Ministry of Justice

FAMILY PROCEDURE RULE COMMITTEE
In the Conference Suite, 2nd Floor Mezzanine,
Queen's Building, Royal Courts of Justice
At 10.30 a.m. on Monday 10 July 2017

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

ANNOUNCEMENTS AND APOLOGIES

1.1 The Chair welcomed all members to the meeting including an intern with the MoJ who had joined Family Justice Policy and was observing the meeting.

1.2 The President of the Family Division noted there were two forthcoming retirements of Family Procedure Rule Committee members: Mrs Justice Pauffley and District Judge Darbyshire.

1.3 The President of the Family Division thanked the Chair for all her work on the Committee. He paid tribute to her skills as a Chair particularly her ability to remain calm and keep the business of the Committee moving during the meeting at an appropriate pace. Whilst noting the Committee's regret at losing her skills and experience, the President of the Family Division concluded by wishing her the best for the future.

1.4 The Chair thanked the President of the Family Division and the Committee for their best wishes. She had enjoyed working with Committee members and considered it a

pleasure and privilege to serve as the Acting Chair of the Committee. She noted that during her time on the Committee she has learnt a lot about the Family Procedure Rules and has enjoyed working with members in creating new Rules over the years.

1.5 Judge Waller noted that District Judge Darbyshire is also retiring from the Committee. District Judge Darbyshire had been a member of the Family Procedure Rule Committee since 2011 and with his initial term being extended in 2014, he has served on the Committee for six years. Although he retired from the District Bench in 2016, he has continued to sit as a Deputy District Judge and to serve on the Committee. Judge Waller paid tribute to District Judge Darbyshire's immense experience in family work and to the contribution which he has made to the work of the Committee and the development of the Rules and Practice Directions since their inception. His experience of front-line judicial work in all aspects of family law has been of particular value in considering the operation of the Rules in everyday practice. Judge Waller especially commended District Judge Darbyshire's work in helping to develop and modernise court forms and on the review and revision of the financial remedies rules. His role has also enabled him to provide valuable liaison between the Family Procedure Rule Committee and the Association of HM District Judges. On behalf of the Committee, Judge Waller thanked District Judge Darbyshire for the time and commitment he has given to the Committee and wished him a long and happy retirement.

1.6 District Judge Darbyshire thanked Judge Waller and the Committee. He noted that he had enjoyed his time on the Committee and had done his best to represent the views of the Association of District Judges in relation to the work of the Committee. He informed members that he will no longer be sitting as a Deputy District Judge from the end of July 2017. He shared his appreciation for the comradeship and intellectual efforts of all members that go into furthering the work of the Committee. He thanked all members and wished them well for the future.

MINUTES OF THE LAST MEETING: 12 JUNE 2017

2.1 The minutes of the last meeting were circulated on 6 July 2017. No amendments were proposed to the minutes. These minutes were approved as a correct and accurate record of the meeting.

MATTERS ARISING

3.1 There were no matters arising that were not included within the agenda.

FAMILY PROCEDURE (AMENDMENT NO 2) RULES 2017

4.1 A draft Statutory Instrument containing Rule amendments that had been agreed by the Committee at a previous meeting was circulated in advance of the meeting. The principal amendment made by these Rule amendments were to mend the provisions in Part 17 of the Family Procedure Rules 2010 to require a statement of truth to be

included in an application for a matrimonial or civil partnership order or an answer to such an application.

4.2 Members indicated their agreement to the draft instrument. Members signed the Rules during the meeting. MoJ Policy confirmed that the next step would be to submit the signed Rules to the Minister for approval.

4.3 The following members signed the Family Procedure (Amendment No 2) Rules 2017:
President of the Family Division
Mrs Justice Theis
Her Honour Judge Raeside
District Judge Carr
District Judge Darbyshire
Richard Burton
Hannah Perry
Michael Horton
Marie Brock

CONSIDERATION OF THE VULNERABLE WITNESSES PRACTICE DIRECTION

5.1 Paper 5 and its annexes in papers 5a and 5b were considered by the Committee.

5.2 MoJ Policy noted that there were two issues on which the Committee's views and conclusions were sought with a view to finalising the Practice Direction. These related to the issue of pre-recorded evidence and the need for transcripts, and whether the provisions of the Practice Direction require any modifications to Part 18 FPR 2010 and its application in relation to the provisions of this Practice Direction.

5.3 MoJ Policy also noted that a separate question has been raised with the Family Business Authority in relation to amending the Rules and/or Practice Direction to provide for a default position to require separate waiting areas and special measures for vulnerable persons involved in proceedings under Part 4 of the Family Law Act 1996 and at First Hearing Dispute Resolution Appointments in section 8 Children Act 1989.

5.4 Members considered paragraph 5.4 of the revised draft Practice Direction. The Chair questioned the suggestion that there is seldom transcription in the Crown Court. She could not imagine any situation where the court would not be assisted by a transcript. MoJ Policy noted that this was the initial findings from the pilot being conducted at three Crown Court sites.

5.5 District Judge Darbyshire noted that this finding does not reflect historical practices within the Crown Court where transcripts are required to follow the pre-recorded evidence. The President of the Family Division observed that in criminal proceedings, juries would be watching on a screen what would otherwise be live evidence on the day. He also noted the possibility that the equipment used within criminal courts may be more advanced than those available within the family courts leading to

increased quality of pre-recorded evidence. He considered that it would not be possible to rely on findings of pilots in the Crown Court within the family sphere due to the poor quality or recording of pre-recorded evidence within family courts. MoJ Policy commented that the technology solution being used within the Crown Court is in principle capable of being extended to the family court, but this was a decision for HMCTS as it would require some investment.

5.6 District Judge Carr questioned how the Crown Court manage proceedings without any transcript. He noted that for witnesses giving live evidence before the court there will be a witness statement which the judge would have before him. In relation to a pre-recorded video of the evidence in chief there is no statement before the court other than the transcript. Will Tyler noted that where the evidence in chief of a witness is in the form of a pre-recorded interview then the prosecution will always arrange for this to be transcribed if the case proceeds to trial. He observed that he had never seen a case where the pre-recorded evidence in chief has not been transcribed. Mrs Justice Theis questioned how the Crown Court judge sums up the evidence at the conclusion of the trial if there is no transcript available. She noted that it would be helpful to hear the views and experience of the Crown Court judges in the pilot areas. MoJ Policy noted that the Crown Court pilots were concerned with pre-recorded cross-examination evidence.

5.7 District Judge Carr questioned where the recording takes place; at the police station or at the courthouse. MoJ Policy said their understanding was that the recording takes place within the courthouse, including in a witness room within that same building. He [MoJ Policy] confirmed the recording of evidence in the pilot did not take place at a police station. Will Tyler noted that pre-recorded cross examination is done within the courthouse and these hearings are listed early in the day to enable advocates to deal with other work during court sitting hours. He further noted that Achieving Best Evidence interviews constituting evidence in chief are always recorded at the police station.

5.8 The President of the Family Division questioned where the child was during the recording process. Will Tyler's understanding of the process is that all advocates and the witness (who may be a child) would all be in the same room together. The Chair noted the logistical challenges in ensuring everyone is available to be in the same room whilst also enabling advocates to take on other work during the business day.

5.9 Judge Waller questioned whether the proposed amendment to the wording in paragraph 5.4 of the revised Practice Direction was necessary. He noted that the existing wording confers a discretion on the court in ordering transcripts although it does not directly express this. MoJ Legal noted that the existing wording suggests courts would consider whether pre-recorded evidence and transcripts are needed together (rather than there being an option of pre-recording without also having a transcript) whereas the proposed wording makes it clear that the court needs to consider each element separately.

5.10 The President of the Family Division noted that the proposed amendment is helpful especially as the first 10 or 15 minutes of any pre-recorded evidence has to be watched by the judge but may not all need to be transcribed. This was endorsed by Marie Brock.

5.11 District Judge Carr noted that his experience of children being cross-examined in court related to sexual assault cases where ground rules have been made that any cross-examination is to be limited. He noted that there are occasions when the cross-examination is very short and therefore the impact of ordering transcripts may not be as great as being predicted. Richard Burton agreed that there are many occasions in practice where cross-examination is limited. Marie Brock noted that this could apply equally to any vulnerable witness and not be a practice exclusive to children.

5.12 Members agreed the proposed amendment to the wording of paragraph 5.4 of the revised Practice Direction so that it reads "… recorded and, if the court so directs, transcribed…"

5.13 Members considered Her Honour Judge Karp's proposal for default special measures to be granted to vulnerable persons involved in proceedings under Part 4 of the Family Law Act 1996 and at First Hearing Dispute Resolution Appointments. It was suggested that this would involve providing these persons with separate waiting rooms and screens automatically. Members noted that separate waiting rooms are not in fact a special measure but something that HMCTS ought to be able to provide as a matter of routine.

5.14 HMCTS reported that there had been a customer experience event in Bristol which had sought the views of practitioners on steps that might be taken to improve the experience of vulnerable individuals in family proceedings. The consensus from that event was that it was not necessary to have a default position of special measures being granted automatically for these case types but there should be increased publicity about the measures available to vulnerable persons with better monitoring of such requests by HMCTS.

5.15 Marie Brock considered that it would be useful to have a default position of separate waiting rooms and screens for vulnerable witnesses. District Judge Darbyshire noted that in practice it would be difficult to accommodate separate waiting rooms for First Hearing Dispute Resolution Appointments as these appointments encourage parents to resolve issues in relation to their child(ren) together which could not work if the parents were in separate areas of the court. Richard Burton noted that many court buildings do not have the facilities to accommodate separate waiting rooms. Marie Brock noted that whilst separate waiting rooms may not be available at all courthouses, parents can be directed to different ends of the building with ushers facilitating this.

5.16 HMCTS acknowledged District Judge Darbyshire's concern that separate waiting rooms at First Hearing Dispute Resolution Appointments may hamper negotiations.

Marie Brock disagreed noting that in cases where there are allegations of violence or abuse, and mediation is considered unsuitable, then it does not automatically follow that the parents will be expected to engage and negotiate at the First Hearing Dispute Resolution Appointment. However, she conceded that this would only apply to a small number of cases within the total number listed for First Hearing Dispute Resolution Appointments. The Chair noted that the needs of vulnerable persons involved in this small proportion of cases will still somehow need to be accommodated by HMCTS.

5.17 The President of the Family Division conceded the difficulties in the Rules or Practice Directions requiring default special measures and, in some circumstances, separate waiting rooms in cases listed for a First Hearing Dispute Resolution Appointment. However, he did not consider this to be a difficulty in relation to proceedings under Part 4 of the Family Law Act 1996.

5.18 Judge Raeside noted that the difficulty is not in any application for special measures or lack of information about the types of special measures available, but the continuity of any arrangements ordered by the court after the first hearing. She further noted that HMCTS staff do not have the time to remember what arrangements have been made and follow that through in future hearings. She considered it necessary for HMCTS to implement a system to ensure staff know how special measures should be dealt with in every case. She concluded that it may be possible to have default special measures of screens in all Part 4 Family Law Act 1996 proceedings but did not consider this to be appropriate at First Hearing Dispute Resolution Appointments.

5.19 District Judge Carr questioned the use of default special measures. He considered it appropriate that vulnerable persons in Part 4 Family Law Act 1996 proceedings should have a separate waiting room where available, but such measures were matters of operational procedure rather than "special measures" as such. However, he was concerned about the automatic use of special measures within the courtroom in these types of proceedings. He noted that in criminal proceedings persons under the age of 18 were automatically granted special measures, and particular provision is made for a complainant in respect of a sexual offence or an offence under section 1 or 2 of the Modern Slavery Act 2015. In other situations, the witness would need to satisfy the judge that the quality of their evidence would be enhanced by the granting of special measures. The statutory criteria in Section 39 Youth Justice and Criminal Evidence Act 1999 would be applied by the court in making this decision. He did not consider a default position of automatic special measures within the court room to be appropriate in Part 4 Family Law Act 1996 proceedings. He considered it to be necessary for a judge to look at the nature of the allegation and be satisfied that the applicant is vulnerable and intimidated by the other party.

5.20 Marie Brock disagreed noting that a default position of automatic special measures will not prevent the other party from objecting to its use within the proceedings. The

default nature would serve to remove the vulnerable person having to ask for help and move the onus to the "non-vulnerable" alleged abuser to request their removal.

5.21 District Judge Carr considered it may be more appropriate to amend the application form to make it clearer to applicants what type of special measures are available. Judge Waller endorsed this noting that any request for special measures needs to be accurately identified by court staff and implemented at all relevant hearings.

5.22 Marie Brock noted that her experience of vulnerable persons in the courtroom is that ushers do not know which party should be in a separate room and therefore whoever arrives first at court is taken to a separate room. Whilst acknowledging that the application forms could be clearer, District Judge Darbyshire noted that litigants in person are getting assistance from somewhere e.g. Personal Support Unit, Citizens Advice etc, which means they are also getting the information about available special measures at the same time.

5.23 The President of the Family Division noted that the issue of domestic abuse and its impact on victims is currently being publicised outside the court arena. He reminded members of the debates in relation to domestic abuse in the House of Commons (September 2016) and the House of Lords (July 2017) and the cross-party support for reform within the family justice system in relation to vulnerable persons. He considered it important to make progress with consideration of measures to protect vulnerable persons and implement these as soon as possible. He suggested that all relevant court application forms should be reviewed so there is uniformity across all forms in how special measures are applied for within family court proceedings. He also considered that increased guidance and signage may also raise awareness amongst court users about the types of protection available within family proceedings. He proposed HMCTS operational instructions to staff be reviewed to identify cases requiring special measures at an early stage. He considered this could be done by marking up the file clearly on the outside so staff preparing case files prior to the hearing are aware of the need for special measures in a given case. He noted that there are two questions to be answered in relation to this issue: firstly, whether as a matter of principle default special measures were required in specified types of proceedings? If the answer to that was yes, then secondly, there needed to be an analysis of the resource impact of implementing this proposal in practice. He observed that there were many court buildings where unused rooms could be looked at to implement a separate waiting room for vulnerable witnesses e.g. advocates' robing rooms. He considered it imperative that court users should be able to apply for special measures; and, when applied for, courts should be able to facilitate this.

5.24 Judge Raeside considered that there would be a delay in proceedings if automatic special measures were to be applied at First Hearing Dispute Resolution Appointments. However, she noted that there are very few inter parties Part 4 Family Law Act 1996 applications as most hearings are ex parte initially with the respondent not attending or not contesting the application at the second hearing. She questioned whether it would be possible to implement default special measures

in contested Part 4 Family Law Act 1996 proceedings. Judge Waller noted that if this approach was to be taken that it should apply to all applications made with notice to the other party. Marie Brock also endorsed this noting the increased allegations of domestic violence within proceedings.

5.25 District Judge Carr re-iterated the difference between the use of separate waiting rooms outside the courtroom and the use of special measures in the courtroom. He supported action being taken to implement separate waiting rooms as far as possible, particularly in Part 4 Family Law Act 1996 proceedings. However, in relation to special measures in the courtroom, including the use of screens, he considered it necessary for there to be an application for special measures which the judge can consider taking into account the nature of the allegation and its impact on the victim. He did not envisage lengthy detailed applications that would be onerous on the vulnerable applicants but considered there should be some judicial oversight of its use in practice. This was endorsed by the President of the Family Division who noted that the public concern is about the waiting rooms rather than the availability of special measures within the courtroom. The Chair, Judge Raeside and Marie Brock shared their experiences of the use of screens within court proceedings under Part 4 Family Law Act 1996.

5.26 HMCTS noted that the recent event held in Bristol revealed that many Part 4 Family Law Act 1996 proceedings are issued ex parte and the return date hearing is not contested as the respondent either does not attend or does not contest the application. There was a proposal at this event as to whether the applicant could attend the return date hearing by telephone.

5.27 Judge Raeside noted that Surrey is considering the use of telephone hearings within applications under Part 4 of the Family Law Act 1996 where a vulnerable applicant has difficulties in attending court as this measure would ensure access to justice for all vulnerable persons. The Chair noted difficulties with hearings by telephone particularly in relation to assessing whether the applicant is sincere and genuine. The President of the Family Division questioned how the court could be satisfied that the person at the other end of the telephone is the applicant. Mrs Justice Theis noted that the use of telephone hearings raises many different issues and no final decisions had been made as to their use within family proceedings.

5.28 Jane Harris questioned the extent to which advice is available to court users completing forms for a Part 4 Family Law Act 1996 injunction. District Judge Darbyshire noted that often applicants are getting support from various agencies in completing the form. Judge Waller considered it essential that there is a clear explanation somewhere of what is available at a particular court centre so applicants know what facilities are available when the make their application.

5.29 Marie Brock questioned whether special measures could be considered as part of the allocation process for Children Act proceedings. Judge Waller and District Judge Darbyshire noted that this is the existing practice.

5.30 The President of the Family Division noted that this highlighted a clear need to ensure that all court forms are as user-friendly as possible with appropriate guidance notes to support litigants in person through the form-filling process. He also considered it necessary to feed such considerations into the court reform programme, and specifically its designs for the "court of the future". There ought to be an appropriate ratio between the number of courtrooms, consultation rooms and waiting rooms available.

5.31 The President of the Family Division considered that on current information available it may be possible to agree default special measures for all contested or inter partes applications under Part 4 of the Family Law Act 1996 but considered it imperative that there is uniformity in how special measures are detailed on court application forms supported by clear internal processes by HMCTS to easily identify cases where special measures have been ordered and their implementation at all court hearings.

5.32 MoJ Legal noted that in relation to Practice Direction 3AA, the court can order special measures either of its own initiative or on an application by a party in the proceedings. Further, the draft Rules impose a duty on the court to consider matters in relation to participation directions as soon as possible after the start of the proceedings and throughout. So if most Part 4 Family Law Act 1996 proceedings are ex parte in the first instance, then at that point the judge can determine what, if any, measures need to be put in place for the return inter partes hearing. The Judge has the discretion to tailor the directions based on the needs of the vulnerable person and the facilities available in each courthouse. This might suggest then that nothing additional is needed in the Rules.

5.33 Marie Brock noted that changing perceptions of vulnerable witnesses and ensuring they are adequately protected in court will be a culture change and matter of practice over time. This was endorsed by Judge Raeside. Judge Waller considered it appropriate that there should be a national practice for all parties in proceedings under Part 4 of the Family Law Act 1996 to be kept separately and questioned whether HMCTS would be able to implement this. Will Tyler observed that it was necessary for applicants to know in advance that they could ask to be taken to a separate secure waiting room.

5.34 District Judge Carr noted that the implementation of separate waiting areas is an operational requirement for HMCTS. He considered it imperative that HMCTS should have clear arrangements to ensure court users requesting or requiring separate waiting areas can be accommodated. This was endorsed by the President of the Family Division, who considered it necessary for HMCTS to satisfy the judiciary that appropriate measures were being implemented locally to support vulnerable witnesses.

5.35 Judge Waller concluded that whilst there should be no amendments to the draft Part 3AA Rules or to Practice Direction 3AA at this time, there should be on-going work by HMCTS to ensure that separate waiting areas, particularly for applicants of Part 4 Family Law Act 1996 applications, are implemented unless it is impracticable at a

particular court location. This was endorsed by Judge Raeside. Judge Waller accepted that this is a sensitive area and there should be increased guidance about the types of special measures available on a court user's request. He endorsed the President of the Family Division's earlier point about needing to amend court application forms to specify the types of special measures available.

5.36 Hannah Perry noted that there are practical difficulties in trying to contact courts by telephone. She had experienced many occasions where it is not possible to get through on the phone and practitioners would subsequently email the court to confirm whether arrangements for special measures had been made. She considered that this could cause real difficulties for litigants in person who may be concerned that special measures had not been implemented in their case.

5.37 MoJ Policy suggested that MoJ would work with HMCTS to develop an operational proposition covering activity aimed at facilitating the special measures referred to in Practice Direction 3AA and wider plans for improving the operational response to vulnerable court users. This was endorsed by District Judge Carr who noted that it would be helpful to see the operational instructions to staff so the judiciary were aware of what they needed to do to ensure special measures were appropriately implemented. MoJ Policy agreed this could be shared with the judiciary and there may need to be wider considerations of a training programme to support HMCTS staff in dealing with these types of applications. This was agreed by Committee members with MoJ Policy preparing a paper for the next Committee meeting.

5.38 Will Tyler questioned whether there should be a review of court forms to see if amendments are required in relation to special measures. This was agreed by the Committee. The Forms Working Group who are responsible for reviewing court forms would be approached to undertake a review of court forms, considering how they could be made more user-friendly for vulnerable individuals. It was agreed that this review should look in particular at giving greater prominence to information on the availability of special measures and at expressing such information in plain English.

5.39 The Chair noted the suggestion from officials that Practice Direction 3AA should not be amended to incorporate this change at this time but the issue of separate waiting rooms and automatic special measures will continue to be considered further by the Family Business Authority. Members approved this course of action.

5.40 District Judge Carr questioned the reference to central funds in Paper 5. MoJ Policy confirmed this was funds from the local court budget. The President of the Family Division questioned whether there are any instructions to court staff / court users on its implementation in practice. MoJ Policy noted that there will be draft guidance for the use of intermediaries which will include guidance on payments from local court budgets and this would be amended to include reference to transcriptions. District Judge Carr questioned whether the finalised guidance would be shared with the judiciary and MoJ Policy confirmed that it would be finalised with the President of the Family Division and then distributed.

5.41 MoJ Legal noted that the outstanding issue on which the Committee's views were sought were about the use of Part 18 FPR 2010 for participation directions made under Practice Direction 3AA. Paper 5b sets out MoJ Legal's views on whether modifications to Part 18 FPR 2010 are required and members were invited to comment.

5.42 Judge Waller considered that amending Part 18 FPR 2010 may complicate proceedings unnecessarily. He noted that procedure set out in Part 18 FPR 2010 provided a simple and clear process and to impose a different process for this particular type of direction is unnecessary. This was agreed by all Committee members.

5.43 Marie Brock raised an amendment to the title heading preceding Rule 3A.5. She noted that in all other Rules it referred only to the "Court" yet this heading referred to "The Court". She proposed removing "The" to make it more consistent with other headings within the Rules. She also proposed amending paragraph 1.1.1. of the Practice Direction to 1.1. These two amendments were agreed by all Committee members.

5.44 Will Tyler raised an amendment to Rule 3A.7 (m) to include the word "other" so the court could consider any other matters set out in the Practice Direction. This was agreed by all Committee members.

5.45 District Judge Carr requested paragraph 2.1 of the Practice Direction to be cross-referenced to the relevant Rules to ensure consistency.

5.46 MoJ Legal noted the need for the reference to domestic abuse in Practice Direction 3AA to be consistent with Practice Direction 12J. It was suggested that Paragraph 2.1 of the Practice Direction be amended to use the same terminology as settled on for Practice Direction 12J, with the reader also being signposted to the guidance contained within Practice Direction 12J.

5.47 Judge Raeside agreed that there is a need for consistency. She noted the phrase domestic violence is being phased out and replaced with the term domestic abuse. Members agreed that conclusions made during discussions relating to Practice Direction 12J later in the meeting would be incorporated within Practice Direction 3AA.

5.48 MoJ Legal confirmed that the next step will be to amend the Rules and Practice Direction to create final versions. There will also be minor modifications to Rule 3A.10 (3) in light of the decision not to modify the Part 18 FPR 2010 procedure for Part 3A cases. MoJ Legal questioned whether, subject to changes agreed at this meeting, the Rules and Practice Direction could be finalised. Members agreed that any future draft would be the final version for implementation.

5.49 MoJ Legal explained that the next steps will be to prepare final versions of the Rules and Practice Direction and go through internal clearance procedures. The intention is to implement the Vulnerable Witnesses Rules and Practice Direction on 2 October 2017. The statutory instrument will be sent out of committee for signing by members.

Conclusions: **Paragraph 5.4 of the revised Practice Direction to be amended to state "*recorded and, if the court so directs, transcribed*".**
The implementation of Practice Direction 3AA should not be delayed by incorporating default special measures for certain types of proceedings.
Subject to changes agreed at this meeting, the next drafts of the Rules and Practice Direction will be final versions.

Actions: MoJ Legal to produce final versions of the Rules and Practice Direction.
MoJ and HMCTS to develop an operational proposition covering activity aimed at facilitating the special measures in PD3AA and wider plans for improving the operational response to vulnerable court users.
MoJ Policy to work with the Committee's Forms Working Group to review court forms and consider how greater prominence can be given to information on the availability of special measures.

CHILDREN PRACTICE DIRECTION

6.1 MoJ Policy updated Committee members of progress in relation to the Children Practice Direction.

6.2 MoJ Policy are intending to meet with analysts in the coming week to consider the comments raised by HMCTS, Cafcass and CAFCASS Cymru to try and identify different costed options that can be returned to the Committee at the October 2017 meeting for discussion. It might not be possible to provide a revised draft of the children Practice Direction for the October meeting given the need to consider different approaches to various matters but officials are intending to present a comprehensive policy paper explaining the rationale for different options so as to obtain a steer from the Committee as to how any revised draft should proceed.

6.3 MoJ Policy accepted that the Committee had considered previous drafts of the children Practice Direction fit for purpose but due to the difficulties in resourcing its implementation a separate timetable was agreed for work on children and on vulnerable witnesses. Officials are keen to present the Committee with options to consider for how the children Practice Direction can be further progressed. Whilst officials take into account the Committee's views on resources, it is necessary to obtain Ministerial approval to any Practice Direction and officials need to be able to present the Minister with a range of costed options which will vary according to the scope of the Practice Direction. MoJ Policy concluded that any final version will depend on whether the Committee feel that there is a version of the Practice Direction capable of being implemented as opposed to a gold standard version of the Practice Direction that required significant resources to be found.

6.4 The President of the Family Division noted the long delay in progressing this work. He also questioned whether a parliamentary timetable has been fixed for a Bill through Parliament (relating to cross-examination in family proceedings). MoJ Policy noted that the parliamentary timetable was more challenging than anticipated. However, the cross-examination provisions were included in the legislative programme for the next two years, as set out in the Queen's Speech.

6.5 MoJ Policy noted that the Committee's steer that, where possible, this work could be linked to the Bill provisions would be taken into account and officials will seek to narrow the issues for further consideration of this Practice Direction.

FINANCIAL REMEDIES WORKING GROUP

7.1 Following members' previous agreement to amendments to Part 9 FPR 2010, Paper 9 and its annexes provide details of the consultation proposed; members' views were sought on the draft consultation documents.

7.2 MoJ Policy reminded members that it had previously been agreed that the principle of procedural de-linking and the implementation of changes to the fast track procedure were not to be consulted on. Therefore, the drafting within the consultation document reflects that this is intended to be a narrow consultation on the question of whether a protective application for a financial remedy is required, and the question of the lump sum threshold for allocation to the fast track.

7.3 MoJ Legal drew members attention to the amended draft Rules for members' comments.

<u>Rule 9.4</u>

7.4 Judge Waller proposed amending the Rule to insert a new paragraph stating that paragraph (1) does not apply if the relevant statutory provisions do not apply. He noted the advantage of this route is that avoids the Rules needing to define what is already defined in Section 27 (2) Matrimonial Causes Act 1973 (and the CPA 2004 equivalent). He observed that he cannot recall ever having an application for maintenance for a child where divorce proceedings have been dismissed but the legislation does provide for this potential situation.

7.5 This proposed amendment was agreed by the Committee.

<u>Rule 9.5</u>

7.6 Judge Waller and Michael Horton endorsed suggestions by MoJ Legal to omit 9.5 (1). This proposed amendment was agreed by the Committee.

<u>Rule 9.9B</u>

7.7 MoJ Legal noted that this Rule attempts to define periodical payments and lump sum payments.

7.8 Judge Waller questioned why a definition is needed within the Rule. MoJ Legal noted that these terms are not defined for the purpose of the Family Procedure Rules 2010 elsewhere. This was endorsed by Michael Horton.

7.9 Judge Waller and Michael Horton endorsed the definitions suggested by MoJ Legal This proposed amendment was agreed by the Committee.

7.10 The Chair questioned whether there was an overlap between Rule 9.9B(3)(a) and (b) – for example if you could make an application for periodical payments under the Domestic Proceedings and Magistrates' Courts Act 1978. Judge Waller accepted that there is an overlap as under the 1978 Act it is possible to apply for periodical payments. Michael Horton noted that the overlap was taken into account in the proposed drafting but due to the types of remedies available it was simpler to proceed with the proposed draft and accept the potential overlap.

7.11 Judge Raeside proposed an amendment to Rule 9.9B (3) (c) to provide clarity over the circumstances where this Rule applies. This was agreed by Committee members.

Rule 9.18

7.12 Judge Waller and Michael Horton endorsed the proposed amendments suggested by MoJ Legal to 9.18 (1A). This proposed amendment was agreed by the Committee.

7.13 MoJ Legal noted that within this Rule there is a proposed amendment on the request of HMCTS to remove the requirement on the court to send out blank financial forms (Form E) to both parties. MoJ Legal proposed omitting paragraph 9.18 (1)(b)(iii).

7.14 District Judge Carr questioned whether the rationale for its removal was resources. Judge Raeside noted that it is not needed as the form is publicly available on the internet. District Judge Darbyshire questioned how vulnerable people who are not on the internet would access this form. Judge Raeside and Marie Brock noted such persons can use the library or a legal support service. MoJ Legal and HMCTS observed it would still be possible for courts to print and post forms on request. Members agreed to this amendment.

Rule 9.18A

7.15 Judge Waller and Michael Horton endorsed the proposed amendments suggested by MoJ Legal to 9.18A. This proposed amendment was agreed by the Committee.

7.16 District Judge Carr questioned whether there is a specified procedure within the Rules which a respondent would use to file an objection. Michael Horton noted that if you are a respondent seeking to challenge allocation to the fast track procedure

this objection can be raised with the Court. District Judge Carr accepted this but questioned the mechanism by which that objection would be raised with the court.

7.17 Judge Raeside questioned whether there could be an amendment to the order stating that the decision to allocate to the fast track has been made without notice and any objection must be made within seven days.

7.18 Michael Horton noted that the difficulty with this is that there is no hearing for the allocation as it is an automatic process if the threshold is met.

7.19 Members agreed that the Rule itself does not need to be amended but the notice of allocation to the fast track should be amended to state that the allocation decision has been made without a hearing and any party wishing to object should do so within seven days.

Consultation

7.20 Members agreed that subject to the amendments agreed at this meeting the revised Rules can be circulated for consultation.

7.21 MoJ Policy questioned whether the list of stakeholders on page 2 of the covering letter is sufficiently inclusive. The Chair questioned how views of litigants in person would be sought. MoJ Policy agreed to send the consultation to Citizens Advice and the Personal Support Unit.

7.22 Judge Waller considered it helpful to retain in the consultation paper background to how Chapter 5 of Part 9 FPR 2010 came to be in its current form.

7.23 MoJ Policy questioned whether members were content with the order of the questions in the draft consultation document, as it reflects the previous views of the Committee that protective applications were not required. Members agreed the order of questions within the consultation document.

7.24 MoJ Policy hope to be able to send consultation documents out by the end of the week. The Committee agreed the consultation should end on 8 September 2017. MoJ Policy and the Committee's Financial Remedies Working Group will consider the responses in parallel prior to the October meeting.

Conclusions: **Subject to amendments agreed at this meeting the revised Rules for Part 9 Family Procedure Rules 2010 are agreed to be published for consultation**
The Committee approved the consultation document and covering letter

Actions: MoJ Policy to include Citizens Advice and the Personal Support Unit on the list of targeted stakeholders for consultation
MoJ Legal to amend the draft Rules as agreed in the meeting
MoJ Policy to arrange for the consultation to be issued as soon as possible

REGIONAL FINANCIAL REMEDY COURTS

8.1 Members considered Paper 8.

8.2 The President of the Family Division thanked MoJ Legal for scoping the Rule and Practice Direction amendments that may be needed to support the implementation of regional financial remedy courts. The President of the Family Division confirmed that he and HMCTS will continue to discuss the final model and the commencement of any subsequent pilot scheme.

8.3 MoJ Legal noted that the conclusion that no Rule or Practice Direction amendments are needed is based on the assumptions set out in the paper. As more detail about the final structure is agreed there may be Rule and / or Practice Direction amendments needed. It was noted that any amendments will depend on the final decision about whether enforcement proceedings should be included within the same structure, which if it is, is likely to require Rule and Practice Direction changes. She also noted that the Family Court (Allocation and Distribution of Business) Rules 2014 may require amendment to reflect any final decision as to who will be undertaking this work in the future.

8.4 The President of the Family Division questioned the second assumption within the paper (that the Rules should not make provision about where to send applications). MoJ Legal noted that court users will be informed through Court Finder where applications for financial remedies should be sent rather than in the Rules. Rule amendments will only be required if the Committee consider it necessary to explicitly state within the Rules that applications should be made to a specific venue. She noted this approach was not taken when the Rules were amended to reflect the creation of the single family court and it may appear inconsistent to do so now.

8.5 The President of the Family Division updated members that he is in advanced discussions with HMCTS about the final structure and detail relating to regionalisation of financial remedies courts. HMCTS have produced diagrams showing how regionalisation works currently and how it will be in the future when the online court has been fully implemented. HMCTS have also provided a spreadsheet detailing each family court and what business occurs at each courthouse. Based on this information the President of the Family Division and HMCTS are planning how many centres and hearing centres are required to support this work.

8.6 The Chair questioned whether there will be a pilot. The President of the Family Division confirmed that a pilot test will be run.

8.7 Judge Raeside questioned whether the Association of District Judges will be consulted about the concept of “ticketing”. The President of the Family Division noted that there have been some initial discussions and the question of ticketing does not appear to be controversial at this stage.

Practice Direction 12J

9.1 Members considered Paper 9 and the revised Practice Direction in Annex 9a. Members views were sought on the questions contained within the paper.

9.2 MoJ Policy noted that there are two main points on which officials seek the Committee's views. The first relates to paragraph 7 and how direct consideration of risk of harm to the other parent should be taken into account by the court. MoJ Policy questioned whether it was necessary to amend paragraph 7 to clarify the distinct stages of the court's decision.

9.3 The second question related to paragraph 33 of the revised Practice Direction and the proposed use of "specialist domestic abuse practitioners" to conduct risk assessments. Whilst changes to the draft Practice Direction meant it would no longer be mandatory for the court to obtain such assessments, questions remain as to who would provide this service and potential resource implications.

9.4 Members agreed to work through the Practice Direction and consider any amendments required with a view to a final revised Practice Direction being produced on the outcome of discussions.

<u>Paragraph 3</u>

9.5 Marie Brock suggested removing an "also" within the definition of culture-based domestic violence. This was agreed by members.

9.6 Will Tyler questioned whether honour based should be hyphenated. This was agreed by members.

9.7 District Judge Carr questioned how the definition of abandonment was arrived at. The President of the Family Division noted that this was raised by Southall Black Sisters who noted how widespread this problem is. The purpose of including this within the Practice Direction is to prevent abuse by reason of status or money. Members agreed the inclusion about the definition of abandonment and the culturally-specific forms of abuse.

9.8 Judge Raeside questioned the definition of "domestic abuse". She raised concern that there should be consistent wording within the Practice Direction.

9.9 The President of the Family Division noted that the Government's proposed legislation in this area was termed the "Domestic Violence and Abuse Bill". MoJ Policy made the point that the term "abuse" was preferable to "violence" as it was broader and covered forms of abuse beyond the physical. Judge Raeside endorsed this noting the term "abuse" would include acts of violence.

9.10 Members agreed the Practice Direction should be amended to be titled "Domestic Abuse and harm" and "domestic abuse" should replace "domestic violence" and "domestic violence or abuse" throughout the Practice Direction.

9.11 Will Tyler questioned whether the definition of coercive behaviour needed amending to match practical experiences of controlling and coercive behaviour. Judge Raeside noted the provisions within Section76 Serious Crime Act 2015 and the definition within that act of controlling or coercive behaviour. The President of the Family Division questioned whether any amendment was needed as the definition within the draft Practice Direction was broader than the definition within the statute. This was endorsed by the Chair. District Judge Darbyshire noted that the 2015 Act did not provide a definition of controlling and coercive behaviour merely stating how the court could determine it. Members agreed the definition of coercive behaviour as currently included in Practice Direction 12J should be retained, noting that this mirrors the non-statutory definition adopted across government.

9.12 MoJ Legal questioned whether the addition of "by domestic violence or otherwise" within the definition of harm, was required. She noted that the definitions of "harm", "development" and "ill-treatment" were otherwise the same as the definitions within the Children Act 1989. Marie Brock noted that as this Practice Direction is about domestic abuse the inclusion of these words ensures that this subject is considered by the court when considering those matters. This was agreed by all members.

9.13 MoJ Legal questioned whether the definition of "judge" should be included within paragraph 3. She suggested that the definition is not necessary within this Practice Direction as the term "judge" already defined (differently) within Rule 2.3 Family Procedure Rules 2010. The President of the Family Division considered that the definition should remain as the intention is for Practice Direction 12J to be a stand-alone document capable of being understood by people without needing to cross-refer to the Family Procedure Rules 2010.

9.14 MoJ Legal accepted that the definition could be helpful in this situation but considered whether the wording should be amended to make the provisions in the Practice Direction consistent with the definition of "judge" within Rule 2.3 Family Procedure Rules 2010.

9.15 Marie Brock questioned whether the simple version defining "judge" as drafted could be retained taking into account the wide audience in the family court. She considered the existing definition would be capable of comprehension by litigants in person. This was endorsed by the Chair and Will Tyler.

9.16 MoJ Legal questioned whether the paragraph should be amended to replace the term "legal adviser" with justices' clerks and assistant justices' clerks. The Chair noted it was helpful to include reference to them as litigants in person may seek to challenge whether a legal adviser is a judge. Judge Waller and Richard Burton

endorsed amending the term "legal adviser" to be consistent with the terminology within the Justices' Clerks and Assistants Rules 2014.

9.17 Members agreed the definition of judge should be retained with the reference to "legal adviser" being amended to refer to justices' clerks and assistant justices' clerks.

Paragraph 5

9.18 Will Tyler proposed amending the final bullet point to remove the word "that" within the sentence. This was agreed by all members.

9.19 Judge Raeside questioned whether this paragraph requires amendment to include an obligation on the judge to record on the face of the order that allegations of domestic abuse have been made and the court's decision of their relevance to the proceedings. District Judge Darbyshire noted that this duty is included within paragraph 18 and therefore does not need to be included within paragraph 5. This was endorsed by the Chair.

9.20 Members agreed that paragraph 5 did not require amendment save for the removal of the word "that" in the final bullet point.

Paragraph 7

9.21 MoJ Legal sought the Committee's views on situations when it is appropriate for the court to consider directly the risk of harm or the actual harm to the other parent and when this should be considered only through the prism of the impact of any such harm on the child. It was noted that Re L in 2001 suggested that harm should only be looked at through the prism of its impact on the child. However, she acknowledged that case law appears to have been developed over time to enable the court to consider the risk of harm or actual harm to the other parent when making relevant decisions about a child e.g. a child arrangements order. What officials remain unclear about is the extent to which that position applies in relation to the statutory presumption under Section 1 (2A) Children Act 1989.

9.22 The President of the Family Division noted that MoJ Legal had helpfully identified the different stages in the court's decision making process.

9.23 Marie Brock questioned whether the different stages for the court need to be specifically broken down. She considered it more appropriate to examine such issues in the context of the case as a whole. Will Tyler noted that there are concerns about the drafting of the paragraph 7 as Section 1 (2A) Children Act 1989 has two different presumptions in operation.

9.24 Judge Waller noted that, in practice, courts would look at the case as a whole. He was reluctant to introduce amendments that might result in technical disputes before the court. The President of the Family Division noted this and reminded

members that the intention of the Practice Direction was to assist victims of domestic abuse and provide effective protection for them within court proceedings. He did not consider there was a problem with the wording of Paragraph 7 and was reluctant to overburden this paragraph with amended wording.

9.25 Members agreed the intention behind paragraph 7 should remain but debated how this should be worded in a manner capable of being easily understood by litigants in person.

9.26 Will Tyler noted that whilst the proposed amendment by MoJ Legal is more consistent with the statute there are still aspects of the statutory presumption that have not been included.

9.27 Judge Raeside questioned whether paragraph 7 could be omitted in its entirety. She noted that the statute is confusing and incorporating this paragraph would cause practical difficulties for litigants in person. Judge Waller considered it necessary to include some form of wording which explains the presumption and how it is to be applied by the courts. He noted that the origin of this paragraph was to provide guidance following criticism by Women's Aid that the presumption is being applied too generously.

9.28 District Judge Carr preferred the amendment drafted by MoJ Legal noting its accurate reflection of the statutory provisions. However, he liked the wording by Mr Justice Cobb as it incorporated what the court should do where there is a risk of harm to the other parent with whom the child is living. MoJ Legal noted the desirability of this but considered the difficulty of this not being explicit within the statutory provisions.

9.29 The President of the Family Division acknowledged this noting that the Practice Direction cannot contain a proposition of law which is not explicit within primary legislation.

9.30 Judge Raeside questioned how judges can decide when the statutory presumption does not apply as to make this decision the court would first need to make findings of fact. Will Tyler noted that judges always consider serious or significant harm or violence when dealing with domestic abuse allegations. He considered the situation where there is some slight harm to the other parent because that parent continues to be affected by past minor coercive behaviour, but having balanced the risks overall it is concluded that it is better for the child to see that other parent than to have no relationship at all. He highlighted that the difficulty is finding a form of wording that realistically incorporates this balancing act of different types of harm. This was endorsed by Judge Raeside who noted that the difficulty in balancing harm lies in the borderline cases where careful thought and examination is required by the judiciary.

9.31 The President of the Family Division noted that the difficulty is the lack of uniformity in the application of the Practice Direction nationally. He considered it imperative

that there be consistency across all family courts in how domestic abuse is dealt with in the course of family proceedings. The Chair noted that there are some courts where Practice Direction 12J has not been utilised sufficiently within proceedings and hoped that the final revised version would bring its contents and use back to the forefront amongst the judiciary.

9.32 District Judge Darbyshire noted that the initial draft of the Practice Direction changed the operation of the statutory presumption and was recast in this draft to avoid interfering with the operation of the statutory presumption.

9.33 Judge Raeside suggested removing this paragraph in its entirety. Will Tyler acknowledged that there are difficulties in only partially setting out the provisions of the statute within the Practice Direction. MoJ Legal noted that there may be inconsistencies by not referring to the statutory presumption within the Practice Direction. Will Tyler questioned where there would also be inconsistency created by referring to the statutory presumption without then providing guidance on the applicability of the welfare test.

9.34 Judge Waller noted that there exists a tension between setting out statutory provisions and also pointing judges to the need to consider domestic abuse issues in the context of the statutory presumption. He proposed an amendment to the paragraph in the following terms:

> "*The paramount consideration of the court when making decisions about a child's upbringing is the welfare of the child; as part of that consideration the court must take into account any harm which the child has suffered or is at risk of suffering. There is a rebuttable / statutory presumption that, unless the contrary is shown, involvement of a parent in the child's life will further the child's welfare, but that presumption may not apply if the involvement of a parent in the child's life would put the child at risk of suffering harm. The risk to a child may be of direct harm or of indirect harm arising from harm to the other parent from domestic abuse or other ill-treatment. Where there is evidence of a risk of harm to the child arising from domestic abuse, the court must consider whether the presumption applies and, if it does, whether any proposed order accords with the child's welfare.*"

9.35 Judge Raeside noted that the mischief this paragraph is intending to prevent is judges making inappropriate contact orders because they feel compelled to do so by the operation of the statutory presumption. She and Will Tyler endorsed the wording proposed by Judge Waller. District Judge Carr also supporting this wording for paragraph 7 as it is capable of being comprehended and reflects the statutory provisions. He further noted that it is not necessary for the Practice Direction to replicate every word within the primary legislation. This was endorsed by District Judge Darbyshire who noted that judges would still need to consider the primary legislation requirements.

9.36 The President of the Family Division endorsed the proposed wording by Judge Waller but considered it necessary for the paragraph to refer to the statutory presumption.

Judge Waller agreed to work with officials and Mr Justice Cobb to agree a finalised version.

Paragraph 8

9.37 Judge Raeside questioned whether Cafcass had any concerns about the operation of paragraph 8 of the Practice Direction. She also raised concern about the impact on the judiciary of having to request this information in every case.

9.38 Melanie Carew noted that it was difficult to comprehend the intention of this paragraph as the court will have been provided a safeguarding letter which details the advice given to parents and whether there have been any referrals to a local authority. She further noted that in contested proceedings where a section 7 report has been ordered by the court, this information will be updated within any final report.

9.39 The President of the Family Division noted that the intention behind paragraph 8 is to impose an obligation on judges when dealing with consent orders. It is not an indication of what the court is expecting from Cafcass. Marie Brock endorsed this, noting that when considering consent orders, it would be helpful for the court to know whether the initiatives proposed came from the parties or were recommended by Cafcass. She further noted that it would highlight situations where the parties were seeking to agree an arrangement that had not been endorsed by Cafcass.

9.40 District Judge Darbyshire noted that this paragraph only applied to consent orders. He observed that if a court orders a section 7 report in a situation where an agreement has been reached between the parties this is indicative of the court's suspicion of the arrangement. He therefore agreed that it was appropriate for this paragraph to require the judge to order extra information. The President of the Family Division endorsed this. Whilst he accepted the increasing demands on the judiciary he considered it important that there be a process in place that is followed to ensure vulnerable persons are protected.

9.41 Members agreed paragraph 8 should be retained. Judge Waller proposed a minor amendment in the last sentence to omit the word "written" as this was the only method by which a summary could be recorded in a Schedule to an order. This was agreed by all members.

Paragraph 10

9.42 Judge Raeside questioned whether paragraph 10 required amendment. She suggested that clarity was needed as to why video link should not be the expected participation method.

9.43 District Judge Carr questioned the intention behind the proposed amendment. Will Tyler noted that it appears to be stating that where special measures are needed it should not be the victim who is expected to leave the courtroom in order to give

evidence and participate in proceedings. This was endorsed by Jane Harris. The Chair noted that the last half of the sentence does not add anything as it may influence a case in one direction when another path may be more appropriate.

9.44 Members agreed the words "the alleged victim should not be expected to participate by video-link" should be removed from this paragraph.

Paragraph 14

9.45 Judge Raeside proposed amending the paragraph to include "and record on the face of the order" after the word opportunity in the first sentence. This was endorsed by the Chair. Marie Brock noted it could be included within the issues section of the order.

9.46 Members agreed to this amendment.

Paragraph 19

9.47 MoJ Legal clarified that the intention behind the reference to third parties obtaining documents from abroad would be a practice funded by the parties themselves. HMCTS confirmed they would be unable to fund such costs.

9.48 The Chair noted that in practice this usually only applies in wardship proceedings where solicitors will have funding in place to obtain this. She could not envisage any cases where a litigant in person would be faced with these requirements. This was endorsed by Will Tyler who considered it unnecessary to specify how the obtaining of such documents would be funded.

9.49 Will Tyler questioned whether the words "of a pattern" could be omitted from Paragraph 19 (d). This was agreed by all members. He also recommended consistency in punctuation within the paragraph.

9.50 Judge Raeside questioned paragraph 19 (k) and how the court would know whether a specific type of electronic media is secure for the purpose of attending court. Members agreed that this provision did not incorporate hearings by telephone. Will Tyler questioned whether using Skype would be an appropriate medium for a sensitive case. The Chair noted that parties are only allowed to participate in proceedings through Skype where they have linked in through a secure bridge which the party has paid for. She noted that she has never permitted use of unsecure media for video link within court proceedings.

9.51 Will Tyler questioned whether the paragraph should be amended to remind judges of the need to consider security of the proposed medium. Judge Raeside considered judges should be given as much discretion as possible to enable parties to participate within the proceedings; however, guidance from HMCTS as to what is secure and what is not would assist the judiciary in practice.

Paragraph 22

9.52 District Judge Darbyshire suggested omitting the amendment proposed by Mr Justice Cobb. He noted that this was unnecessary as Cafcass get a copy of the order which under Paragraph 29 requires an inclusion of a schedule of findings. He also considered it unnecessary to include an agreed list of findings within the paragraph.

9.53 MoJ Legal proposed that the paragraph be amended to refer to an agreed list of findings is to be provided as set out in paragraph 29. The President of the Family Division and Marie Brock endorsed this proposed amendment.

Paragraph 25

9.54 Will Tyler questioned whether this paragraph needs amendment as it appears to set out a concrete rule that purports to bind the judge's hands of the type of decision they can make as regards an interim child arrangements order. He questioned whether it should be amended to refer to an "unacceptable" risk of harm to the child or parent.

9.55 The Chair noted the difficulties in attempting to make a qualitative assessment of the risk of harm based solely on written evidence. This was endorsed by Marie Brock who noted such decisions are often sought before the outcomes of any fact-finding hearing and without the benefit of a Section 7 report.

9.56 District Judge Darbyshire noted that it may be possible to implement interim safeguards which would not be appropriate on a long term basis. He acknowledged the difficulty that the current paragraph appears to prohibit the making of any order even where the risk can be managed in the interim.

9.57 MoJ Legal noted that a Practice Direction has to be confined to matters of practice and procedure of the court and cannot be used to control what decisions a tribunal can or cannot make.

9.58 Judge Waller noted that the other difficulty of the paragraph is that it looks at one aspect of harm but doesn't take into account the need to balance between different types of harm which is provided for in the provisions of the existing Practice Direction 12J.

9.59 Marie Brock questioned whether this amendment was proposed because of concern that courts are granting unsuitable interim contact orders in cases where domestic abuse is alleged. Hannah Perry noted that there may be situations where it is more abusive to prevent all contact between a parent and child on an interim basis than it would be for the risk to be managed.

9.60 District Judge Darbyshire suggested amending the paragraph to include the word "unacceptable". He noted that children are always at risk of harm but it is about managing unacceptable risk. The President of the Family Division raised concern with

the word “unacceptable” as it suggests that there are acceptable levels of risk. He noted that contact should be ordered where it is in the interests of the child and any risk of harm is in the view of the court manageable. This was endorsed by Will Tyler and District Judge Darbyshire.

9.61 District Judge Carr questioned whether it is “manageable” risk or “acceptable” risk. He considered that we operate on levels of risk all the time but some risks are so remote they are discounted but others are significant and need to be managed. He noted that judges will need to consider whether the risk of harm exists and, if it does, go on to consider whether the benefits to the child outweigh the potential risk. This was endorsed by Judge Raeside who noted judges currently decide cases this way in practice.

9.62 Will Tyler noted that this paragraph is to some extent repeated in paragraph 26. This was endorsed by Michael Horton who noted that paragraph 27 also looks at minimising the risk of harm.

9.63 The Chair questioned whether paragraph 25 should be omitted in its entirety based on the contents of paragraphs 26 and 27. Judge Waller noted that the purpose of paragraph 25 is to ensure the court takes all matters into account before making any interim order. This was endorsed by the President of the Family Division. He considered that an interim children arrangements order should not be made unless it is in the interests of the child to do so and the child will not be exposed to an unmanageable risk of harm.

9.64 Members agreed paragraph 25 should be amended to refer to an “unmanageable” risk of harm.

<u>Paragraph 27</u>

9.65 Will Tyler raised punctuation amendments to this paragraph which were agreed by all members.

<u>Paragraph 28</u>

9.66 The Chair questioned why the third bullet point was removed from the revised draft. MoJ Legal noted that there is power to control how evidence is given within the proceedings but it is not possible to appoint someone publicly paid to undertake cross-examination on behalf of a party. This was endorsed by the President of the Family Division who observed parties had a constitutional right to represent themselves if they chose to do so and the Practice Direction could not prevent this.

9.67 The President of the Family Division considered that it is not possible to deny a party the right to represent themselves which could include questioning the vulnerable party themselves. Any questioning would need to be relevant and not coercive. Judge Waller noted that this is provided for in the first two bullet points within the paragraph. The President of the Family Division noted that it is not possible for a

judge to prevent the party from asking questions but can intervene where inappropriate questions are put to the witness.

9.68 Judge Raeside noted that judges have the power to control the way evidence is given within the proceedings. This was endorsed by District Judge Carr who noted that judges are under an obligation to assist unrepresented parties in putting their case. Marie Brock noted that in many cases litigants in person struggle to frame their points as questions and instead make statements to the court.

Paragraph 33

9.69 Melanie Carew raised concerns about the use of risk assessments and the availability and resourcing of this from providers other than Cafcass. She noted that Cafcass cannot be the default organisation undertaking these reports. She agreed that Cafcass have tools to undertake a DV risk assessment as part of a section 7 report but there are also other ways of undertaking this risk assessment; e.g. a Domestic Violence Perpetrator Programme.

9.70 The Chair questioned whether Cafcass contract out work where the court have requested risk assessments. Melanie Carew responded that Cafcass only work with other organisations where they are directly involved with a party. Where the court has ordered a parent to be referred to a perpetrator programme, Cafcass will work with the organisers of that programme to provide a risk assessment. However, where the court orders a section 7 report Cafcass will assess that risk as part of the overall welfare assessment on what is going on in the child(ren's) life.

9.71 She reiterated that Cafcass would be concerned if this was to become an automatic request of Cafcass to the extent that it then forms part of Cafcass's duty to the court. She conceded that the revised draft no longer places a mandatory duty on courts to obtain such reports but remained concerned that courts may still consider such reports necessary and request Cafcass to provide these reports.

9.72 Marie Brock questioned what "a specialist domestic abuse practitioner working for an appropriately accredited agency" would be in practice. She queried whether the wording needed amendment to be more capable of being understood, particularly by litigants in person.

9.73 Hannah Perry noted that a form of accreditation is provided by an organisation called Respect and there are currently 14 providers nationwide. She questioned whether any of these agencies would be able to meet the needs of any of the cases before the courts. She also raised concern about the impact of such reports on legal aid funding. She observed that currently expert rates claimed through a legal aid certificate are restricted to £50.40 an hour and unless these cases fell within those costs it is highly unlikely that public funding would be granted.

9.74 Judge Waller noted that the problem in practice will be cost as it is necessary to know what the final costs would be if this provision were retained. MoJ Policy

endorsed this noting that the concern is about how many cases are likely to require such assessments and then predict costs based on this. It was noted that where risk assessments were undertaken as part of a contact activity condition then there may be no increase in cost as this is in line with current practice. The Chair endorsed this noting that there are some cases where a risk assessment is not needed.

9.75 Hannah Perry noted that there are problems with the definition. She considered that Domestic Violence Intervention Programme assessments are ordered nationally and no court has an accredited list of specialist providers.

9.76 District Judge Carr questioned what the principle behind the proposed amendment is. Judge Raeside noted it is intended to stop judges from making findings that abuse has occurred and continuing to order future contact where there is risk of harm to the child or the parent. She noted that the paragraph is specifically saying Cafcass do not need to be used to provide the risk assessment information that the court requires to make a final decision.

9.77 The President of the Family Division noted that the intention of the paragraph is to build in flexibility to the court of the different types of assessment that may be required. He conceded that there are no additional resources available to fund such specialist assessments. Judge Waller noted that where the party represented is the victim, that legal aid certificate will not fund a risk assessment of the father. Judge Raeside noted that in such situations it may be open to the court to join the child as a party to the proceedings so a risk assessment can be funded by legal aid, but she accepted that this should not be standard practice.

9.78 Judge Waller conceded that as currently drafted the paragraph raises a risk that there may be a fresh cost pressure. MoJ Policy confirmed that the new government is reviewing all spend across every government department. This review is being overseen by the Treasury. If a new cost pressure was proposed, it would first have to be quantified.

9.79 Judge Waller noted that the court should obtain a risk assessment from a suitably qualified professional, as is already provided for in Practice Direction 12J. He hoped that if the judiciary complied with Practice Direction 12J risk assessments could come from a wide range of sources; for example Cafcass, psychologists, psychiatrists, perpetrator programmes etc. He hoped by giving judges a wide discretion over the source of the report this would not lead to an increased use in section 7 reports.

9.80 District Judge Carr agreed with MoJ Policy that the proposed wording was too vague and that further information was needed about the full impact of the provision in practice. He supported the amendment to the court having an obligation to consider whether such a report is required. However he noted that the revised draft treats risk assessments differently from any other type of report. Marie Brock questioned whether it would be possible to revert to the provisions of the existing Practice Direction 12J. She considered that it would enable the court to have an expert safety and risk assessment. This was endorsed by District Judge Carr.

9.81 Judge Waller proposed removing the bullet point referring to specialist risk assessments and incorporating within the second bullet point references to an expert safety or risk assessment, in line with earlier references to such assessments in the Practice Direction. This was agreed by all members

Paragraph 35

9.82 Will Tyler suggested amending paragraph 35 to include reference to an unmanageable risk of harm. This was agreed by all members. He also raised punctuation amendments to be taking into account in the final draft.

Paragraph 37

9.83 Wil Tyler suggested removing the word "applicant" in paragraph 37 (c) as this could apply equally to respondents. This was agreed by all members.

Next Steps

9.84 MoJ Legal will prepare an amended Practice Direction. Members agreed that a complete replacement should be issued rather than amendments to the existing Practice Direction 12J. Judge Raeside considered this to be particularly appropriate with the change in title.

9.85 MoJ Policy asked whether there was any intention to share the revised final version with any party that contributed to the revisions by Mr Justice Cobb. This is because there were initial positive comments to the draft on which comments were sought and some stakeholders may raise concern about any differences in the final version. The President of the Family Division noted that this is an extremely sensitive area and it will not be possible to please everyone due to the nature of the issues involved. He noted that the comments of interested stakeholders were taken into account following the publication of the initial draft and the final version had been considered by Mr Justice Cobb and the Family Procedure Rule Committee and agreed. District Judge Carr noted that the minutes will in due course be published outlining the Committee's rationale for the proposed amendments. Judge Raeside considered Mr Justice Cobb should have sight of the final revised version for any final comments.

9.86 The President of the Family Division questioned the timescales for implementation of the revised Practice Direction. MoJ Policy noted that parliamentary recess commences on 20 July and gave a commitment to talk to ministerial private offices about the possibility of securing ministerial approval as a matter of urgency.

Conclusion: Practice Direction 12 J to be revised incorporating above amendments. This will be the final revised version of this Practice Direction.

Actions: MoJ Legal to prepare revised final draft of Practice Direction and share this draft with Mr Justice Cobb and the President of the Family Division for final comments.
MoJ Policy to liaise with the private offices of ministers and the President of the Family Division to agree a timetable for signing off the Practice Direction.

EXTRADITION IN CRIMINAL AND FAMILY PROCEEDINGS

10.1 Members considered Paper 10 and the proposed Rule amendments by Amelia Nice and Mary Westcott (both practising barristers). Members also took into account the views of the Criminal Procedure Rule Committee on 28 April 2017 when these proposals were discussed at that meeting.

10.2 Members noted that the Criminal Procedure Rule Committee concluded that the issues raised by Amelia Nice and Mary Westcott were best resolved by a future judgment of the Divisional Court. Members endorsed this conclusion with no further action being required at this stage.

Actions: Secretary of the Family Procedure Rule Committee to write to the authors informing them of the Committee's decision.

ONLINE DIVORCE SYSTEM

11.1 HMCTS updated members on the progress of the online divorce system, reporting that the system had passed its safety check and been deemed safe from potential cyber attacks. Following this testing, HMCTS will begin the beta testing phase during the week commencing 31 July 2017. HMCTS are also starting to build the prototype for the decree nisi process which will be the next stage of the updating process.

11.2 The President of the Family Division questioned when the online system will be able to facilitate online payment services. Judge Waller noted that this will need to be viable before the system can move to the beta phase of the testing. HMCTS agreed to update the President of the Family Division on this point prior to the next meeting.

11.3 Judge Waller updated members that he continues to work with HMCTS and other officials in developing the procedure for applying for a decree nisi through the online system. Much of the information currently required in the form D80 has been removed and incorporated within the D8 form to avoid repetition of information. There remain on-going discussions to find a definition of "jurisdiction" that is easily comprehensible to court users, particularly litigants in person.

11.4 The President of the Family Division questioned whether the new system will still require a party to make an application for the decree absolute. Judge Waller confirmed this process will remain within the new system as the petitioner may not necessarily want the decree absolute to be automatically issued after six weeks due to financial remedy applications being made. Michael Horton noted that even when

a financial remedy application is made there is still a requirement for records to be checked about the status of any divorce petition. Judge Waller confirmed this would also be retained under the online process.

11.5 The Secretary to the Family Procedure Rule Committee reminded members that it had previously been agreed that amendments to Practice Direction 36D would be made in agreement with the President of the Family Division with members being updated of these amendments. Practice Direction 36D has been updated to extend the period for the initial stage until October 2017 and to include reference to the requirement for a statement of truth to be completed within applications made within the pilot scheme. The President of the Family Division signed the Practice Direction amending document making these changes.

Actions: HMCTS to update President of the Family Division of the progress of online payment facilities within the reform project.

ANY OTHER BUSINESS

12.1 No other business was raised at the meeting.

DATE OF NEXT MEETING

13.1 The next meeting will be held on Monday 09 October 2017 at 10.30 a.m. at the Royal Courts of Justice.

Secretary to the FPRC
July 2017
FPRCSecretariat@justice.gov.uk