



Ministry of Justice

FAMILY PROCEDURE RULE COMMITTEE
In Judges Conference Room, QB1M
Queen's Building, Royal Courts of Justice
At 11.00 a.m. on Monday 7 October 2019

Present:

Mrs Justice Theis	Acting Chair
Lord Justice Baker	Court of Appeal Judge
Mr Justice Mostyn	High Court Judge
His Honour Judge Godwin	Circuit Judge
Her Honour Judge Raeside	Circuit Judge
District Judge Suh	District Judge
Michael Seath	Justices Clerk
Fiona James JP	Lay Magistrate
William Tyler QC	Barrister
Dylan Jones	Solicitor
Rob Edwards	Cafcass Cymru

ANNOUNCEMENTS AND APOLOGIES

- 1.1 Apologies were received from The President of the Family Division, His Honour Judge Waller, Her Honour Judge Hickman, Melanie Carew and Michael Horton,
- 1.2 Dylan Jones and Rob Edwards dialled in although there were issues with the connection which prevented them from hearing all discussion points.
- 1.3 The Acting Chair welcomed the invited stakeholders to the meeting and asked those around the table to introduce themselves.

MINUTES OF THE LAST MEETING: 8 JULY 2019

- 2.1 Judge Godwin asked if he could be added to the list of attendees and for para 4.6 to be amended to reflect his title. The minutes were then approved as a correct and accurate record of the meeting.

MATTERS ARISING

Update on the appointment of a lay member to the FPRC

- 3.1** MoJ Policy updated the Committee that the final checks taking place on the lay member appointment process are now being completed and that the new member should be in place for the next committee meeting. The Acting Chair said that she was concerned that the process has taken so long since the previous incumbent stepped down and asked whether a further update could be provided in November.
- 3.2** MoJ Policy accepted the point on the length of time taken to complete the process but explained that there is a strict timetable to adhere to which includes the necessary vetting of candidates and submitting advice to Ministers.

ACTION

MoJ Policy to update Committee in November.

Mirroring CPR provision for transcripts and recordings update

- 3.3** District Judge Suh spoke to the issue first raised in June and followed up on at the July Family Procedure Rule Committee meeting. She explained that the small working group had met and made good progress. MoJ Legal will prepare draft rules for consideration at the November Committee meeting.
- 3.4** Judge Raeside asked for confirmation that any provision about copying correspondence to other parties should cover email communications. District Judge Suh confirmed that the draft provisions will need to provide for this.

ACTION

This issue to be included for further discussion in November

Web Page for the FPRC update

- 3.5** MoJ Policy said that updates have been made over the summer and there are a number of further updates which will still need to be reflected on the Justice website for the Family Procedure Rules and Practice Directions. The Acting Chair said that it is important that the Family Procedure Rule Committee website is updated regularly.

QUESTIONS TO THE COMMITTEE

- 4.1** The representative from Senate House Chambers wanted to know whether “Adopting the practice in the High Court, should the rules incorporate a provision that all litigants in person be sworn before speaking in court so that their comments have evidential value”?
- 4.2** The Acting Chair thanked the official for raising his concerns with the Committee. She said that this is not an issue that has been discussed previously although the President of the Family Division wanted to pass on that he welcomed this suggestion and is keen that it is discussed by the Family Procedure Rule Committee. The Acting Chair said that she was sure colleagues around the table will have a view and will

wish to look at and consider the provision for litigants in person in the course of Committee business.

- 4.3** The Association of Lawyers for Children wanted an update us on the progress of the Rule changes and Practice Direction relating to children in the family courts since the production of the final report of the vulnerable witnesses and children working group in March 2015 and why, 4 and a half years on, if the Family Procedure Rule Committee could explain the cause/s of the delay and what steps are being taken by the Committee to support children participating in family courts and to hear the voices of affected children.
- 4.4** The Acting Chair said that the report contained proposals for protecting vulnerable witnesses when giving evidence (including children) as well as new proposals for facilitating children's participation in proceedings otherwise than by giving evidence. These were progressed as separate pieces of work and the vulnerable witness provisions were implemented in November 2017.
- 4.5** The Acting Chair said that on children's participation, and following much consideration and discussion at this committee, minister Lucy Frazer reluctantly concluded in 2018 that the working group's proposals could not be implemented at that time due to their assessed operational impacts. Her letter of 11 July 2018 to the former President sets out her reasons. The minister believed that system reform was a vital prior requirement to their successful implementation given the increasing demands on the private law system and assessed operational impacts on Cafcass in particular. In reaching this decision, the minister noted the way in which the current system provides for children's participation, including the development of new digital tools by Cafcass. She agreed that more could be done but that the priority must be on tackling the existing, unprecedented demand and reducing the number of cases that unnecessarily proceed to court (which Cafcass estimates to be up to 25% of private law cases currently).
- 4.6** The Acting Chair went on to say that the President's Private Law Working Group has published proposals in July for reforming the handling of private law Children Act proceedings generally to address the current pressures and improve the effectiveness of the system. That consultation closed on 30th September. Consideration of how and when children's voices are heard within a reformed Child Arrangements Programme is part of that ongoing work and the working group is meeting after the Family Procedure Rule Committee today.
- 4.7** The Acting Chair added that the concerns on progress on these matters was well documented as recorded in the Family Procedure Rule Committee minutes from July and October 2018 and were raised further when the previous Lay Member, Jane Harris resigned from her role on the Committee. However, the work from the President's Public and Private Law Working Groups will go some way in addressing pressures and the effectiveness of the system. The Acting Chair said that as Committee members, HHJ Raeside and DJ Suh sit on the working groups, then they

can be relied on to express and continue to raise the Family Procedure Rule Committee's concerns.

- 4.8** The final question was put forward by the Law Society Gazette. They wanted to know what work is being done by the committee to address what the president of the family division described a few months ago as an 'unprecedented and unsustainable' volume of cases and what changes could we see down the line and when?
- 4.9** District Judge Suh spoke to this point. She said that when the President of the Family Division took up office in July he announced that it was immediately apparent that there was a need for a collaborative approach by all those involved in the Family Justice system to consider what might be done either to reduce the volume of cases, or to enhance the ability of the courts to deal with them justly and efficiently. He therefore invited Mr Justice Keehan to lead a 'Public Law Working Group' and Mr Justice Cobb to lead a 'Private Law Working Group' to look at, in detail, what might be done. This work led to the release of two reports which were put forward as part of a consultation exercise which ran from 3 July to 30 September 2019.
- 4.10** District Judge Suh said that as the consultation only closed last week, there had not been sufficient opportunity to fully consider all the responses. However, many of the areas concerned will have resource implications for MoJ, Cafcass and the HMCTS and she said that officials from those departments will be working closely with all concerned to see whether any of the proposals will alleviate the concerns raised by the President.

PRESIDENT'S PUBLIC AND PRIVATE LAW WORKING GROUPS UPDATE

- 5.1** The Acting Chair said that she will update the Committee in the absence of the President of the Family Division. She said that the interim reports of both the Public and Private Law Working Groups were published on 3 July 2019, with the consultation period ending on 30 September. She added that there had been a good response so far, with 191 responses to the public law interim report, and 127 to the private law. The next stage is for the Working Groups to meet, to consider and evaluate these responses and both groups have their next meetings during the week commencing 7 October.
- 5.2** The Acting Chair said that in terms of the timetable going forward, the aim is for the Public Law Working Group's final report to be published by the end of December 2019. The Private Law Working Group hope to provide their final report a little later, in approximately January 2020. The reason for this, is that the MOJ will have reported on the findings of their call for evidence regarding risk of harm to children and parents in private law children cases by then, and the Working Group wish to take account of the MOJ report when making their final recommendations

- 5.3** The Acting Chair said that it is hoped that many of the proposed changes will be in place by summer 2020, especially given many of these measures do not require any changes in black letter law. On the private law side, given new procedures will be involved, there may well be a need to run some pilot schemes at various courts and there will be a need for judicial training in relation to both the private and public law measures.

ACTION

MoJ Policy to provide a further update for the Committee in October

DIGITISATION SUB-COMMITTEE UPDATE

- 6.1** Lord Justice Baker spoke about the work of the sub-committee which had been convened to look at the impact on the Family Procedure Rules of the digitisation processes being introduced as part of the HMCTS reform programme. The minutes of the last meeting of the sub-committee had been circulated. He said that the group were looking at three distinct areas.
- 6.2** The first area was the proposal from MoJ for how rule changes relating to digital processes should be introduced. Lord Justice Baker said that MoJ propose provision broadly mirroring CPR r7.12, which is an introductory/ enabling rule, under which there would be a series of Practice Directions. The sub-committee minutes show the issues that were discussed. The general view is that this is an appropriate way forward, but ultimately this is a matter for the Committee. MoJ Legal said that the work involved had been built into Family Procedure Rules Committee SI Planning point for discussion at Item 10 of the agenda for this meeting. A further draft of the proposed new enabling rule will be provided for more detailed discussion at the November Committee meeting.
- 6.3** The second area the sub-committee considered was the various individual pilot schemes. The minutes set out what HMCTS reported.
- 6.4** The third area was in relation to the progress of the Courts and Tribunals (Online Procedures) Bill. MoJ Policy reported that the Bill was likely to be reintroduced in the new Parliamentary session from 14 October, and that a further update will be provided when there is more clarity. The proposed new Online Procedure Rule Committee will be relatively small – 5 members – but it is anticipated the Committee would bring in experts to advise on individual projects as needs be.
- 6.5** On the issue of current HMCTS digital projects, HHJ Godwin said that he was concerned at the lack of progress of translation into the Welsh language, especially as the MoJ Welsh Language Scheme (2018) requires equal treatment of English and Welsh.
- 6.6** HMCTS Policy said that they will not be in a position to provide the online schemes in Welsh until the schemes move to the HMCTS platform in summer 2020. However,

HMCTS Policy confirmed that this line will be followed up on with the HMCTS Deputy Director and reported back on at the November Family Procedure Rule Committee meeting.

- 6.7** The Acting Chair said that the points on the Welsh language will need to be followed up on and suggested that HHJ Godwin send her and Lord Justice Baker an email (copied to the President of the Family Division's office) outlining his concerns.
- 6.8** HHJ Godwin asked to join the digitisation sub-committee and this was agreed.

ACTION

HHJ Godwin to write to the Acting Chair and Lord Justice Baker citing concerns on the lack of provision for online schemes in the Welsh language. Agenda forward to November for an update.

BREAK – END OF OPEN MEETING SESSION

UPDATE AND NEXT STEPS DISCUSSION FOLLOWING THE CONSULTATION EXERCISE SEEKING VIEWS ON RULES TO BE MADE IN RELATION TO THE COURTS AND TRIBUNAL (JUDICIARY AND FUNCTIONS OF STAFF) ACT 2018

- 7.1** MoJ Policy said that seven organisations had responded to the consultation exercise which had been carried out by the Family Procedure Rule Committee following discussion at previous meetings. Options for the way forward were set out in the paper before the Committee. While this is a decision for the Committee, MoJ Policy noted that the option of mirroring into the Family Procedure Rules/ Practice Directions the current provision in the Justices' Clerks and Assistants Rules 2014 was the only option that would meet the April 2020 implementation date.
- 7.2** MoJ Policy noted that the responses of the consultees in relation to the functions to be capable of being carried out by authorised persons broadly supported the status quo, but some consultees proposed changes. On qualifications of authorised persons, the consultees supported the status quo, with the addition of those with CILex qualifications. On rights of reconsideration, most consultees did not consider these to be necessary, but the ADJ and FLBA did support their introduction.
- 7.3** It was agreed that the full consultation responses would be circulated to members following the meeting and that any comments would be provided to MoJ by 15 October.
- 7.4** The Acting Chair proposed that the Committee should proceed with mirroring the current provision from the 2014 Rules into the Family Procedure Rules/ Practice Directions, with a Working Group then being set up to look at the particular issues raised by consultees including rights of reconsideration, with a view to possible amendments being made in the planned amending SI for October 2020. This was agreed, with members noting that it is important that the consultees' reasoning is fully considered.

- 7.5** MoJ Legal noted that there are some rights of reconsideration in the Civil Procedure Rules 1998, but their starting point is rather different to that in family, where there is an existing appeals structure whereby decisions made by justices' clerks or assistants are subject to the same routes of appeal as those of lay justices in the family court. HHJ Raeside noted that having specific rights of reconsideration might reduce the number of appeals.
- 7.6** The issue of limiting circumstances in which authorised persons can undertake court functions to cases which are allocated in the family court to lay justices was discussed. Michael Seath noted that this is what happens in practice in any event, in his experience. District Judge Suh said she would be concerned if authorised persons were to take steps in cases allocated to a District Judge or Circuit Judge. MoJ Legal noted that the 2014 Rules do not impose such a restriction, although the practical reality may well be that justices' clerks and assistants do only exercise court functions in cases allocated to lay justice in the family court.
- 7.7** Michael Seath noted that there is a Good Practice Guide on the exercise of delegated powers by justices' clerks and assistants which covers a lot of the issues being discussed. It was drafted by the JCS.
- 7.8** The Acting Chair proposed that the Committee agree to follow the option to decide now to mirror into the Family Procedure Rules and Practice Directions what is currently set out in the current 2014 Rules. A paper should be put to the November Committee meeting setting out current guidance on the 2014 Rules (Michael Seath to assist on this). At the November meeting, the Committee will look at setting up a Working Group to look at any changes from the position in the 2014 Rules and at rights of reconsideration.

ACTION

- 1. MoJ Policy to send out the full consultation responses and for Committee Members to reply with their thoughts by close on Tuesday 15 October**
- 2. Michael Seath to forward current guidance on the exercise of court functions by justices' clerks and assistants to MoJ.**
- 3. MoJ Policy to draft a paper for discussion in November setting out further information on current guidance.**
- 4. MoJ Policy to write to those who responded to the consultation explaining the Committee's proposed next steps.**
- 5. The Committee to consider at the November meeting establishing a Working Group to look at possible future changes, including rights of reconsideration.**

HIGH COURT POWER TO SET ASIDE CERTAIN CHILDREN ORDERS: DRAFT CONSULTATION PAPER

- 8.1** Mr Justice Mostyn thanked officials for their work over the summer in producing the draft consultation paper and draft setting aside rules and related Practice Directions put before the Committee.
- 8.2** Mr Justice Mostyn discussed the proposed scope of the new setting aside rules: return (and non-return) orders under the 1980 Hague Convention to clarify and attach clear rules of procedure to the High Court's power in light of *Re W*; similarly, return orders (and non-return orders) made under the inherent jurisdiction, and other orders made under the inherent jurisdiction. It was confirmed that since Part 12 of the Family Procedure Rules deals with the 1980 Hague Convention and inherent jurisdiction in separate Chapters (Chapters 6 and 5 respectively), two separate rules would be necessary.
- 8.3** There was a discussion about whether the new setting aside rule applicable to inherent jurisdiction orders would apply to inherent jurisdiction orders made in proceedings not involving children. It was pointed out by MoJ Legal that according to section 75(3) of the Courts Act 2003, and Schedule 1 to the Senior Courts Act 1981, the FPR only applied to inherent jurisdiction proceedings relating to minors. It was agreed that MoJ would carry out further consideration of these provisions and the rules applicable to inherent jurisdiction proceedings relating to adults.
- 8.4** Will Tyler echoed a question that had been asked by Mr Justice Mostyn ahead of the meeting as to whether the setting aside rules should apply where an inherent jurisdiction order is made ex-parte and an error of the court is alleged. It had been pointed out ahead of the meeting by HHJ Waller that rule 18.11 would apply in such a situation. The 7-day time limitation in that rule was noted. It was further noted by the Acting Chair that an application could be made to extend that time period. It was pointed out by MoJ Legal that the rules were to be made under section 17(2) of the 1981 Act (as well as section 75 of the Courts Act), which referred to 'no error of the court' being alleged. It was decided that on that basis, the proposed scope of the rules and the draft consultation paper should not be changed, but that the issue (of whether without notice orders involving an error of the court should be subject to appeal or to set aside applications) would return to a future meeting.
- 8.5** MoJ Policy asked the Committee to consider the time period for the proposed consultation, in particular in light of the timetable for finalising the next FPR amending SI for coming into force in April. It was discussed that since the consultation would be targeted, three weeks should suffice for most potential respondents, such that a 3-week deadline would be set, but that the offer would be made by MoJ that if any respondents needed an extension, this would be considered.

ACTION

MoJ Policy to arrange for the consultation to be circulated to a tailored distribution list with a three-week end date for responses, but with an offer to extend the deadline if necessary.

UPDATE ON FEMALE GENITAL MUTILATION PROTECTION ORDERS AND FORCED MARRIAGE PROTECTION ORDERS

- 9.1** MoJ Policy reported that work is ongoing in relation to plans to notify the police as early as possible when an order has been made. Also, targeted surveys have been sent to interested groups seeking views on service of orders by the police. Responses are awaited and the Committee will be updated in due course.
- 9.2** The centralised police mailbox that was put in place from July 2018 is not now functioning, because of police resources, but an auto-response sent from that mailbox indicates what steps should be taken.
- 9.3** The Acting Chair said that this matter had made a promising start but was slightly concerned by the delay. HHJ Godwin said that it was important that this work is reignited. The Acting Chair therefore proposed that this should be discussed again in November.

ACTION

MoJ Policy to provide an update at the November FPRC meeting

OUTLINE OF PROPOSED CONTENT OF FAMILY PROCEDURE (AMENDMENT) RULES 2020

- 10.1** The Acting Chair thanked the MoJ for producing the SI planning timetable and said that it had “brought light” on the process. MoJ Policy said that as there are a number of different provisions issues which is proposed to include within this SI the intention was to ensure that Committee member are clear as to what is being introduced.
- 10.2** Mr Justice Baker asked whether this intended “heavy” project was unusual. MoJ Legal said that this type of exercise has been carried out in the past. The Parliamentary Business and Legislation Committee has to agree to a SI being laid before Parliament. Once that Committee has agreed to particular content for a SI, additional projects cannot be added in, although projects can be removed as needs be.
- 10.3** Mr Justice Mostyn asked whether the Domestic Abuse Bill will result in a call for more rules and had that been considered this time. MoJ Legal said that this is more likely to be considered for inclusion in a SI for October 2020, or a slot for an additional FPR amending SI could be sought if the Government intends to bring the new legislation into force sooner.

- 10.4** HHJ Raeside and Mr Justice Mostyn asked about the Opposite Sex Civil Partnerships Bill as they wanted to stress how important the implementation of this legislation will be. MoJ Policy said that GEO are negotiating a slot for the regulations to be debated.
- 10.5** HHJ Godwin drew the Committee's attention to two matters which may need rule/ Practice Direction amendments.
- 10.6** The first is the lack of a reference to the Welsh Language Commissioner in PD14E. MoJ Legal suggested that this may be something that could be amended and that further consideration would be given to this.
- 10.7** The second point related to a concern raised by the Welsh Language Commissioner in relation to allocation guidelines. MoJ Legal asked that HHJ Godwin write to MoJ setting out this concern, so that consideration could be given as to what steps might be taken to address the point. It was noted that allocation is dealt with in a separate set of Rules (the Family Court (Composition and Distribution of Business) Rules 2014) and accompanying guidance from the President of the Family Division, so the answer to the particular problem might lie there rather than in the Family Procedure Rules.
- 10.8** The Acting Chair suggested that HHJ Godwin send an email to the Secretary of the Family Procedure Rule Committee copying in the President of the Family Division's Office with more information on this second point.

ACTION

- 1. HHJ Godwin to send an email to the Secretary of the Family Procedure Rule Committee copying in the President of the Family Division's Office in relation to the allocation concern.**
- 2. MoJ to consider the point raised on PD14E.**
- 3. MoJ to write to HHJ Godwin seeking clarification on the particular concern here.**

PRIORITIES OF THE FAMILY PROCEDURE RULE COMMITTEE

- 11.1** The revised priorities table was discussed.
- 11.2** The acting Chair asked that some rows be moved up to reflect the matter that it is intended to include in the next FPR amending SI (CPR mirroring plus the first stage of the proposed costs reforms).
- 11.3** MoJ Policy said that a meeting of the Enforcement working group has not been possible although useful discussion has taken place with HHJ Waller in outlining a way forward. MoJ Policy informed the Committee that the resource to take this work forward will not be in place until November. The intention is to have an initial

Working Group meeting in October and then to put a plan to the November Committee meeting setting out a timetable for what will be a substantial piece of work.

ACTION

- 1. MoJ to amend Priorities Table to reflect the latest position.**
- 2. MoJ Policy to provide an update for the November meeting setting out a plan for taking forward work on amending the rules on enforcement.**

ANY OTHER BUSINESS

- 12.1** Mr Justice Mostyn asked if the Committee had considered holding the meetings remotely and suggested using the Skype for business tool which sits under Office 365 as a means to do so.
- 12.2** Will Tyler asked whether there is any scope to starting the meetings earlier. He said that if the meetings have a full agenda, it results in having to take a full day away from other matters. Fiona James noted that travelling distances for some meant starting before 11am could be difficult. The Acting Chair proposed that the Committee should seek to finish meetings by 1pm and that discussion should be focused by the introduction of a timed agenda.

ACTION

- FPRC Secretariat to look at the possibility of holding some FPRC meetings remotely via Skype.**

DATE OF NEXT MEETING

- 13.1** The next meeting will be held on Monday 4 November at 11.00a.m. at the Royal Courts of Justice.

Simon Qasim – Secretariat
October 2019
simon.qasim3@justice.gov.uk