ANNEX C CONSULTATION ON THE CASE MANAGEMENT OF FAMILY AND CIVIL PARTNERSHIP ACTIONS IN THE SHERIFF COURT

QUESTIONNAIRE

1. **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 ☐ Not sure

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

The Society agrees that all family and civil partnership actions should be subject to the proposed case management provisions. However the lack of any proposed pre-hearing conference is a matter of concern. The Society feels that it should be a requirement of the rules in all family and civil partnership actions that a meeting of parties and their agents to discuss settlement should take place before the proposed further and final Case Management Conference. Abolition of rule 33AA in this respect removes a potential settlement tool for agents. While it is accepted that in many cases pre-hearing conferences take place between agents and not clients, it is felt by the Society that this is a missed opportunity and that any proposed new rules should include a provision requiring parties and their agents to meet and discuss potential settlement before the final case management hearing.

2. **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 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) *In a case allocated to the proof track, 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) In a case allocated to the fast track, 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 ☒ Disagree ☐ Not sure

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

While the Society agrees that more effective case management of family and civil partnership cases is very necessary, it is felt that the proposals are unrealistic as far as the timescales are concerned.

(a) The recommendation is agreed.

(b) The recommendation is agreed.

(c) The Society feels that the parties should attend the initial case management hearing.

(d) The Society feels that the timescale proposed, that is a period not exceeding 28 days is unrealistic .

(e) The Society feels that in all cases in which there is a section 11 crave in the Initial Writ, the existing practice of fixing a child welfare hearing at the point when the NID is lodged is in fact working well. The proposed initial case management hearing could be combined with the child welfare hearing which would allow the Sheriff hearing the case to assess the level of conflict between the parents which would be an important tool when assessing which track the case should run on. This would have the benefit in cases where section 11 and financial orders are sought of allowing the case to proceed on the proof track at an earlier stage while still offering the court the ability to fix further child welfare hearings if necessary to manage interim contact issues.

(f) in order to allow the initial case management hearing to function as a triage hearing, the Society feels that parties must attend, this is especially so if there is no other opportunity for the Sheriff to assess the parties behaviour as it is proposed that options hearings no longer take place .

(g) The Society feels that the timescale proposed is unrealistic. Currently parties have approximately eight weeks for adjustment of the pleadings. If it is proposed that a record be lodged prior to the full case management hearing, this will allow the parties no more than three weeks to finalise pleadings. This would require a complete change in the way that solicitors operate and given the increasing difficulty in obtaining information from third parties as a result of the new data protection regulations, it is felt to be unrealistic.

(h) Reference is made to the comments already made in relation to the timescale for the first child welfare hearing. Obviously only cases with no craves for financial provision can be allocated to the fast track as proposed. The proposal that a full case management hearing be fixed for a date no later than six months after the initial case management hearing in fast-track cases is agreed as is the proposal that the sheriff should be able bring forward the date of the full case management hearing.

(i) This recommendation is agreed.

(j) This recommendation is agreed.

(k) This recommendation is not agreed for the reasons previously given.

(l) This recommendation is agreed subject to the proviso that the court will be in a position to offer early proof dates. As the recommended procedure seeks to effectively front load preparation for cases to go to proof, all impetus will be lost if proof dates several months down the line are then offered.

(m) This recommendation is agreed.

(n) This recommendation is agreed provided provision is made for the continuation

3. 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 ☐ Not sure

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

The Society feels that pre-hearing conferences can be a valuable tool for practitioners in focusing minds on settlement, or at least restricting the areas of dispute. Requiring clients to attend pre -hearing conferences and imposing sanctions on parties who do not attend could be of assistance in bringing home the seriousness of litigation to parties. Attendance at procedural hearings and currently options hearings do not tend to have this effect. It is therefore felt that removing the need for attendance at pre-hearing conferences would be a retrograde step. Currently prehearing conferences are only held in cases involving a crave for a section 11 order. In personal injury actions they are of great assistance in focusing the issues which are actually in dispute. Used properly in all family and civil partnership actions it is felt that they would be of similar assistance.

4. 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?

☐ Agree ☒ Disagree ☐ Not sure

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

(a) This recommendation is agreed, subject to the comments already made in relation to the timing of the fixing of the initial child welfare hearing and therefore the assessment of whether it is in fact appropriate for a particular case to be allocated to the fast track procedure and proceed by way of further child welfare hearings.

(b) This recommendation is agreed.

(c) This recommendation is agreed.

(d) This recommendation is felt to be unnecessary. As it is intended that the same Sheriff deal with the case throughout whenever possible, the Sheriff should be aware of the history of the case which will be reflected in the interlocutors. An explanation of the reason for the number of hearings should be unnecessary.

5. 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?

☒ Agree ☐ Disagree ☐ Not sure

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

The Society feels that these recommendations are practical and should allow cases to be monitored appropriately by the court.

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?

☒ Agree ☐ Disagree ☐ Not sure

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

The Society feels that a practice has grown up whereby lengthy narratives effectively of evidence are the norm in family and civil partnership actions. However the Society agrees that as there are no provisions which require parties to exchange information and to provide fair notice of their case before proceedings are commenced, pleadings do require to set out the legal basis of the parties case and provide sufficient notice of the evidence which is likely to be led to establish this.

The Society agrees that current practice is not best practice and that this should be addressed.

7. **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 ☐ Not sure

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

The Society sees no reason why witness lists should not amended in this way. It would force agents to address the issues to be spoken to by the witnesses at an earlier stage and it is agreed that this would assist the court in controlling the conduct of and length of the proof.

8. 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

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

The Society agrees that this would be of assistance in the case management of family and civil partnership actions. It would save time at hearings as the Sheriff would already have a working knowledge of the case and it would reduce the potential for differing approaches being taken at different points in the case.

9. **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)

The Society agrees that the Sheriff's power to refer an action to mediation should be widened to apply to all family and civil partnership actions. While the Society accepts that there are cases where mediation may not be appropriate, these are felt to be very few in number. Procedures can be put in place at mediation whereby the parties do not require to be in the same room (shuttle mediation). Mediation at an early stage in proceedings can be very useful tool.

10. **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

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

The Society agrees that the **unnecessary** use of expert witnesses should be discouraged. The Society recognises however that expert witness evidence can be of enormous assistance to the court, particularly in cases involving children. The Society agrees that wherever possible a single expert should be instructed to assist the court. However, there will be situations where more than one expert report will be required. It would seem sensible and indeed logical for the Sheriff to have the power to make orders in relation to the instruction and disclosure of the reports of expert witnesses at a full case management hearing.

11. 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?

☒ Agree ☐ Disagree ☐ Not sure

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

The Society agrees that the procedure in cases in which a minute of variation is lodged should be dealt with under a similar procedure to that which is proposed for the principal proceedings. The society feels that Chapter 14 should no longer apply to family or civil partnership actions and that it would be preferable to insert new provisions dealing with these applications in chapters 33 and 33A. In family and civil partnership cases there seems no good reason why the cases should not follow the "normal" procedure albeit that consideration will always have to be made in these cases as to whether there is a change in circumstances justifying a variation which may require proof. It would therefore seem unlikely that these cases could follow the proposed fast-track.

12. **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.

13. **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.

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?

The Society does not see any benefit in a "fast track" for cases not involving section 11 orders.

15. **Do you have any additional comments?**

The Society recognises that there is much pressure on judicial time however it is felt that it would be of benefit to agents and parties for consideration to be given to fixing case management hearings at specific intervals rather than in the context of a general civil court. If there is to be front loading of cases which are likely to proceed to proof, there will need to be very much a change of attitude on the part of agents who realistically have to work to multiple timescales. It may not be possible for agents to deal with so many cases which may involve clients paying increased fees over a shorter period. This may have implications for legal aid practitioners. Sheriffs will require to actively case manage rather than passively case manage and sanctions will require to be available for imposition on agents and parties in appropriate cases. Case management hearings should it is felt, be a very important part of the case and dealing with these in the context of a general civil court could potentially lead to these being dealt with in a perfunctory way as happens with some options hearings. While the Society is generally supportive of the aims of the recommendations, it feels that if these are to be effective there will need to be not just training of Sheriffs and sheriff clerks but also active engagement with practitioners.