preserving their financial position and how this could be preserved when full procedural de-linking is implemented. He updated members that this remains an outstanding issue that needs to be resolved with officials. He believed the easiest option would be to not allow any financial applications within divorce proceedings with parties making a financial application at

a later stage; however, he acknowledged this would require educating practitioners and litigants in person before this option could be implemented. Judge Raeside noted that practitioners are used to amendments and it would be relatively easy for professionals to be educated provided sufficient notice of any proposed changes is provided. Judge Waller and Judge Raeside noted that professionals will need to get used to the change in the process which should not pose too much difficulty as professionals are used to changes in practice and procedure. Marie Brock endorsed this approach and noted that the divorce petition may be off-putting to litigants in person as on first reading it appears as if an application could be made for every financial order available.

6.4 The President of the Family Division endorsed the proposed plans for a two-stage implementation in relation to financial remedies de-linking. He emphasised the importance of fully implementing this by the end of 2017. He questioned why the online divorce petition is still asking questions about children when this has been separated legally from the divorce process for some time. MoJ Policy responded that questions in relation to children are still asked on the form, on a voluntary basis, because the Office of National Statistics collects this information and it is from this form that they collate their data. It is part of a long-standing data set. MoJ Policy confirmed there is no legal link between information about children and the divorce proceedings and its inclusion is solely for statistical purposes. The President of the Family Division confirmed with officials there is no legal requirement for this information to be included in the form and this was endorsed by Judge Waller. Judge Waller suggested officials liaising with the Office of National Statistics to consider the usefulness of this information being in this form. MoJ Policy noted that this information is used to monitor the number of children affected by divorce and their ages. Discussions were last had with the Office of National statistics in 2014 and officials recognised that if people do not voluntarily provide this information it does raise questions about its usefulness on the form. It was always intended to review the position. MoJ Policy further noted that this issue is the subject of feedback as part of the online testing pilot which will be looked at in more detail at the conclusion of the pilot process. District Judge Darbyshire questioned whether the statistical information could be sent out as a separate form inviting responses with those questions then being removed from the petition. Those who wish to provide that information will then return the form. MoJ Policy noted that a final decision on how to proceed has not been made and will need consideration. Any proposal to discontinue the collection of this information would need to be discussed with the Office of National Statistics.

6.5 The President of the Family Division did not consider it appropriate for the court process to be used to collate this information. Judge Waller recalled that this was discussed with the Committee in 2014 and approved at that time but the matter can be re-considered as part of the wider online divorce reform programme. Officials confirmed that parties using the pilot online divorce system will be able to leave this information blank and submit the other required details on the form as it is voluntary.

FINANCIAL REMEDIES WORKING GROUP UPDATE

7.1 A paper setting out the proposed work for the Committee had been circulated to Members. Members were invited to consider which initiatives are a priority for the Committee to enable officials to prioritise work accordingly. The Chair noted that the meeting in March 2017 will provide members a full opportunity to consider the prioritisation of work before the Committee.

7.2 Judge Waller noted that the note of the meeting on 17 January 2017 prepared by MoJ Legal provides more detail about the proposed changes discussed with officials, particularly changes to Part 9 of the Family Procedure Rules and how this might be proceeded with on a practical basis. He did not consider there to be any procedural difficulty in amending the rules to take account of the recommendations proposed by initial Financial Remedies Working Group led by Mr Justice Mostyn.

7.3 The main changes proposed on behalf of the Committee's Financial Remedies Working Party are in relation to the scope of the shortened procedure under Part 5 of the Family Procedure Rules and to strengthen the place of the Financial Dispute Resolution Appointment.

7.4 Judge Waller considered that some of the proposed changes, for example the amendments to Part 8 of the Family Procedure Rules and strengthening the use of Financial Dispute Resolution Appointments can be achieved easily without requiring consultation of stakeholders. He further considered whether the changes should be undertaken without the form amendments being made or wait until the required form amendments have been made and implement it all together.

7.5 Judge Waller recalled that the Committee had previously agreed that amendments in relation to Chapter 5 and the use of the shortened procedure would be subject to a targeted consultation. If this is to remain the decision of the Committee, he encouraged members to consider the timescale for the consultation to occur and any form amendment issues which may arise. He updated members that currently the Chapter 5 procedure is not reflected in any of the FamilyMan forms and therefore any changes made will not impact on the IT system.

7.6 Judge Waller accepted that the changes to the forms themselves are more complex and a more intensive piece of work. He did not consider it necessary to wait for the form amendments to be made prior to implementing some of the proposed changes.

7.7 Judge Waller concluded that this remains on-going work. Judge Waller recommended that form changes are to be considered for all changes to be implemented by the Committee. Judge Waller suggested a consultation on the proposed changes being published in the summer of 2017 with a view to any amendments and rule changes being drafted in autumn of 2017 working towards implementation of these rules in April 2018. He acknowledged that it may be possible to work to a faster timetable if changes to the relevant forms can be accommodated.

7.8 Michael Horton noted that if full procedural de-linking is to be implemented by the end of 2017, implementation on a piecemeal basis would not be practicable. He considered it necessary to consult on procedural de-linking at the same time as the proposed rule changes on the shortened procedure. This was endorsed by District Judge Darbyshire who noted that the only real question for consultation on the shortened procedure is the figure of £25,000.

7.9 The President of the Family Division questioned how much work has been undertaken to date on drafting the proposed rule amendments and the new forms. Judge Waller responded that the draft rule amendments have been completed and are with officials for comments and finalisation. District Judge Darbyshire noted that the proposed rule amendments were considered by the Committee at the meeting on 5 December 2016.

7.10 Judge Waller updated members that work on amending Form E is a bigger project than the other proposed changes. He acknowledged the need to ensure that the new form is robust. There has been an agreement to combine the Form E with other forms but it needs to be made more user-friendly. Judge Waller considered the amendments to Form A to be more complicated because of the range of forms that are currently available. He observed that it would not be difficult to adapt Form A and Form A1 to take into account the shortened procedure. District Judge Darbyshire noted that the proposed form amendments do not affect the implementation of the shortened procedure. Judge Waller confirmed that there has been a draft Form A prepared which requires further work and a composite Form E is currently being worked on by the Financial Remedies Working Party.

7.11 MoJ Policy noted that Form E is a complicated high volume form which will require feedback from practitioners and real users before any changes to it can be implemented. MoJ Policy observed that further consideration is needed to identify whether any IT changes to FamilyMan are required before timescales can be confirmed for the progress and implementation of the proposed changes and form amendments. HMCTS noted that there is no confirmed date for the end of the FamilyMan system. The wider view of the proposed changes is that they would align with the end of the reform programme but this has not been confirmed.

7.12 The President of the Family Division indicated to members that it is a top priority to get a working draft of Form A and Form E amendments so that any consequential changes to Family Man can be identified. Judge Waller agreed to report back at the next meeting with more timescales for progressing this work.

RATIFICATION BY THE USA OF THE 2007 HAGUE MAINTENANCE CONVENTION

8.1 The USA ratification of the 2007 Hague Maintenance Convention came into effect on 1 January 2017. Draft guidance has been prepared by officials which is currently with the President of the Family Division for consideration and approval. The guidance will come into effect on the date it is published by the Judicial Office.

8.2 Members agreed that no further updates are required at Committee meetings on this matter.

ANY OTHER BUSINESS

- ***Practice Direction 12J***

9.1 A paper had been circulated setting out the initial policy views on the report by Mr Justice Cobb on the proposed amendments to Practice Direction 12J. The President of the Family Division has requested these amendments be implemented shortly after this meeting as he considers the implementation of the revised Practice Direction to be urgent. He encouraged the Committee to make it a priority area of work. The Chair noted that whilst officials support the principles behind the proposed changes, further time has been requested to consider the proposed amendments and how best to progress this work. Members' views were invited on the proposed approach.

9.2 Judge Raeside raised three matters in relation to the proposed Practice Direction 12J. Firstly, she questioned whether there should be more emphasis placed on the role of Cafcass officers. She considered them to be in a better position to advise the court on whether a fact-finding hearing is required or not because they have had the opportunity to speak to the parties separately and will have undertaken their own safeguarding enquiries when preparing the Schedule 2 letter to the Court. She noted that Cafcass will have more time to investigate the allegations that have been made with both parties and make a recommendation to the court. She suggested that Cafcass officers could make a recommendation to the court, either orally or in the Schedule 2 letter, as to whether a fact-finding hearing is required based on the allegations made. She further suggested that where Cafcass have advised the court to hold a fact-finding hearing, where a court does not follow this advice reasons for going against this recommendation should be recorded by the court in the order.

9.3 Secondly, Judge Raeside suggested that the training materials prepared for the judiciary (including justices) and legal advisers should be the same. She did not consider there to be any reason why the training needs to be separate as is the current position. She suggested that, despite the expense and time involved, the Judicial College could be requested to prepare a training DVD which could then be shown at all levels of the judiciary. She believed this would prevent discrepancies in the training from occurring and enable consistent implementation of the revised Practice Direction across all levels of the judiciary.

9.4 Thirdly, she questioned the listing implications in holding fact-finding hearings. She recognised that there are time pressures in holding these hearings and the judiciary will always be conscious that any delay in holding a fact-finding hearing may impact on the relationship between the child and the parent accused of perpetrating domestic abuse. She considered the process of holding a fact-finding hearing to be cumbersome, for example explaining to litigants in person how to prepare a Scott Schedule and obtain police reports. She questioned whether it would be possible to

make the process quicker and less intense particularly in cases where there are low-level allegations of domestic abuse.

9.5 Marie Brock considered that one of the difficulties in deciding whether a fact-finding hearing is needed at the First Hearing Dispute Resolution Appointment is that courts do not necessarily have all the information about the alleged domestic abuse. There are situations where parties have requested, for example, separate waiting areas but this information on the application form is not always acted on by court staff. It is then only brought to the court's attention by the usher. She endorsed having additional information from Cafcass as that would assist in the decision-making process.

9.6 The Chair considered the role of Cafcass to be vital in such cases as Cafcass officers can speak to the parties separately and determine their fears, worries and anxieties and then conclude whether a proper evaluation of the risk of domestic abuse is required by the court.

9.7 Melanie Carew noted that the role of the Cafcass officer is to prepare the initial safeguarding letter. This letter is designed to raise issues of concern which will inevitably include the allegations made by one person against another. She considered, however, that there is a difficulty for Cafcass as Cafcass officers are repeatedly told that it is not within their remit to comment or make decisions on factual matters as that is the role of the judiciary. She confirmed that it is not the role of the Cafcass officer to state whether the allegations are true or not but based on the allegations made, the Cafcass officer will likely err on the side of caution and recommend a fact-finding hearing to determine those issues in the majority of cases. She was concerned about the prospect of responsibility being placed on Cafcass officers to decide whether there was any basis for allegations made as such a decision would be outside Cafcass's remit. However, where Cafcass officers do make recommendations for a fact-finding hearing, she endorsed Judge Raeside's suggestion that reasons for going against the Cafcass officer's recommendation should be recorded in the order.

9.8 Marie Brock noted that as this issue is specific to cases involving domestic abuse, there may be cases where there is evidence of previous domestic abuse enabling the granting of legal aid. She considered where a party is legally represented through the granting of legal aid, there will have been some evidence submitted previously of past domestic abuse. She considered the difficulty to be in those cases where there is no past evidence of domestic abuse and the parties appear before the court as litigants in person.

9.9 Hannah Perry raised concern about relying on evidence submitted as part of a legal aid application as being the threshold to determine whether or not a fact-finding hearing is required in individual cases. She noted that the threshold for the granting of legal aid is quite different; for example a letter from a GP that would not particularise the violence, however whether a fact-finding hearing is required by the

court will depend on the nature of the allegations made and the extent to which they are disputed.

9.10 Judge Raeside accepted that it is not the role of Cafcass officers to state whether the allegations are true or not. She questioned whether it would be possible for Cafcass officers to give a recommendation taking the allegations at their highest and, using that as a starting point, then proceed to recommend whether contact is safe for the child and whether a fact-finding hearing is required. She considered it would then be for the judiciary to explain why this recommendation is not accepted by the court. Dylan Jones endorsed this approach, noting that he had seen this approach adopted in a recent case he had been dealing with. Hannah Perry noted that one of the concerns with this approach is the Cafcass officer present at court at First Hearing Dispute Resolution Appointments has limited time to speak to the parties on the day and the Schedule 2 letter will usually have been prepared by another Cafcass officer.

9.11 Melanie Carew noted that children should not be joined as a party to the proceedings to resolve issues relating to a fact-finding hearing. That is not the purpose for which the joinder provisions were made.

9.12 Marie Brock noted that in many cases where domestic abuse is alleged, there will be no concerns about the welfare of the children in the other parent's care and, in such situations, it may be possible to mitigate the risks; for example by ensuring that parents do not meet during hand overs etc., which would then allow contact arrangements to be made with the other parent.

9.13 Mrs Justice Theis noted that a fact-finding hearing is only required where the allegations impact on the contact between the alleged perpetrator of domestic abuse and the child. She considered this to be a point made in Re V. She considered it to be the role of the judiciary to determine whether a fact-finding hearing is required in each case and conceded Melanie Carew's point about the pressure being placed on Cafcass officers.

9.14 Judge Raeside noted that paragraph 14 of the revised Practice Direction requires the court to identify issues which are relevant to the decision of the court. She noted that whilst Cafcass officers can only make recommendations, with the final decision lying with the judiciary, she considered the more help that can assist judges in making this decision, the better it would be for all the parties in the case. She noted that all the proposed amendments are in the existing Practice Direction 12J. The issue with the amendments is firstly, in respect of the need for a risk assessment, how this will be obtained and who will be paying for it; and secondly, the issues raised about cross-examination by individuals who may be perpetrators of domestic abuse and the impact of this on victims.

9.15 The President of the Family Division noted that there has been much debate in the Houses of Parliament about domestic abuse in family proceedings. He further noted that both Houses are unanimous in their view that the family court system is seen by the public to be failing. In light of this, he considered the proposed amendments to

Practice Direction 12J as one step to resolving a wider scale problem. He confirmed that when the revised Practice Direction 12J is implemented, all members of the judiciary will be reminded of the need to comply with the Practice Direction. He conceded that there are complaints about the role of the Judicial College and issues with training competence but he would look at training issues after the implementation of the revised Practice Direction 12J. He indicated that Mr Justice Cobb is not intending for the Practice Direction amendments (paragraph 4) to reverse the statutory presumption and the drafting may need to be adapted to ensure this is clear to the public and practitioners.

9.16 Judge Waller noted that the Women's Aid report is primarily concerned with the position of victims of domestic abuse not being taken seriously enough by the court and the report accuses the court of not paying sufficient regard to the impact of domestic abuse on the victim, instead focusing on the impact on the child. He questioned this assumption, stating that he is not aware of any member of the judiciary who does not take issues of domestic violence and / or domestic abuse seriously. He further noted that there are a variety of reasons why a fact-finding hearing may not be ordered in a particularly case particularly where the allegations made are not relevant to the issues in the case. He considered the points raised in the Women's Aid report to be part of a system-wide problem relating to the available resources to deal with fact-finding hearings, issues of safety at court for victims of domestic abuse and limited courtroom facilities. He did not believe that the problem is restricted to the actions of judges in individual cases. The President of the Family Division endorsed this noting that the judiciary are being attacked for the perceived failings because of a lack of public understanding of the distinction between the judiciary and HMCTS.

9.17 Mrs Justice Theis accepted Judge Raeside's point about the delay in holding a fact-finding due to listing issues and judicial availability. She questioned whether it would be possible to set up a pilot where there are a number of court days, for example three or four, set aside every month to deal with fact-finding hearings. She considered that most fact-finding hearings are approximately half a day. She conceded that such an approach would involve a loss of judicial continuity but balanced this with the ability to have a reasoned decision with findings of the court made in a shorter period avoiding delay in the conclusion of the proceedings. She further suggested that after the fact-finding hearing that matter could revert to the Judge allocated to the case. The President of the Family Division endorsed this approach as he also considered the majority of fact-finding hearings to last no longer than half a day. Marie Brock noted that if such an approach is to be adopted, then references in the revised Practice Direction to judicial continuity for fact-finding hearings would need to be re-drafted to take this approach into account. This approach was also endorsed by Judge Waller who noted that in many areas, the majority of private law cases start with Justices and do not require a judge at a higher level.

9.18 District Judge Darbyshire noted that there is great deal of pressure on District Judge availability and it can result in a three month delay for a fact-finding hearing due to

listing pressures. He considered much of the problem related to training issues and the interpretation of the Practice Direction; but he acknowledged that there are difficulties in changing attitudes particularly in relation to cross-examination. The Chair noted that these difficulties are likely to arise at hearings where both parties are unrepresented. She further noted that she does not allow a perpetrator of domestic abuse to cross-examine the alleged victim instead requiring questions to be put through her to ask the victim. Marie Brock endorsed this noting that many Justices and legal advisers will not permit a perpetrator to cross-examine the victim in practice, using similar approaches drawing on their experience from the criminal sphere. The Chair acknowledged that knowledge of the criminal sphere is helpful in these types of cases.

9.19 The President of the Family Division re-iterated that responsibility for implementation of the Practice Direction needs to lie with the judiciary. He invited members to continue discussing the proposed revisions with any additional comments in relation to the policy and / or drafting to be sent by 10 February 2017. He noted that Parliament expects action to be taken in relation to this by Easter and he intends this Practice Direction to be considered by the Secretary of State within the next month.

9.20 District Judge Darbyshire questioned whether Parliament intends to reverse the statutory presumption in section 1(2A) Children Act 1989. MoJ Policy noted that there had been much debate in Parliament around the parental involvement provision. The resulting provision did not give any new rights to parents but made clearer the approach to be followed by the courts in deciding these matters through, in effect, codifying case law. He [MoJ Policy] further noted the importance of the provision in addressing the perception by many fathers that the family courts are biased against them. The issue that remains is how the statutory presumption is applied within the court procedure. He [MoJ Policy] informed members that there are no plans to revisit the statutory provision in the immediate future as it is a rebuttable presumption to be considered alongside the welfare considerations identified in the Children Act 1989 and that meets the policy intention.

9.21 Marie Brock noted that the existing Practice Direction 12J was good but acknowledged there may have been inconsistencies in its interpretation and implementation. She questioned whether the revised Practice Direction 12J could be implemented alongside additional training for the judiciary to enable consistent practice across all family courts and levels of judiciary. Judge Raeside endorsed this noting that Designated Family Judges could roll out local training involving Justices. Judge Waller noted that aspects of the revised Practice Direction 12J ties in with the proposed Vulnerable Witnesses Practice Direction.

9.22 MoJ Policy noted that there were drafting points which officials were concerned with and these concerns are to some extent ameliorated by the President of the Family Division confirming the intention behind the amendments proposed to the revised Practice Direction 12J.

9.23 Judge Raeside considered it useful for the revised Practice Direction 12J to remind practitioners and the judiciary that the presumption applies unless specified circumstances exist. She conceded that the current drafting in the revised Practice Direction appears to weaken the statutory presumption and can be appropriately re-drafted to reflect the intention.

9.24 Judge Waller noted that paragraph 4 of the existing Practice Direction 12J was drafted and implemented before the statutory presumption came into effect. He considered that some drafting amendments may be required to reflect the intention behind the revised Practice Direction 12J. He considered it inappropriate to refer to harm to the child or parent alleged to be the victim of domestic abuse in applying the statutory presumption, however, it would be appropriate to consider that domestic abuse towards a parent may also mean harm to the child albeit indirectly. Judge Waller proposed that this paragraph could be amended to read: "Where the involvement of a parent in the child's life would put the child at risk of suffering harm, whatever the form of the involvement, the presumption in section 1(2A) of the Children Act 1989 does not apply. The risk may be of direct harm to the child or of indirect harm arising from harm to the other parent from domestic violence or abuse." He noted that MoJ Policy had raised the issue of whether it was appropriate to refer in other proposed amendments to the Practice Direction to the risk of harm to the other parent, rather than the child. His view was that if those paragraphs did not relate to the statutory presumption, then re-drafting will not be required.

9.25 District Judge Carr noted the differences between the start and end of the existing Practice Direction 12J as it talks about harm to the parent and child at the start of the Practice Direction but makes no reference to it at the end of the Practice Direction. District Judge Darbyshire observed that it is difficult to specify situations, or examples of situations, when the presumption does not apply. The statutory presumption applies to all cases but the definition of harm can be expanded to incorporate how abuse of a parent can result in emotional harm to the child. The Chair endorsed this approach noting that the statutory presumption is a qualified one which is capable of rebuttal in appropriate circumstances.

9.26 Melanie Carew considered that she read the revised Practice Direction 12J as stating that there would be an expectation that the statutory presumption would apply unless it is unsafe for the child to do so. She also endorsed re-drafting this provision to make it clearer to litigants in person, practitioners and the judiciary that the statutory presumption should be applied as a starting point. She noted that the existing Practice Direction 12J clearly states that it is harmful for children to be exposed to domestic abuse but conceded this category is not applied as often as it should be. MoJ Policy endorsed members' views that the statutory presumption is capable of rebuttal in appropriate circumstances.

9.27 Judge Waller noted that the difficulty with the statutory presumption is that it categorises the abusive parent by excluding them as a person to whom the presumption applies. He considered it appropriate for the revised Practice Direction

12J to initially state the application of the presumption before then proceeding to consider welfare-related issues to children affected by the presumption.

9.28 MoJ Legal noted that there are two questions for courts to consider: firstly, is this a person to whom the presumption applies, given the provision in section 1(6) CA 1989; secondly, if so, are there any circumstances to rebut the operation of the presumption. She further noted that the concern of officials is that the provision, as currently drafted, appears to specify situations when the presumption should not apply which detracts from judicial discretion and raises issues relating to the vires for making a Practice Direction, which must relate to the practice and procedure of the court not to statutory interpretation. She concluded, however, that with the President of the Family Division and members clearly expressing the intention behind the provisions is not to reverse the statutory presumption but is instead intended to clarify the practice and procedure of the courts then re-drafting the affected provisions would resolve this concern. The Chair endorsed this noting that the revised Practice Direction is not intended to undermine the operation of the statutory presumption and the Minister can be reassured of that on behalf of the Family Procedure Rule Committee.

9.29 District Judge Carr observed that the revised Practice Direction 12J refers to a child being exposed to the risk of harm, but risk is not qualified in any way within the Practice Direction. He considered that in all family cases there will be a risk of something occurring and the role of the court is to consider whether that risk is high, medium, low or otherwise too remote to be taken into account. He questioned whether there should be an additional paragraph qualifying how risk is to be determined e.g. significant risk etc. The Chair acknowledged this point but referred to paragraph 40 of the revised Practice Direction 12J and considered this provision assists the court in undertaking risk management in affected cases. Hannah Perry noted that harm is clearly defined in paragraph 1 of the revised Practice Direction 12J. District Judge Carr acknowledged that the revised Practice Direction 12J refers to types of harm but further questioned whether guidance as to how the risk of harm should be analysed is required.

9.30 Judge Raeside noted that there is an obligation on the courts to promote contact between children and both parents. She considered this to be difficult in cases where domestic abuse is alleged as there will often be shades of grey in dealing with this issue. District Judge Carr concurred with this, noting that there is a spectrum of domestic abuse with cases falling within that spectrum and any findings of domestic abuse require the courts to undertake a risk assessment, however that risk assessment occurs. He questioned where the line is drawn in relation to risk and the decision to prevent contact between a child and an abusive parent. The Chair acknowledged the difficulties in these cases noting that it is a value judgment of risk for the court in every case. Marie Brock agreed that it is not possibly to quantify risk and courts would be required to make a decision based on their analysis of the risk in individual cases. This was endorsed by Judge Raeside and conceded by District Judge Carr.

9.31 The Private Secretary to the President of the Family Division noted that questions have been asked of Women's Aid as to where the figures quoted in their report were obtained from. Women's Aid have confirmed that the figures are obtained from a survey of people who contacted their helpline, which is not a representative sample. He conceded that the report makes concerning reading but the figures need to be considered in their own context.

9.32 MoJ Policy raised concerns about the proposed amendments which would require safety and risk assessments in every case where DV was in issue, questioning who would provide these risk assessments, how they would be commissioned and how they would be funded.

9.33 Judge Waller questioned whether it is possible for the legal aid agency to fund a risk assessment of an unrepresented party on the alleged victim's legal aid certificate. Hannah Perry noted that there would be difficulties with this in practice as the legal aid agency often refuse payments in such circumstances, as there is case law on the division of funding. She observed that many agencies or experts request payment first before undertaking the work required if there is an unrepresented party. There will always be a charge for a risk assessment, but they may be means tested; for example, DVIP fees vary for people earning less than £40,000 and those earning above £40,000. Hannah Perry advising there is LAA expert's guidance and to seek a risk assessment over the risk assessment rate would require prior authority applications. Marie Brock questioned whether paragraph 10 of the revised Practice Direction 12J would enable the legal aid agency to pay for the disbursement on the represented parent's certificate. District Judge Darbyshire acknowledged that the legal aid agency would resist any such application of the Practice Direction and a form of words would need to be considered for courts to order it as being necessary for the victim of domestic abuse. MoJ Policy noted that there is limited evidence that these risk assessments are being put through as a disbursement on legal aid certificates, so there is a risk that the revised Practice Direction 12J amendments as currently drafted would lead to it becoming a disbursement regularly applied for, which would need to be considered and quantified by analysts and so that the Minister could be advised about the potential impact on resources. Melanie Carew observed that until the fact-finding hearing has concluded, a risk assessment cannot be effectively undertaken as the assessment has to be based on facts as found by the court. Hannah Perry noted that some domestic violence agencies also request a section 7 report to assist them in their risk assessment. The Chair noted that there will be some findings of fact which make a risk assessment unnecessary, for example in cases where there is clear high levels of risk to the child and victim of the abuse.

9.34 Melanie Carew raised the problem of requiring a risk assessment in every case. Judge Raeside endorsed this noting that in cases where severe violence is alleged, subject to the findings of the court, a risk assessment may not be necessary. She considered a risk assessment to be crucial in cases at the lower end of the spectrum for example where there are allegations of controlling behaviour without physical abuse but still amounts to emotional abuse. These are the difficult judgment cases

requiring a risk assessment. Melanie Carew agreed that a section 7 report can assess the impact on the child once findings have been made.

9.35 Members noted that the revised Practice Direction 12J has a new paragraph 33a. Mrs Justice Theis considered it to be too onerous to require a risk assessment in every case but believed the court should have an obligation to consider whether such an assessment is required. This was endorsed by the Chair who agreed that it should be a consideration for the court subject to judicial discretion and not a mandatory requirement.

9.36 MoJ Policy noted that even if this provision is to be amended, there remains a question as to who will pay for the risk assessment where one is needed. District Judge Darbyshire acknowledged that was part of the consideration when deciding whether to order a risk assessment. Hannah Perry questioned whether it would be possible to use a contact activity condition for a Domestic Violence Perpetrator Programme (DVPP) to obtain the risk assessment which would mean that the costs of the assessment would be funded by Cafcass. MoJ Policy responded that the purpose of a DVPP intervention is to promote a change in behaviour, in appropriate cases involving domestic violence or abuse, to enable contact to occur safely for the benefit of the child. Therefore this was unlikely to be an appropriate vehicle for obtaining a risk assessment in every case involving domestic violence. This was endorsed by Melanie Carew. District Judge Darbyshire considered that courts have a range of resources available to undertake a risk assessment, through judges undertaking an assessment of the risk themselves, a formal risk assessment from a domestic violence agency and ordering a section 7 report from Cafcass. He considered that it would not be possible for the Practice Direction to include a mandatory provision for which there are no public resources and, in practice, litigants in person would be unable to fund it. Mrs Justice Theis considered that it may be possible to have a separate contact risk assessment undertaken at a separate rate, however, for this to be effective there would need to be a national register of accredited providers which the court can turn to in order to obtain the effective information required to make a decision about contact arrangements.

9.37 Judge Raeside opposed any amendment to reduce an obligation on the court to undertake a risk assessment in all cases of domestic abuse. She considered that resources would need to be made available to enable it to occur in any case where the court is considering making provision for contact, whether direct or indirect. MoJ Policy noted that further work would need to be undertaken on the potential resource impact and would be subject to a Ministerial decision.

9.38 Mrs Justice Theis considered that the provision should be amended so there is an obligation to *consider* a risk assessment in all cases where domestic abuse is alleged. This was endorsed by the Chair and District Judge Darbyshire. All Committee members agreed to this proposed amendment, save for Judge Raeside.

9.39 Melanie Carew noted that there are narrow issues requiring amendment in the revised Practice Direction 12J. She agreed section 1 could be re-drafted to give

clearer guidance on the operation of the statutory principle in practice. This was agreed by all members. She considered the second issue to relate to whether a risk assessment should be mandatory in all cases or instead a positive obligation to consider whether one should be undertaken, with the judiciary retaining discretion in this area. The majority of members agreed that this provision should be amended to be a positive obligation on the judiciary to consider whether such an assessment is required. She noted that the final issue in relation to the cross-examination of victims cannot be the subject of a Practice Direction and requires primary legislation making it outside the remit of this Committee. This was endorsed by all Committee members.

9.40 MoJ Policy considered that it would be helpful to have an additional provision in the Practice Direction specifying what is to happen when a risk assessment may be required and Cafcass has not been asked to provide any welfare report to the court, so cannot undertake the risk assessment as part of that report. The Chair noted that such a provision could reflect the existing practice and existing available options. MoJ Policy agreed with such an approach noting that if the intention is to rely on current ad hoc arrangements in meeting the need for such assessments then setting this out would assist analysts to assess the potential for any adverse costs implications.

9.41 The Chair questioned members' views on the removal of paragraph 33a. Judge Raeside re-iterated her opposition to this stating the importance of undertaking a risk assessment in all cases where findings have been made of domestic abuse. She considered such an assessment could be done by Cafcass and did not believe that resources should be a consideration for removing this provision. Judge Waller endorsed the Chair's suggestion noting that a risk assessment in all cases is too wide as there will be some cases where a risk assessment is not necessary. Judge Darbyshire endorsed Judge Waller's points noting that he is content for the provision to remain, but to be re-drafted as an obligation to consider whether a risk assessment was necessary following the findings made by the court. Melanie Carew also endorsed the suggestion of the Chair but was neutral as to whether the provision was removed or amended to be a positive obligation to consider an assessment. She responded to Judge Raeside's suggestion noting that there would be a real impact on the available resources of Cafcass if such as assessment was required in every case. Judge Darbyshire further observed that the need for a risk assessment will depend on what facts have been found by the court. He considered that in high levels of domestic abuse, a risk assessment will not be necessary because the risk is too high. This was endorsed by Judge Waller who proposed amending the provision to a positive obligation for the court to consider obtaining a risk assessment from an appropriately qualified professional. This was endorsed by Mrs Justice Theis and all Committee members, save for Judge Raeside.

9.42 Mrs Justice Theis acknowledged that there is a difficulty in courts funding arrangements for a risk assessment and encouraged officials to consider a national scheme so there is consistency in the application of the provision to avoid a

postcode lottery as to when a risk assessment is ordered by the court due to resources.

9.43 MoJ Policy noted that, cost implications aside, it would not be possible to implement such a scheme by the time the Practice Direction is implemented given the priority allocated to it by the President of the Family Division and the Committee. Therefore the question as to how these risk assessments will be obtained and funded under the revised Practice Direction 12J remains a live issue. Mrs Justice Theis responded that courts will continue to operate within the remits of the available local resources just as is the case in practice where an expert witness is required for other private law dispute issues. This was endorsed by the Chair.

9.44 Melanie Carew questioned the difference between a section 7 report and a risk assessment so Cafcass officers can have clarity as to what is required of them. She explained that the current position is that where findings of domestic abuse have been made, Cafcass will complete a section 7 report about the impact of those findings on the child and the possibility of future contact based on those findings. If there is to be a risk assessment, she questioned whether this could be included within the section 7 report or whether two separate reports are required. She noted that if two separate reports were required this would have an impact on the resources available to Cafcass.

9.45 Judge Waller considered it appropriate for a section 7 report to include information about whether the perpetrator accepts abuse has occurred and the impact on the child. He believed any risk assessment could be included within the section 7 report. This was endorsed by District Judge Darbyshire. Melanie Carew noted that the retention of the provision would go against the existing practices of the court to order risk assessments where they are necessary to determining the issue of contact. Members further agreed that the provision should be amended to remove reference to a risk assessment having to be prepared by a specialist accredited agency. District Judge Darbyshire noted that officials would need to consider setting up a list of accredited agencies if this wording was to be applied.

9.46 Michael Horton questioned whether Part 12 of the Family Procedure Rules should be amended to make compliance with the Practice Direction an obligation. This would endorse any message sent to the judiciary by the President of the Family Division and would set out a clear expectation of compliance with the Practice Direction to the judiciary, practitioners and litigants in person. District Judge Carr endorsed this reflecting that this is an opportunity to amend Part 12 of the Family Procedure Rules. Marie Brock considered a training initiative on the implementation of Practice Direction 12J would assist to ensure consistent interpretation of the requirements of the provisions.

9.47 Judge Raeside noted the inadequacy of implementing special arrangements for victims of domestic abuse. Marie Brock noted there is a box to tick on the application form informing court staff whether special arrangements are required. Judge Raeside re-iterated that a better system is needed as litigants in person may

not read the box on the form or miss it and when issues relating to safety are raised at court it is too late. She considered there was a need for a proper system enabling the need for special arrangements to be identified prior to the First Hearing Dispute Resolution Appointment.

9.48 Marie Brock noted that where she sits it is a combined court building and witness support services are available to assist victims of domestic abuse. This approach was endorsed by Dylan Jones who had recent experience of a similar approach being adopted. Mrs Justice Theis also endorsed this but noted it would only be possible where the hearing occurs in a combined court centre unless witness service agencies can be persuaded to come to the family courts.

9.49 HMCTS noted that there is work currently being undertaken to review all the special measures referred to in the application forms. HMCTS are also working with Women's Aid to consider different methods of obtaining the information prior to the court hearing. Hannah Perry observed that the real difficulty often lies in the communication from the court prior to the hearing to confirm that the special measures have been implemented. She believed there needed to be better communication facilities between the court and court users to enable measures to be effectively implemented, particularly if both parties are unrepresented.

9.50 HMCTS noted that court processes clearly state staff check the forms carefully and where special measures are requested the requested is processed and the person requested special measures is written to and notified of the arrangements have been made. HMCTS conceded that the problems arise where individuals do not put the information on the form and the need for special measures is only identified on the day of the hearing. The Chair acknowledged that HMCTS have a process for dealing with applications for special measures. Judge Raeside noted that this process is not working and requested HMCTS to update the Committee on what information is provided to the courts.

<u>Conclusions:</u> **Paragraph 1 of the revised Practice Direction 12J to be amended to make it clear that it is not intended to displace the statutory presumption.**

Paragraph 33a to be amended to impose a positive obligation to consider the ordering of a risk assessment but this is subject to judicial discretion.

Paragraph 33a to be amended to remove reference to risk assessments being undertaken only by specialist accredited agencies.

Matters relating to cross-examination should be excluded from the Practice Direction as primary legislation is required to deal with this issue.

Action: Members and officials to provide any additional comments on the policy and / or drafting to the Secretary by 10 February 2017.
Secretary to send a consolidated list of comments to the President of the Family Division's Office.

HMCTS to update the Committee on the guidance issued to staff on implementing special arrangements for victims of domestic abuse

- ***Law Commission Report on Financial Enforcement***

9.51 The Law Commission has published its report in financial enforcement. A summary of this report was circulated with the papers. Ministers have not yet had the opportunity to consider the response on behalf of the Government due to other priority work being undertaken. Members were invited to share their thoughts on the report.

9.52 MoJ Policy welcomed comments from the Committee on the report, however, this is not something currently being looked at in depth by officials due to other high priority work. MoJ Policy confirmed that Ministers are aware of the report but officials will need to provide more substantive advice on its contents before any decisions can be made or a formal response provided to the Law Commission. MoJ Policy encouraged members to consider those recommendations relating to matters of court practice and procedure and determine what should be prioritised in accordance with other work before the Committee and discuss this in detail at the next meeting. Any progress and prioritisation of work in this report will be subject to the Minister's views on the report. A formal response is required from the Government which will be provided once Ministers have considered more substantive advice about the report's recommendations.

9.53 Judge Waller noted that there are three key elements to the report; consolidation of the enforcement rules, a Practice Direction on enforcement and other recommendations which require primary legislation. He encouraged members to think about what priority to allocate to elements one and two for discussion at the next meeting to identify what, if any, programme of work is required. He observed that the intention when drafting the Family Procedure Rules was to consolidate the enforcement rules but acknowledged this would require substantial resources and time. He considered that the creation of a Practice Direction in relation to enforcement may be related to any consolidation of the rules but could also be done as a separate piece of work identifying the different enforcement mechanisms available.

9.54 Judge Waller believed the Committee should identify what, if any, work is required based on the recommendations and consider with officials what timescales are needed to implement any programme of work. He acknowledged that given the priority work of the Committee's Financial Remedies Working Party there may be competing priority but nevertheless considered work on enforcement to be necessary to make progress on it.

9.55 Judge Raeside questioned whether it would be possible to work with the Family Justice Council as they have their own working group to look a money cases. She acknowledged that the recommendations were resource-intensive but working

jointly with the Family Justice Council this may shorten the timescales required. She noted that most of the people seeking enforcement are vulnerable women who are in economic difficulty and could see the merit of a programme of work in relation to enforcement.

9.56 District Judge Darbyshire noted that it is a policy consideration to have discrete enforcement rules for the family and civil jurisdictions. He noted that work has commenced on this, for example through the implementation of Parts 39 and 40 Family Procedure Rules and how high a priority this remains will be a matter for the Committee to consider in more detail at the next meeting.

9.57 Michael Horton noted that issues with enforcement are wide-spread amongst practitioners and litigants in person. He confirmed he would be willing to work with members and officials to consider ways in which the proposals can be implemented and with any drafting required. This was endorsed by District Judge Carr who also volunteered to assist Michael Horton. He [District Judge Carr] considered enforcement to be a long-standing problem and believed it was regrettable that enforcement was not looked at in detail when the Family Procedure Rules were initially consolidated. He noted that from his experience, court users are not getting the money they are owed or effective enforcement by the court because of a lack of understanding about the processes and procedures. He further endorsed the need for a proper framework for enforcement than enables litigants in person, and practitioners were applicable, to seek effective enforcement from the courts.

9.58 Members agreed that the meeting in March 2017 should include a full review of the priorities of the work required in enforcement. MoJ Officials noted that the Committee may also wish to take into account work being undertaken as part of the wider HMCTS reform programme which could impact on any timescales. Members agreed it would be prudent to take this into account and requested HMCTS to provide an update on the planned work to the next meeting.

Action: HMCTS to update members on the proposed plans for enforcement under the HMCTS reform programme

- ***Consideration (and prioritisation) of work before the Committee***

9.59 Due to the increasing number of items for the Committee to consider, the March 2017 meeting will undertake a full review of the work before the Committee to prioritise its work programme and to enable officials to allocate available resources and identify timescales for this to occur.

- ***Form A58 (application for adoption)***

9.60 A paper has been circulated in relation to proposed Form A58 amendments and potential timescales. The President of the Family Division considers this to be an urgent matter in need of immediate remedy. In the paper, officials have proposed an

alternative implementation date, taking in account available resources and the process for approving form amendments.

9.61 The Chair noted that the President of the Family Division has made it clear that this amendment should be implemented within one month and is not prepared to contemplate an adjustment to this timetable due to the priority he accords to this.

9.62 The Secretary to the Committee updated members that in view of the President of the Family Division's views, the wider reforms proposed to the adoption forms will be delayed until April 2018 with this work undertaken to a quicker timescales without involving a duplication or work on separate timescales and to assist with version control of the forms.

9.63 Judge Waller endorsed this approach noting the need for the form to be updated on a quicker timescale due to the lack of effective information in relation to Scottish freeing orders.

9.64 No other business was raised at the meeting.

DATE OF NEXT MEETING

10.1 The next meeting will be held on Monday 6 March 2017 at 10.30 a.m. at the Royal Courts of Justice

Secretary
February 2017
FPRCSecretariat@justice.gsi.gov.uk