SCOTTISH CIVIL JUSTICE COUNCIL FAMILY LAW COMMITTEE CONSULTATION ON THE CASE MANAGEMENT OF FAMILY AND CIVIL PARTNERSHIP ACTIONS IN THE SHERIFF COURT

ABOUT

Scottish Women's Aid ("SWA") is the lead organisation in Scotland working towards the prevention of domestic abuse and plays a vital role in campaigning and lobbying for effective responses to domestic abuse.

We are the umbrella organisation for 36 local Women's Aid organisations across Scotland; they provide practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our members include crisis intervention, advocacy, counselling, outreach and follow-on support and temporary refuge accommodation.

Background

We welcome the opportunity to comment on this important consultation and look forward to working further with the Scottish Civil Justice Council ("SCJC") and the Family Law Committee ("FL Committee") in particular on the matters discussed in the consultation paper.

Given the prevalence of domestic abuse in family law actions involving divorce, separation, applications for protective orders and orders involving children (regulation of PRRs, child contact and residence), SWA continues to be concerned that these proposals will - given an inconsistent understanding and approach to the causes, dynamics, impact and manifestation of domestic abuse from some judiciary and legal professionals - disproportionately and negatively impact on women, children and young people experiencing domestic abuse. The impact on particular groups of court users, specifically women, children and young people experiencing domestic abuse, but, more broadly, children and those from the BME community, need to be reflected in system or procedural change. It goes without saying that both an Equality Impact Assessment (EQIA) and a Child Rights and Wellbeing Impact Assessment (CRWIA) be undertaken to identify potential disadvantages.

SWA would be happy to advise and support the work to progress the reforms and looks forward to working further with the SCJC and the FLC on these matters.

QUESTIONNAIRE

Recommendation 1: The scope of application of new provisions for case management-

"The sub-committee recommends that the existing Chapter 33AA should be removed from the Ordinary Cause Rules. It recommends that the new provisions for case management proposed in this report should be applied to all family and civil

partnership actions in the sheriff court, not just those with a crave for an order under section 11 of the Children (Scotland) Act 1995.”

Do you agree or disagree with recommendation 1?

☐ Agree ☐ Disagree X☐ Not sure

We note the outcome of the academic research by Drs Whitecross and Lindsay on OCR Chapter 33AA commissioned by the Committee in 2016 and that this noted varying practice across Scotland in the operation of these Rules which led to the Committee considering a need for change to improve procedures.
We further note the six recommendations made by this research[1] and the further recommendations from the Scottish Government's 2017 paper "Case Management in Family Actions"[2] to the Committee, all of which were considered in the Report of the FL Committee's SubGroup on Case Management in Family Actions,[3].

SWA will always support initiatives that increase the safety of women, children and young people experiencing domestic abuse; in this caseit is unclear whether the recommendations will achieve this, as we discuss below.

Recommendation 2: The structure of hearings in family and civil partnership actions

"The sub-committee recommends that:

(a) On the lodging of a notice of intention to defend in every family and civil partnership action, the sheriff clerk will intimate to the parties a timetable containing (i) the last date for lodging defences and (ii) the date of an "initial" case management hearing. An options hearing will no longer be held in family and civil partnership actions.

(b) Defences should be lodged within 14 days of the expiry of the period of notice. The initial case management hearing should take place no earlier than 4 weeks and no later than 8 weeks after the expiry of the period of notice.

(c) Only the initial writ and defences are required for the initial case management hearing, and only agents will need to attend, unless a party is not represented. The sheriff may conduct the hearing by conference call, in chambers, or in a court room, as appropriate.

(d) The initial case management hearing may be continued once, on cause shown, for a period not exceeding 28 days.

(e) Where on the lodging of a notice of intention to defend the defender opposes a section 11 crave, or seeks a section 11 order which is not craved by the pursuer, a child welfare hearing will not normally be fixed

[1] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-5-1b-case-management-in-family-actions---research-report-by-dr-richard-whitecross.pdf?sfvrsn=2

[2] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-5-1c-case-management-in-family-actions---policy-paper-by-the-scottish-government.pdf?sfvrsn=2

[3] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/consultation-on-the-case-management-of-family-and-civil-partnership-actions-in-the-sheriff-court/annex-a---report-of-the-family-law-committee-39-s-sub-committee-on-case-management-in-family-actions.pdf?sfvrsn=2

until the initial case management hearing has taken place. An earlier child welfare hearing – i.e. before the initial case management hearing – may be fixed on the motion of any party or on the sheriff's own motion.

(f) The initial case management hearing will function as a triage hearing. The sheriff will seek to establish whether the case is (i) of a complex, or potentially high-conflict, nature which will require proactive judicial case management leading up to a proof ("the proof track"); or (ii) a more straightforward case where the issues in dispute appear to be capable of being resolved by a series of child welfare hearings without the need for a proof ("the fast track").

(g) <u>In a case allocated to the proof track</u>, the sheriff will fix a full case management hearing to take place as close as possible to 28 days after the initial case management hearing (or continued initial case management hearing). The interlocutor fixing the full case management hearing could give the last date for adjustment; the last date for the lodging of any note of the basis of preliminary pleas; and the last date for the lodging of a certified copy of the record. The sheriff may order parties to take such other steps prior to the full case management hearing as considered necessary. In some cases, this may include a pre-hearing conference and the preparation of a joint minute. There may of course be some cases allocated to the proof track which will also require child welfare hearings. This will still be possible.

(h) <u>In a case allocated to the fast track,</u> the sheriff will fix a date for the child welfare wearing and a date for a full case management hearing. The child welfare hearing will be fixed on the first suitable court day after the initial case management hearing, unless one has already been fixed. The full case management hearing will be fixed for a date no later than 6 months after the initial case management hearing. It may become apparent, in the course of the series of child welfare hearings, that matters are not likely to be resolved by that means. In those cases, it will be open to the sheriff to bring forward the full case management hearing to an earlier date, so that time is not lost.

(i) On the sheriff's own motion, or on the motion of any party, a case may move between the two tracks where necessary.

(j) The rules should allow for the full case management hearing to be continued. It is quite possible that some cases will require more than one case management hearing to ensure that the parties are ready for proof.

(k) The "initial" or "full" case management hearing should not be combined with the child welfare hearing. The two hearings have distinct purposes which should not be merged. The child welfare hearing should be retained as a separate hearing that focusses solely on what is best for the child.

(l) *Where a proof or proof before answer is allowed, the date should not be fixed until the sheriff, at a case management hearing, is fully satisfied that the matter is ready to proceed.*

(m) *Pre-proof hearings should not be fixed in family and civil partnership actions as they come too late to be an effective case management tool. Their purpose will now be fulfilled by the case management hearing. As noted at paragraph 4.7 [of the report], pre-proof hearings will be swept away by the deletion of the existing provisions in Chapter 33AA.*

(n) *The rules should provide that a case management hearing can only ever be discharged when an action is being sisted, to prevent the risk of actions drifting."*

Do you agree or disagree with recommendation 2?

☐ Agree **x Disagree** ☐ Not sure

We have concerns around proposals f) to h) listed above, whereby the initial case management hearing will function as a triage hearing at which the sheriff will seek to establish whether the case is (i) of a complex, or potentially high-conflict, nature which will require proactive judicial case management leading up to a proof ("the proof track"); or (ii) a more straightforward case where the issues in dispute appear to be capable of being resolved by a series of child welfare hearings without the need for a proof ("the fast track").

As mentioned in the submission we made to the SCJC paper 4 "New Civil Procedure Rules- First Report," these proposals will impact on women, children and young people experiencing domestic abuse in family actions, particularly section 11. Whether this is positive or negative will rest entirely on the understanding of both the legal professional representing them and the sheriff hearing the case, in terms of the former ensuring that domestic abuse has been clearly raised as the basis for the woman and children's case and the judge's understanding of the underlying issues,

Fast-tracking could prove supportive and positive for women, children and young people experiencing domestic abuse who are applying for protective orders and paying for the action themselves. However, it is not recommended for section 11 actions and also has the potential to be counter-productive; domestic abuse is a complex issue, so narrowing or adjusting pleadings or fast tracking proceedings could allow abusers to "push through" actions without proper judicial scrutiny, whereby the "fast-tracking" process, or restricted pleadings, concealed, undermined or diminished the presence, evidence and nature of the abuse and behaviour of the perpetrator.

From a positive perspective, this approach would concentrate the focus of the court on the intention and content of the case presented by perpetrators. It would ensure that, in financial matters, the court took more of an active step in ensuring that information around a perpetrator's financial position was disclosed to the court, particularly where potential concealment of assets and income has been raised.

The negative aspect arises where there is a lack of understanding around the dynamics and impact of domestic abuse, in relation to civil actions, and the

[4] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/the-new-civil-procedure-rules---first-report-and-annex.pdf?sfvrsn=2

proposals could be potentially unhelpful in leading to important and relevant information provided on the abuse being overlooked. We have concerns that this may facilitate abuse of the system by perpetrators of domestic abuse, particularly where the presence of domestic abuse is not clearly highlighted as an issue.

It is absolutely imperative that the option to move a case between the two tracks where necessary is retained and is actively used either on the sheriff's own motion, or on the motion of any party. Expediting procedure should not mean that the parties' Article 6 rights would be transgressed upon.

Recommendation 3: The pre-hearing conference and joint minute

"The sub-committee recommends that the pre-hearing conference and joint minute currently required in terms of Chapter 33AA should no longer form a mandatory step before the full case management hearing in the new case management structure. Although this is of value in more complex cases, it may be unnecessary in cases where the only matters in dispute relate to a crave for an order under section 11 of the Children (Scotland) Act 1995 or are narrow in scope. However, the sheriff should still have the option to order a pre-hearing conference (or "case management conference") and joint minute in appropriate cases."

Do you agree or disagree with recommendation 3?

☐ Agree ☐ Disagree **X☐ Not sure**

It is wrong to assume that section 11 cases are, by definition, likely to be the less complex cases since those involving domestic abuse are by no means straightforward. Therefore, it is important that the sheriff retains the option to order a pre-hearing conference/case management conference and joint minute.

Also, we note that the academic research paper indicated that there was a "… *need to clarify with the Scottish Legal Aid Board the position in terms of legal aid payment to cover the pre-hearing conference preparation of the joint minute. This was raised as an area of concern by both solicitors and sheriffs."* Although the intention is to remove these procedures as part of the mandatory steps, the FL Committee should liaise with the Scottish Government and the Scottish Legal Aid Board to ensure that legal aid payments are available to legal practitioners for these procedures should sheriffs exercise their option to order these.

Recommendation 4: Keeping the number of child welfare hearings under review

"The majority of actions involving a section 11 crave do not proceed to proof and are managed by way of child welfare hearings. The sub-committee considers that the rules should not allow for a potentially open-ended series of child welfare hearings in such cases because of the risk of drift and delay. Accordingly, the sub-committee recommends that:

(a) An initial case management hearing is required in all cases to allow the sheriff (i) to decide if it is appropriate for the case to proceed down the "fast track" and, if so, (ii) to fix a full case management hearing for no later

than 6 months later so that cases which have not settled by that point can be "called in" for a judicial check on where the action is headed.

(b) At a "full" case management hearing on the fast track, the sheriff may make such case management orders as appropriate (e.g. orders relating to the pleadings, a case management conference and joint minute, or allowing a proof and setting the case down the proof track).

(c) The sheriff may also decide to allow the case to proceed by way of a further series of child welfare hearings. Where this happens, the rules should require a second full case management hearing to be fixed, again for no more than 6 months later, so that the case can be "called in" for a second time if it has still not resolved by that point.

(d) Rules could also place an obligation on the parties to tell the court at the full case management hearing how many child welfare hearings there have been to date, and to provide an explanation if there have been more than perhaps four or five."

Do you agree or disagree with recommendation 4?

X Agree ☐ Disagree ☐ Not sure

We would support any proposals to limit a "potentially open-ended series" of repeated and unhelpful CWH which cause unnecessary stress on women, children and young people experiencing domestic abuse, with the caveat that it is important that the initial case management hearing fully identifies domestic abuse as an issue.

Recommendation 5: Sisting family and civil partnership actions

"The sub-committee recommends that:

(a) The rules should state that family and civil partnership actions cannot be sisted indefinitely. The sheriff should have discretion to decide on a suitable duration, taking the particular circumstances into account. For example, a sist to monitor contact or to allow a party to obtain legal aid would not need to be as long as a sist to allow the parties to attend mediation or to sell an asset.

(b) Sisted cases should be subject to a mandatory review by way of an administrative hearing, called a "review of sist", which only agents would need to attend. Where a case involves a party litigant, it should be made clear to the party litigant that the hearing is administrative in nature, so that they know substantive issues will not be considered. Operationally, the sub-committee acknowledged there is a limit to how far in advance the court programme will allow hearings to be fixed. This may have an impact on the duration of sist that can be granted initially.

(c) The interlocutor sisting the case must specify the reason for the sist, and fix a date for the review of sist hearing. This will provide a procedural focus for parties, and prevent any delay around fixing and intimating the date administratively at the expiry of the sist.

(d) At the review of sist hearing, the sheriff should have the following options:

(i) extend the sist for a defined period and fix a further review of sist hearing;

(ii) *recall the sist and fix either an initial case management hearing or full case management hearing (depending on the stage at which the action was initially sisted); or*

(iii) *recall the sist and make case management orders if the case requires it.*

The sub-committee noted that the choice between (ii) and (iii) would depend to an extent on the state of readiness of the parties, as well as the time available to the court at the review of sist hearing."

Do you agree or disagree with recommendation 5?

x Agree ☐ Disagree ☐ Not sure

We agree that family actions involving domestic abuse cannot be sisted indefinitely and that the sheriff should have discretion to decide on a suitable duration, taking the particular circumstances into account. However, please note that sisting the case to allow the parties to attend mediation is not appropriate in cases involving domestic abuse; mediation is not an appropriate response and can indeed be harmful and dangerous for victims of domestic abuse and their children. (See our submission to the Scottish Parliament's Justice Committee inquiry into alternative dispute resolution[5] and our subsequent oral evidence to the Committee.[6])

Recommendation 6: Abbreviated pleadings

"The sub-committee recommends that:

(a) Abbreviated pleadings, rather than forms, should be adopted in family and civil partnership actions. This accords with the approach taken by the Rules Rewrite Project. The use of forms could be revisited in future years, when family and civil partnership actions come to be added to the Civil Online portal.

(b) Lengthy narratives should be discouraged in family and civil partnership actions, so that pleadings are more concise – along the lines of what happens in commercial actions. For example, the sub-committee noted that Practice Note No.1 of 2017 on commercial actions in the Sheriffdom of Tayside, Central and Fife states at paragraph 10 that "pleadings in traditional form are not normally required or encouraged in a commercial action, and lengthy narrative is discouraged". Similar wording is included in the Court of Session Practice Note on Commercial Actions (No 1 of 2017).

However, the sub-committee noted that in commercial actions, the parties will have given each other 'fair notice' of their case before proceedings are commenced. The commercial Practice Notes contain provisions about pre-litigation communications, which are not generally exchanged in family actions. If the Committee approves this recommendation, some thought will need to be given to how best to frame any rule relating to it."

Do you agree or disagree with recommendation 6?

[5] http://www.parliament.scot/S5_JusticeCommittee/Inquiries/ADR-SWA.pdf

[6] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11399&mode=pdf

☐ Agree X☐ **Disagree** ☐ Not sure

Firstly, it is not appropriate to compare proceedings in commercial cases with family law actions and to seek to "cut-and-paste" procedures from the commercial sphere into family actions from the commercial sphere, particularly in relation to limiting narratives in initial writs.

The narration of the circumstances surrounding family actions is of a completely different nature from that of commercial cases. Seeking to limit the narration of the long-term impact of domestic abuse on a woman and her children would be wholly inappropriate and this cannot be accurately depicted via a truncated description that risks omitting crucial detail about the perpetrator's persistent and varied behaviours which are contrary to the child's welfare and best interests. Limiting the content and length of narration will be particularly problematic once the new coercive control offence under the Domestic Abuse (Scotland) Act 2018 is commenced. The behaviours visited on women and children in relation to this offence, often complex, numerous and varied, over a period of time, will be wholly relevant to family proceedings involving protective orders, section 11 orders and divorce. SWA also queries whether this approach could, in fact, represent a breach of women and children's ECHR Article 6 rights and whether decisions arrived at via this "narrowing of issues in dispute" process could also be considered a breach of their ECHR Article 8 rights?

In sum, in family law cases, the focus on the "early resolution of disputes" must not introduce steps, or require disclosure of information, that would compromise women and children's safety.

Recommendation 7: Witness lists

"The sub-committee recommends that parties should be asked to state (in brief general terms) on the witness list what each witness is going to speak to. This would enable the sheriff to consider whether the witnesses will all speak to issues that remain in dispute (i.e. are relevant) and whether there would be scope to agree some of the evidence. This would give the sheriff greater control over the point at which a date for proof should be fixed, and for how long it should be scheduled."

Do you agree or disagree with recommendation 7?

☐ Agree ☐ Disagree **X Not sure**

We are unsure whether this would be counter-productive in cases involving domestic abuse and could influence witnesses' willingness to give evidence if the perpetrator knew in advance the nature of the evidence. It could also result in women and children being pressurised to change their evidence, a very real risk for children who are still in contact with the perpetrator but who do not want to continue that contact.

Recommendation 8: Judicial continuity

"*The sub-committee notes that the Fatal Accident Inquiry Rules make provision about judicial continuity. In particular, rule 2.5 provides that, where possible, the same sheriff is to deal with the inquiry from beginning to end. The sub-committee recommends that a similar provision should be applied to family and*

civil partnership actions. The sub-committee notes that insofar as practicable and feasible, the Sheriffs Principal all encourage judicial continuity in their courts."

Do you agree or disagree with recommendation 8?

☒ **Agree** ☐ Disagree ☐ Not sure

We would reiterate our comments above, judicial case management and allocation of specific judges, and a single judge throughout the life of the action, is a bold and positive aspiration that we support. We also reiterate that the successful assignment of judges/sheriffs in specific areas will depend on judicial training for that subject area being in place, particularly for domestic abuse cases.

Recommendation 9: Alternative Dispute Resolution

"*The sub-committee accepts that in principle, the sheriff's power to refer an action to mediation should be widened to apply to all family and civil partnership actions, rather than being restricted to cases involving a crave for a section 11 order. This recommendation is subject to two caveats.*

Firstly, there is a need to ensure that the rule is not inadvertently applied to a type of action that is not listed in section 1(2) of the Civil Evidence (Family Mediation) (Scotland) Act 1995 (inadmissibility in civil proceedings of information as to what occurred during family mediation). That appears unlikely, as the list is very broadly framed.

Secondly, the sub-committee understands that Scottish Women's Aid has expressed concerns to the Scottish Government about the appropriateness of mediation in cases with a domestic abuse background. The sub-committee noted two points which may address this concern: (i) mediation is a voluntary process, and if a party is unwilling to participate the mediator will not allow it to go ahead; (ii) in the proposed new case management structure, it will be open to parties to move for a proof – or at least raise concerns about the appropriateness of mediation – at the initial case management hearing, which will take place at a very early stage in proceedings, often before there has been a child welfare hearing."

Do you agree or disagree with recommendation 9?

☐ Agree ☐ Disagree ☐ Not sure

(Please tick as appropriate and give reasons for your answer)

We refer you to our submission to the Scottish Parliament's Justice Committee inquiry into ADR[7] and our subsequent oral evidence to the Committee[8]

It is, unfortunately, not at all accurate to state that "…*(i) mediation is a voluntary process, and if a party is unwilling to participate the mediator will not allow it to go ahead,"* indeed the statement reflects a fundamental misunderstanding of the dynamics of coercive control and domestic abuse more generally. First, as we have

[7] http://www.parliament.scot/S5_JusticeCommittee/Inquiries/ADR-SWA.pdf

[8] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11399&mode=pdf

noted, inappropriate referrals occur already; legal and other advisers with poor understanding of domestic abuse have directed women towards the process and women have engaged in mediation at the behest of their lawyer because it has been suggested that if they do not do so, the courts will regard them as unreasonable, obstructive, hostile or "*entrenched in a position*" should they refuse to attend and that this may have implications for the eventual outcome of child-related actions. Indeed, we know of a recent case in which a woman whose abuser had a decades-long NHO in place was encouraged to mediation to address his request for child contact.

Women have been ordered to attend mediation by the court and any refusal or reluctance to do so would be held against them. For these, and the reasons set out in our paper to the Justice Committee, we are wholly sceptical that any concerns raised by women would be assigned appropriate weight if raised at the initial case management hearing early in the proceedings.

The proposals do not take the voice of the child into account, nor does the mediation process.

Further, for this engagement to be positive and take the best interests of the child into account, both the presiding judge and the legal professional representing the woman and/or child, would require an in-depth and appropriate understanding of domestic abuse, which, from the evidence before us and the experiences related to us from women and children, is not evident.

Recommendation 10: Expert witnesses

"The sub-committee notes that recommendation 117 of the SCCR states: 'The provisions in relation to expert evidence which apply to adoption proceedings should be extended to all family actions and children's referrals.' The SCCR cites paragraph 4.3.3.2 of Practice Note No 1 of 2006 of the Sheriffdom of North Strathclyde as an example. This states: 'The sheriff should discourage the unnecessary use of expert witnesses. If expert evidence is essential, the sheriff should encourage the joint instruction of a single expert by all parties. If one party instructs an expert report, it should be disclosed to the other parties with a view to the agreement of as much of its contents as possible.' This paragraph was incorporated into near identical Practice Notes on the Adoption and Children (Scotland) Act 2007 issued in each sheriffdom in 2009. The sub-committee recommends that these points should be added as matters about which the sheriff may make orders at a full case management hearing."

Do you agree or disagree with recommendation 10?

☐ Agree ☒ **Disagree** ☐ Not sure

We note the following from the SCJC First Report paper

- *"…6.12 The SCCR recommended that: "We are not persuaded that it is necessary to introduce a general permission rule in Scotland or to introduce express case management powers that would enable the court to regulate the type of expert evidence to be adduced or the number of experts that parties may lead. With the exception of proceedings relating to children, respondents did not identify any problems relating to inappropriate use of experts and if*

witnesses are called unnecessarily this can be addressed by the court's powers in relation to certification of witnesses.However, given the concerns that have been expressed in relation to cases involving children we recommend that the provisions in relation to expert evidence which apply to adoption proceedings should be extended to all family actions and children's referrals.

- *…6.14 The SCCR did not endorse a presumption in favour of the instruction of single joint experts. It did, however, recommend that the court should have the power, in actively case managed cases, to order the instruction of such witnesses."*

Again, for the reasons outlined above, in relation to judicial understanding of domestic abuse, we have concerns that this could impact negatively in cases involving domestic abuse if one expert only was appointed. This would be a particular issue where the appointed expert supported "parental alienation" as a counter –argument to dismiss domestic abuse, was hostile to the introduction of domestic abuse as an issue, or where the court thought that the woman's expert was not needed and preferred the abuser's. Again, this could raise Article 6 issues.

Recommendation 11: Minutes of variation

"The sub-committee recommends that minutes of variation should be dealt with under a similar procedure to that which is proposed for the principal proceedings. The sub-committee proposes that when a minute is lodged, the clerk will fix an initial case management hearing and specify the last date for lodging answers. An alternative would be to fix an initial case management hearing only where answers are lodged. The sub-committee does not favour this alternative approach, because it is considered that some sheriffs would be reluctant to grant the application without hearing the parties. Further, the procedure could become complicated in cases where there were applications for permission to lodge answers late. The initial case management hearing will determine if the issue can be addressed by way of a child welfare hearing, or if a more formal case management process leading to an evidential hearing on the minute and answers will be required. It is proposed that Chapter 14 (applications by minute) should no longer apply to family or civil partnership actions, and that it would be preferable to insert bespoke provisions into Chapters 33 and 33A."

Do you agree or disagree with recommendation 11?

x Agree ☐ Disagree ☐ Not sure

The comments around the alternative approach are noted and the proposals seem a sensible way to proceed

Recommendation 12: Training

"The sub-committee recommends that formal training for judiciary and court staff should be delivered, by the Judicial Institute and SCTS respectively, in relation to its proposed new case management structure for family and civil partnership actions."

This recommendation has been endorsed by both the Committee and the SCJC and the SCJC secretariat will liaise with the Judicial Institute and SCTS once the scope of any rules changes is clearer.

SWA notes this Recommendation supports formal training for judiciary and court staff around the new case management structure and we reiterate that this training must be accompanied by formal, gender-competent training around the dynamics, nature and impact of domestic abuse. The training must reflect the new criminal offence, and its guidance notes, which provide excellent examples of the range of behaviours through which the abuse can be perpetrated, a matter vital to the protection of children in civil proceedings. We would also add that similar mandatory training for the legal professionals engaging with the courts, including Child Welfare Reporters, Safeguarders and Curators ad litem, is necessary to ensure the proposed case management structure succeeds.

Recommendation 13: Legal Aid

"The sub-committee recommends that the Committee should liaise with the Scottish Government and the Scottish Legal Aid Board once the scope of any rules changes is clearer."This recommendation has been endorsed by both the Committee and the SCJC and the SCJC secretariat will liaise with the Scottish Government and the Scottish Legal Aid Board once the scope of any rules changes is clearer.

SWA notes and supports this recommendation

14-Cases without a crave for an order under section 11 of the Children (Scotland) Act 1995

The sub-committee proposes that where the only matter in dispute is a crave for an order under Section 11 of the Children (Scotland) Act 1995, cases could be allocated to a "fast track". The aim of the "fast track" is for the case to be managed to early resolution by means of a child welfare hearing or series of child welfare hearings. It is recognised that the initial case management hearing would be a procedural formality for cases without a crave for a section 11 order unless such cases could be allocated to a separate "fast track" not involving child welfare hearings.

Do you have any comments on:

(i) whether there should be a "fast track" for cases without a crave for an order under section 11 of the Children (Scotland) Act 1995?

(ii) ***the nature of the hearings or procedure that should apply in a "fast track" for cases without a crave for an order under section 11 of the Children (Scotland) Act 1995?***

SWA opposes this approach. Given that one of the most frequent issues facing women using the services of our local Women's Aid groups is child contact and orders under section 11, and what they tell us about the overwhelming lack of any understanding of domestic abuse repeatedly evidenced by legal professionals and unfortunately, judiciary, these proposals pose a grave threat to the safety of women and children experiencing domestic abuse. There is a widespread failure to routinely

consider domestic abuse, including the need to protect women and children appearing before the courts, including use of special measures.

The proposals suppose that all section 11 issues are "disputes" between the parties that could be "resolved." Domestic abuse is not a dispute that can be "resolved" but a crime and a human rights violation. Approaching section 11 cases with this blanket "fast-track" process ignores the underlying issue and endangers women, children and young people experiencing domestic abuse.

In this context and in light of these concerns, we would query whether this approach could, in fact, represent a breach of women and children's Article 6 rights and whether decisions arrived at via this "*narrowing of issues in dispute*" process could also be considered a breach of their Article 8 rights.

a. Do you have any additional comments?

"Shrieval note sheets"

We have noted the comments of the FL Committee's Sub Committee's Report on the academic paper's observations on "note sheets," the practice of having notes of previous CWHs passed to the next sheriff dealing with the case. The academic paper notes that this was seen as "going some way to alleviate concerns over changing shrieval views of cases." We also note that the Sub Committee rejected the academic paper's recommendation that this be rolled out the sheriff courts as an example of good practice, on the grounds of concerns about the status of such notes in the process. While we are sympathetic to the notion of not complicating the process further, there must be some efficient way of sheriffs relaying information when judicial continuity is not an option for the procedure.

Rules Rewrite Project and Workstream membership

We note that the minutes of the various workstream project groups do not appear on the SCJC website, nor is there information on the membership of these workstream groups, a concerning matter since there is effectively no public information on this important work and thus, no opportunity for the public and organisations supporting court users to become involved or comment. Further, the SubCommittee report mentions, at page 14, that the Rules Rewrite Project "…is carrying out a significant review of the use of expert witnesses and some possible rule changes." Again, concerningly, there is no publicly accessible information available on this review. http://www.scottishciviljusticecouncil.gov.uk/committees/rules-rewrite-working-group/rules-rewrite-project-work-streams

Scottish Government recommendations in their Policy Paper referred to above

We note that the following were either rejected by the SCJC Sub Committee in their Report or are not being taken forward

- **Page 14- Greater clarity on what "cause shown" means in the rules on excepting the personal attendance of the parties at CHW-** We would support that this should be addressed for the protection of women, children and young people.

- **Page 15- Curators ad Litem- the Scottish Government recommended that rules be made so that interlocutors appointing a curator in a section 11 case provide the reasons for the appointment and duties of the curator and that the court keeps the need for the curator's appointment under review**. We note that the SubCommittee rejected these recommendations and would voice our support for the Scottish Government's proposals. The age of the child, their ability and/or willingness to give a view, and how their views are taken will evolve and change. The role of the curator and their duties, like those of a CWR, must be monitored.

- **Child welfare hearings and domestic abuse** We note that the Scottish Government paper states the following *"24. The Scottish Government has received correspondence from domestic abuse victims concerned at having to sit at the same table as the abuser at CWHs. The Scottish Government has also received correspondence on being excused from attending CWHs. (Ordinary Cause Rule 33. 22A (5) provides that "All parties (including a child who has indicated his wish to attend) shall, except on cause shown, attend the Child Welfare Hearing personally"). For example, a recent correspondent, who had been the victim of domestic abuse, indicated that she had to obtain a note from her GP to be excused from having to attend child welfare hearings. She contrasted that unfavourably with her experience in the criminal justice system, which had gone to considerable lengths to protect her. …25. In light of the above, the Scottish Government recommends: 25.1 When the court is aware of domestic abuse or violent conduct being alleged or proved in a case, the rules should lay down that the court must take steps to protect the parties at any child welfare hearing. This may formalise arrangements already in place locally. It may, perhaps, be possible for any rules to be based in part on whether there are relevant criminal cases or convictions or interdicts in place."*

  The FLC SubCommittee Report goes on to respond as follows-
  - 3.5 ***Child welfare hearings and domestic abuse:*** *"When the court is aware of domestic abuse or violent conduct being alleged or proved in a case, the rules should lay down that the court must take steps to protect the parties at any child welfare hearing. This may formalise arrangements already in place locally. It may, perhaps, be possible for any rules to be based in part on whether there are relevant criminal cases or convictions or interdicts in place."*
  - *The sub-committee agreed that this was an important matter that requires further consideration. The sub-committee considered that there is a question as to whether it would best be addressed by primary or secondary legislation, or by operational practices implemented by SCTS.*
  - *It was noted that introducing a formal application for special measures to protect a party at a child welfare hearing would not fit with the intended pace and informal nature of child welfare hearings. The sub-committee sought further information from SCTS as to the steps that courts currently take to protect parties at child welfare hearings where there is a background of alleged or proven domestic abuse.*

- *The sub-committee understands that SCTS is in the process of considering how to progress this request. The sub-committee agreed that it would be appropriate to delay consideration of this matter until SCTS is able to provide more information.*

Comment from the FL Committee on 5th February 2018 were *" … Members noted the issue did not appear to be raised frequently with the courts and noted the lack of motions being made to the court."*
(http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/05-february-2018/approved-minutes-of-flc-meeting-05-feb-2018.pdf?sfvrsn=2)

While the Committee was advised that the Scottish Government intended to include the matter in their consultation to review the 1995 Act, it is of considerable alarm that the Committee did not voice any concern over the findings of the SCTS Report.

Given the prevalence of domestic abuse in civil family law actions, the fact that more than half of the courts "…*reported not receiving formal motions to excuse owing to a situation of alleged/proven domestic abuse.."* and that *" In the text responses received for Q2 clerks advised they would expect solicitors, or parties' to bring to their attention any possible issue relating to domestic abuse or violent conduct allegations prior to the case calling,"* shows that there is a clear issue here of a lack of protection, particularly since the paper goes on to note that ""*Additional comments within the survey indicate that it is often not clear from processes if a history of domestic abuse is present, and unless it is brought to the attention of a member of SCTS staff this can be difficult to ascertain prior to the hearing."*

It is concerning that the courts themselves took no steps to identify whether domestic abuse was an issue and therefore to intervene to put special measures in place. This also indicates that in these CWH cases, domestic abuse was not identified, suggesting that it was not taken into account in shrieval decision-making.

SWA routinely hears accounts from victim-survivors in our services, from callers to our Helpline, and from workers at the Scottish Women's Rights Centre working with women are discouraged from talking about DA by their legal representative. In one recent example, a solicitor advised a woman not to have any formal support from WA put in place until after the child welfare report and initial proof hearing had passed. We are confident that the research recently commissioned by the Scottish Government's Justice Analytical Services how the law and court system take domestic abuse in to account when making decisions about children will confirm just how problematic the current landscape is and critical that all involved understand that domestic abuse continues, indeed often increases, after separation. Indeed, this risk is clear in that *"…the majority of courts stated they did not receive more motions when bail conditions were in place*…" and that in *"the 15 courts surveyed only 2 indicated receiving motions to utilise the use of live television link to conduct CWH's."*