



**Scottish
Civil Justice
Council**

Report of the Family Law Committee's Sub-Committee on Case Management in Family Actions

October 2017

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1. Introduction

- 1.1 This is a report by a sub-committee of the Scottish Civil Justice Council's ("SCJC") Family Law Committee ("the Committee") about the case management of family and civil partnership actions in the sheriff court. It is a response to recommendations made in two papers on case management which were considered by the Committee in May 2017.
- 1.2 The first, a report on the [*Use and Implementation of OCR Chapter 33AA in Section 11 Order Proceedings*](#) by Dr Richard Whitecross and Dr Claire Lindsay of Edinburgh Napier University, originates from research commissioned by the Committee in the summer of 2016.
- 1.3 The second, a wide-ranging [*policy paper by the Scottish Government*](#), draws on a number of reports and judgments which have addressed questions of case management and undue delay in family actions.

Background

- 1.4 The SCJC was established on 28 May 2013 under the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. It prepares draft rules of procedure for the civil courts and advises the Lord President on the development of the civil justice system in Scotland. The SCJC established the Committee on 10 June 2013. The Committee's remit is concerned with the power to make provision about the practice and procedure to be followed in the Scottish civil courts in relation to family actions and proceedings relating to children.
- 1.5 In relation to the above remit, the Committee has the following functions:
 - to keep the relevant civil rules under review;
 - to consider and make proposals for modification and reform;
 - to require that family actions and proceedings relating to children be dealt with as expeditiously and efficiently as is possible;
 - to review, develop and promote a case management structure for family actions and proceedings relating to children; and
 - to report to the SCJC with its recommendations and, where applicable, draft rules.
- 1.6 In the exercise of the foregoing functions, the Committee is to take due account of the guiding principles of the SCJC:

- the civil justice system should be fair, accessible and efficient;
- rules relating to practice and procedure should be as clear and easy to understand as possible;
- practice and procedure should, where appropriate, be similar in all civil courts; and
- methods of resolving disputes which do not involve the courts should, where appropriate, be promoted.

1.7 In addition, in cases involving children, the Committee is to take due account of the need to regard their welfare as the paramount consideration.

Case management and delay in family actions

1.8 Ensuring effective case management of family and civil partnership actions has been one of the Committee's main priorities since 2014, with particular regard to the need to prevent undue delay in proceedings relating to the welfare of children. Much of the Committee's early work in this area has focussed on how well Chapter 33AA of the Ordinary Cause Rules 1993 ("Chapter 33AA") meets this need in the sheriff court. (Chapter 33AA can be seen at [Annex B](#) to this report.)

1.9 Chapter 33AA came into force on 03 June 2013. It provides for enhanced case management powers in cases proceeding to proof where there is a crave for an order under section 11 of the Children (Scotland) Act 1995. It was introduced to address concerns raised in the Supreme Court judgment in the case of [NJDB v JEG](#) about the "glacial pace of the proceedings" in the sheriff court, which were "inimical to the best interests of the child."¹

1.10 In accordance with the SCJC's function to keep the civil justice system under review, a report on the operation of Chapter 33AA was prepared for consideration by the SCJC at its meeting on 29 September 2014. The SCJC noted that the report suggested a lack of consistency in the application of Chapter 33AA but that further evidence was needed. The SCJC remitted the matter to the Committee to undertake what further research or inquiry it deemed necessary.

Research commissioned by the Committee

1.11 At its meeting on 27 October 2014, the Committee agreed to consider the operation of case management in sheriff court family actions more generally, alongside a review of the effectiveness of Chapter 33AA. The Committee

¹ [2012] UKSC 21, paragraph 21.

subsequently agreed on a two-stage approach to the research at its meeting on 23 February 2015. The research was to be both quantitative and qualitative.

- 1.12 The first stage involved a questionnaire issued to sheriffs throughout Scotland in the summer of 2015 seeking views on their experiences of case management hearings under Chapter 33AA. As the response rate was low, it was not possible to reach any generalised conclusions.
- 1.13 The second stage was to involve face-to-face interviews with sheriffs, sheriff clerks, and family law practitioners, carried out by an independent researcher. The Committee agreed on a research specification at its meeting on 09 May 2016, which was subsequently approved by the SCJC on 11 July 2016. Following a procurement exercise, Dr Richard Whitecross of Edinburgh Napier University was awarded the contract to undertake the research on 19 August 2016. Four study courts were identified.
- 1.14 Between October 2016 and February 2017, Dr Whitecross and his research assistant, Dr Claire Lindsay, conducted four face-to-face and two telephone interviews with sheriffs; four face-to-face interviews and one telephone interview with sheriff clerks; and nine telephone interviews with solicitors. Dr Whitecross also analysed data on case management hearings and child welfare hearings obtained from the Scottish Courts and Tribunals Service's ("SCTS") Case Management System.
- 1.15 The final research report, entitled *Use and Implementation of OCR Chapter 33AA in Section 11 Order Proceedings*, was considered by the Committee at its meeting on 08 May 2017. The report made six recommendations about improving the operation of Chapter 33AA specifically and enhancing case management more generally. These recommendations are discussed in part 2 of this report.

Scottish Government policy paper

- 1.16 At its meeting in May 2017, the Committee also considered a policy paper by the Scottish Government, which proposes extensive changes to promote more effective and consistent case management in family actions. The paper draws from a number of sources, principally the [Report of the Scottish Civil Courts Review](#) ("SCCR"), the Family Justice Modernisation Strategy Summit held by the Scottish Government in March 2016 and the Court of Session opinion in the case of [SM v CM](#)².

² [2017] CSIH 1.

1.17 The Scottish Government's recommendations are discussed in part 3 of this report.

Establishment, membership and remit of the sub-committee

1.18 The Committee agreed to establish a sub-committee to address the report by Dr Whitecross and Dr Lindsay and the policy paper by the Scottish Government.

1.19 The sub-committee was comprised of:

- Sheriff Principal Lewis, Sheriff Principal of Tayside, Central and Fife
- Sheriff Fiona Tait, a resident sheriff at Edinburgh Sheriff Court
- Simon Stockwell, Head of Family and Property Law, Scottish Government
- Rachael Kelsey, Solicitor
- Ian Maxwell, Families Need Fathers Scotland, and SCJC member

1.20 The sub-committee's remit was to consider each of the recommendations made by, respectively, Dr Whitecross and Dr Lindsay and the Scottish Government, and to report back to the Committee on which of them it considered should be taken forward, and by what means.

1.21 The sub-committee met several times over the course of summer 2017. This report of its conclusions was prepared for consideration by the Committee at its meeting on 23 October 2017.

2. The research report by Dr Richard Whitecross and Dr Claire Lindsay

Consideration of the evidence

- 2.1 The sub-committee welcomed the report by Dr Whitecross and Dr Lindsay, and noted that it provided empirical evidence about the operation of Chapter 33AA, whereas the Committee has previously had to rely on only limited or anecdotal information. The sub-committee agreed that the report had not identified any major problems with the current system of case management, and that the recommendations by Dr Whitecross and Dr Lindsay did not entail a large degree of change.
- 2.2 The sub-committee noted that the report contained evidence of varying practice across Scotland; that it highlighted possible confusion between some standard ordinary procedures and family specific procedures; and that this was perhaps suggestive both of a lack of procedural clarity in the rules and of a training need among sheriffs and sheriff clerks. The sub-committee concluded that the report contained sufficient evidence of the need to do more to ensure proactive and consistent judicial case management.
- 2.3 Regarding the question of delay, the sub-committee noted that, in the four study courts, statistics suggested an average of 3 child welfare hearings per case within an 18-month period, with the highest number in a single case being 14 in an 18-month period. The sub-committee noted that there have been anecdotal reports of far higher numbers of child welfare hearings in a single case.
- 2.4 The statistical analysis carried out by Dr Whitecross and Dr Lindsay showed that high numbers of child welfare hearings did not correlate with high numbers of case management hearings. The sub-committee considered that this was evidence of child welfare hearings being used as the principal case management tool in the majority of family actions. The sub-committee discussed whether it was appropriate to allow for an open-ended series of child welfare hearings in such cases without there being some form of judicial 'check'. The sub-committee considered that there should be more of an interaction between the child welfare hearing and any new case management provisions that it recommended, so that such a check could be made.
- 2.5 In relation to the cases where case management hearings were fixed under Chapter 33AA, it was possible to infer that any undue delay may have resulted from issues around the readiness of parties to proceed to proof, which suggested to the sub-committee that there was a need for greater judicial management in deciding whether, and at what point, to fix diets of proof.

- 2.6 The sub-committee took the view that the comments made by the Supreme Court in *NJDB v JEG* and *ANS v ML*³ together with the introduction of Chapter 33AA might have led to courts taking a more proactive approach to case management, resulting in fewer recent cases with the very high numbers of child welfare hearings that have been reported anecdotally.
- 2.7 Overall, the sub-committee considered that the report by Dr Whitecross and Dr Lindsay highlighted a need for change to improve procedures.

Discussion of the recommendations by Dr Whitecross and Dr Lindsay

- 2.8 The six recommendations made by Dr Whitecross and Dr Lindsay are considered in turn.
- 2.9 **Training:** *“Although the sheriffs interviewed all were aware of and used the rules set out in Chapter 33AA, the research suggests that training on the rules and their interaction with other Ordinary Cause Rules, for example Chapter 28 and Chapter 33, should be provided. This could take the form of formal training offered to sheriff clerks through SCTS and also for Sheriffs through the Judicial Hub. This training would also provide clarity of process in how to manage a Minute to Vary as there was confusion over how this process would be managed and whether (depending on the date the action was originally raised) Chapter 33AA applied.”*

The sub-committee noted that the existing case management powers are used inconsistently. Although this may highlight a lack of procedural clarity in the rules, the sub-committee decided to recommend that formal training for judiciary and court staff should be delivered in relation to any new provisions about case management that it recommended.

- 2.10 **Options Hearings:** *“The use of Options Hearings is the subject of variations in local practice in terms of whether they are fixed in cases that proceed to case management under Chapter 33AA. Rule 33AA.2(1)(a) does allow for a case management hearing to be fixed at an Options Hearing. Further consideration should be paid to the role of Options Hearings because of evidence highlighting the inconsistency in application, considering the points raised in sections 3.9 and 3.24.”*

The sub-committee noted evidence in the report suggesting that standard ordinary procedures, such as the Options Hearing, do not always work well alongside family specific procedures, such as Chapter 33AA. The sub-committee therefore concluded that a simpler – and family specific – case management structure is needed, and that the Options Hearing should be

³ [2012] UKSC 30

removed from family and civil partnership actions. The sub-committee's detailed proposals about the new structure of hearings can be seen at paragraph 4.8 of this report.

2.11 **Information:** *“A note sheet was in evidence at one of the study courts and was in use to ensure information flows between sheriffs in situations where scheduling meant the same sheriff was not able to remain with the case. This is viewed as effective by sheriffs and sheriff clerks. Having notes of previous CWHs passed on to the next sheriff may go some way to alleviate solicitor concerns over the changing shrieval view of cases as noted in section 3.44. We recommend that this note is rolled out to sheriff courts as an example of good practice evident from this study.”*

The sub-committee noted that a similar point has also been raised in discussions about a recent Public Petition in the Scottish Parliament.⁴

The sub-committee rejected this recommendation for the following reasons:

- (a) The additional judicial time and resources required to complete such a note would lead to a reduction in the number of child welfare hearings that could be scheduled in the court programme, which would increase delay.
- (b) If this practice were to become formalised, the status of such a note could be problematic. If it were to be a part of process, it might result in child welfare hearings being diverted into discussions about the content of the note and what was said at the previous hearing, rather than focussing on the welfare of the child. The note could also be subject to appeal, which might lead to it taking on a more formal status. On the other hand, if the note was not part of process, there could be a question as to exactly what its status might be, and how it should be retained, given its confidential nature. It is currently up to individual sheriffs to make their own notes as they see fit, but these issues might be raised if the practice were to become formalised, such that all sheriffs were compelled to take these notes.
- (c) It is already the case that there is a record of *decisions* taken at a child welfare hearing – namely, the interlocutor. If, in addition, a note were to be required detailing the discussions that led to the decision, this could bring about a fundamental change in the nature of child welfare hearings. At present, they are intended to be informal and fully focused on the welfare of the child. If notes were to be taken as a means of recording what unfolded at the hearing, there is a risk that

⁴ <http://www.parliament.scot/GettingInvolved/Petitions/PE01631>

this could be undermined – parties could become more entrenched and not want to be seen to concede ground.

- (d) It would not be a practical “one size fits all” solution. In courts with only one sheriff, completing such a note would not serve any purpose. Some courts, such as Glasgow and Edinburgh, have particular sheriffs who are dedicated to family actions and hear the majority of family cases in those courts. This means that greater judicial continuity is possible, which lessens the need for a note.

2.12 **Sanctions:** *“Overall sheriffs did not report any major problems with solicitors complying with Chapter 33AA. However, it was noted that at present there are no sanctions that they can apply to ensure compliance, notably attending the pre-hearing conference, preparing and lodging the joint minute. Challenges with this have been noted (section 3.11). It was acknowledged that there could be a range of practical reasons for the delay and failure to lodge as directed by the court. Yet on occasion it would be useful for the sheriff to be able to sanction a solicitor.”*

The sub-committee noted that the Rules Rewrite Project is making provision about sanctions for non-compliance with the rules. This picks up on recommendations 127 and 128 of the SCCR. Recommendation 127 states: *‘Where there is a failure to comply with a rule or court order, the rules of court should provide a general power for the court to impose such sanctions as it considers appropriate.’* Recommendation 128 goes on to list examples of what the rules should entitle the court to do.

The Rules Rewrite Project’s [First Report on the New Civil Procedure Rules](#) states (paragraph 5.21): *‘The SCJC agrees with the analysis of the SCCR. In order to give effect to the statement of principle and to any improvements to civil procedure made by the rules, the enforcement of any orders and of the rules must have real teeth. The SCJC agrees that it is the judges who are best placed to assess the gravity of any non-compliance, weigh up whether it is non-compliance that could be or ought to be excused, and decide whether to provide relief, impose a sanction, or both.’*

Accordingly, the sub-committee decided not to make any recommendation on this issue, on the basis that it is being taken forward by the Rules Rewrite Project, and will be of application to all types of proceedings. The new Civil Procedure Rules that will be produced by the Rules Rewrite Project are expected to come into force in approximately four to five years.

2.13 **Legal Aid:** *“There is a need to clarify with the Scottish Legal Aid Board the position in terms of legal aid payment to cover the pre-hearing conference and*

preparation of the joint minute. This was raised as an area of concern by both solicitors and sheriffs”.

The sub-committee was advised that the focus of the Scottish Government’s legal aid legislative work in 2017 is in relation to criminal legal aid. However, in 2018 the Scottish Government will be able to consider whether changes are needed to legal aid legislation resulting from any proposals by the sub-committee which may ultimately be approved by the Committee and the SCJC.

Given that the sub-committee proposes to remove Chapter 33AA from the Ordinary Cause Rules, it decided not to make any recommendation in respect of legal aid cover for the pre-hearing conference and joint minute. The sub-committee considered that the Committee should liaise with the Scottish Government and the Scottish Legal Aid Board once the scope of any rules changes is clearer.

2.14 **Effectiveness:** *“Despite the inconsistencies, Chapter 33AA is viewed as an effective process for managing cases. The case management provision set out in Chapter 33AA is viewed as being suitable for other types of family actions but with a clear implementation strategy and clear process. This would minimize any ambiguities highlighted in this research with the process of managing Chapter 33AA”.*

The sub-committee noted that the majority of sheriffs interviewed by Dr Whitecross felt that it would be beneficial to apply the provisions of Chapter 33AA to all family actions. The sub-committee agreed that any new provisions about case management to replace Chapter 33AA which it might recommend should be applied to all family and civil partnership actions, not just those with a crave for an order under section 11 of the Children (Scotland) Act 1995.

3. Policy paper by the Scottish Government on case management

Scope of the proposals

- 3.1 As noted in part 1 of this report, the Scottish Government's policy paper draws on a range of opinions, judgments and reports which have addressed case management and delay in family actions. Annex A of the Scottish Government's paper consists of relevant excerpts and quotes. The sub-committee did not discuss these sources directly, as they have formed the basis of much of the Committee's work since its establishment, and members were familiar with them.
- 3.2 The sub-committee noted that the Scottish Government's recommendations are more far-reaching than those of Dr Whitecross and Dr Lindsay and propose extensive reforms to the current system of case management. The sub-committee consequently had regard to the resources and timescales required for accomplishing some of the proposals, particularly given that the Rules Rewrite Project is underway and will result in fundamental reform of the civil procedure rules over the next four to five years. The sub-committee noted that the Scottish Government had made recommendations in a number of areas which are within the remit of the Rules Rewrite Project, but that it would consider some of these where appropriate, if they had a specific bearing on the case management of family and civil partnership actions.

Discussion of the Scottish Government's recommendations

- 3.3 ***Child Welfare Hearings and undue delay:*** *"The first hearing in a section 11 case should be a combined case management hearing and Child Welfare Hearing. Key aims of this first hearing would be to clarify and list the issues in dispute (and those about which parties agree) and to set a timetable for the case. (If issues are subsequently resolved at future CWHs, it may be possible to remove them from the list of issues in dispute)."*

The sub-committee rejected this recommendation for the following reasons:-

- (a) It would be counterproductive to hold a full case management hearing at too early a stage. Active case management is only possible once full pleadings and details about evidence and witnesses are available. However, the first hearing could be a preliminary or initial case management hearing to determine which case management 'track' the case should take, as it would be possible to conduct such a hearing with only the initial writ and defences.

- (b) The child welfare hearing should focus solely on the welfare of the child, and remain distinct from case management matters.
- (c) Combining the hearings would effectively double the length of time required to conduct them. This would reduce the slots available in the court programme, and introduce delay to the system.

“A child welfare (bar) reporter cannot be appointed until after a case management hearing has taken place. This means a reporter could only be appointed at the end of the first hearing or at subsequent hearings.”

The sub-committee rejected this recommendation on the basis that the sheriff should have the discretion to appoint a child welfare reporter at an earlier stage – at a hearing after service in respect of interim residence or contact orders, for example – if it is in the child’s best interests to do so.

“When there is a fifth hearing (of any description other than a proof) in an action where there is a section 11 crave, the rules should require the court to consider if the case should go to proof. (This may require changes to any previously agreed timetable). The key test for the court must be what would be best for the child.”

The sub-committee concluded that the rules should not put a limit on the number of child welfare hearings in a case. The sheriff should have discretion to decide on a suitable number of child welfare hearings, bearing in mind what would be best for the child. The sub-committee considered that there should, however, be a requirement to keep the number of child welfare hearings under review. It hoped that this would prevent cases from being allowed to ‘drift’. The sub-committee’s proposals on how this could be done can be seen at paragraphs 4.8 and 4.10 of this report.

- 3.4 **Options Hearings:** *“Given the terms of OCR 9.2(1A), the Scottish Government recommends the Family Law Committee consider if there are issues in relation to Options Hearings and family actions which need to be addressed.”*

As is noted in paragraph 2.10 of this report, the sub-committee considered that Options Hearings should be removed from the timetable of defended family and civil partnership actions. The sub-committee’s detailed proposals about the new structure of hearings can be seen at paragraph 4.8 of this report.

- 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.

“Rule 33.22A(5) currently states: ‘All parties (including a child who has indicated his wish to attend) shall, except on cause shown, attend the Child Welfare Hearing personally.’ There should be greater clarity in the rules on what “cause shown” means.”

The sub-committee rejected this recommendation because of the risk of it limiting the sheriff’s discretion. It was also felt that it could lead to arguments about whether something that was not included in any clarification added to the rules would be covered by “cause shown” or not.

3.6 Expert witnesses: *“The Scottish Government recommends that rules be introduced to discourage unnecessary use of experts and to require disclosure of information provided by experts to the other parties in an action.”*

The sub-committee noted that the Rules Rewrite Project is carrying out a significant review of the use of expert witnesses, and some possible rule changes. The direction of travel is set out in Chapter 6 (Evidence) of the *First Report on the New Civil Procedure Rules*. However, the sub-committee accepted this recommendation in so far as it would involve implementing recommendation 117 of the SCCR, which 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 sub-committee’s recommendation can be seen at paragraph 4.16 of this report.

3.7 **Curators ad litem:** *“The Scottish Government recommends that rules be made so that:*

- *Interlocutors appointing a curator ad litem in a section 11 case provide the reasons for the appointment and the duties of the curator ad litem.*
- *The court keeps under review the need for the curator ad litem’s initial appointment. One potential way an appointment of a curator ad litem could be kept under review would be to say that after a specified number of hearings (of any description), such as 5, or a specified number of months, such as 6, the appointment should be reviewed.”*

The sub-committee decided not to progress this recommendation for the following reasons:

- (a) The sub-committee noted that rules relating to the appointment of child welfare reporters now require the interlocutor appointing the child welfare reporter to state the precise scope of what he / she is being asked to do (rule 33.21(3)). Unlike a child welfare reporter, a curator *ad litem* will have a very far-reaching role. A curator’s duty is to *‘exercise his judgment independently and protect or safeguard the interests of his ward so far as they are affected by the particular action’* (MacPhail, Sheriff Court Practice, para 4.24). It may therefore be difficult for an interlocutor to define the parameters of this.
- (b) The sub-committee noted that, as set out in rule 33.16, a mechanism for reviewing the appropriateness of the ongoing appointment of a curator *ad litem* appointed to a defender who has a mental disorder is necessary. This is because incapacity is not always ‘static’. A person’s mental health can change quickly, and there may therefore be periods when a defender who has a mental disorder is capable of instructing a solicitor. In contrast, the appointment of a curator *ad litem* to a child will not necessarily require regular reviews, as the child will remain a child. In cases where some time has passed since the curator’s appointment and the child has gained capacity, members considered that the curator or the sheriff would likely query the ongoing appropriateness of the curator’s appointment. The sub-committee agreed that, rather than being a matter that requires to be prescribed in rules, the appropriateness of the ongoing appointment of a curator to a child would arise naturally in the course of proceedings.

3.8 **Alternative Dispute Resolution:** *“The Scottish Government supports the SCCR recommendation [SCCR 77] and therefore recommends that rule 33.22 and the similar rules for civil partnership actions in the sheriff court and for actions in the Court of Session be amended accordingly to allow referral to*

mediation of any matter arising in a family action.”

Recommendation 77 simply states: *‘Rule 33.22 of the Ordinary Cause Rules should be broadened to allow referral to mediation of any matter arising in a family action.’* The sub-committee accepted this recommendation in principle, subject to two caveats. The sub-committee’s recommendation on this point is set out at paragraph 4.15 of this report.

3.9 The sub-committee also considered the following two recommendations made by the Scottish Government in areas which are being taken forward by the Rules Rewrite Project, but which have a direct bearing on family actions.

3.10 **Judicial continuity:** *“The Scottish Government recommends that rules be made for family actions to introduce a docket system and judicial continuity on the lines of recommendation 50 of the SCCR.”*

The sub-committee rejected this recommendation on the basis that it would increase delay in the court system and court programming in the sheriff courts is primarily an operational matter for the Sheriffs Principal. Due to shrieval availability in medium-sized courts, parties would have to wait longer to get a hearing before the same sheriff. However, the sub-committee agreed to make a recommendation about a provision for judicial continuity, modelled on rule 2.5 of the Fatal Accident Inquiry Rules. This recommendation can be seen at paragraph 4.14 of this report.

3.11 **Structure of pleadings:** *“The Scottish Government recommends that for both the Court of Session and the Sheriff Court:*

- *rules be made and forms created along the lines of Annex F in the JWG report;*
- *the forms should ask whether any other relevant court cases – civil or criminal – have taken place or are taking place;*
- *the forms ask the applicant about relevant criminal convictions;*
- *the forms ask what steps have been taken to resolve the issue out of court (eg by use of mediation or other forms of ADR) and what the areas of dispute and agreement are;*
- *where appropriate, forms should ask if jurisdiction could be held elsewhere in the United Kingdom or overseas .”*

The sub-committee felt that development of forms would be a substantial undertaking. It would likely require input from the team developing the Civil Online portal in order to future-proof the forms. It was noted that there are no plans to make family actions available via the portal in the near future, however.

The sub-committee noted that the Rules Rewrite Project has opted for abbreviated pleadings over forms. Although the Rules Rewrite Project might not produce new family rules for four to five years, the sub-committee considered whether it would be a good use of resources to develop, implement, and possibly review new forms which would become redundant shortly thereafter. The sub-committee also noted that forms would require continuous care and maintenance.

The sub-committee thought that the question of forms for family actions could be revisited at a future stage, perhaps when family actions come to be added to the Civil Online portal.

3.12 **Failure to comply:** *“The Scottish Government recommends rules be made to lay down that when a person is sentenced to imprisonment for civil contempt (such as failure to obtemper an order under section 11 of the 1995 Act) this sentence is provided for in an interlocutor which makes it clear the person is being sentenced to imprisonment for civil contempt.”*

3.13 The sub-committee noted that SCTS intends to review operational procedures around imprisonment for civil contempt, to address concerns raised by Lord Glennie in the [Opinion in the Appeal by SM against CM](#)⁵ about the form in which a sentence of three months imprisonment was imposed. The sub-committee understands that as part of this review SCTS will consider developing a style interlocutor imposing civil imprisonment for contempt of court for use in all types of proceedings, including family and civil partnership actions.

⁵ [2017] CSIH 1, paragraph 70

4. The sub-committee's recommendations

The case for change

- 4.1 The sub-committee recognised that any changes it proposes now may only be interim measures, given that the Rules Rewrite Project will involve a wholesale redrafting of the civil procedure rules in Scotland over the course of the next four or five years.
- 4.2 However, the sub-committee considered that changes to the current system of case management in sheriff court family actions can and should be made now, not because the system works badly in all cases, but because it does not work well in a small number of highly contentious cases where undue delay can occur.
- 4.3 However, the sub-committee was mindful that changes to address issues in the minority of discrete high-conflict cases should not be at the expense of the majority of actions, which generally proceed without undue delay. It considered that any new rules it recommends should not be overly prescriptive, and should preserve the strengths of the current system, such as the child welfare hearing and its informality and flexibility. At the same time, the sub-committee noted that allowing flexibility should not, as a side-effect, lead to variations in local practice.
- 4.4 The sub-committee also recognised that a range of other factors can contribute to delay in high-conflict cases – such as legal aid issues, changes of representation or attempts to settle – and that these cannot be cured by changes to court rules.
- 4.5 The sub-committee therefore agreed to bear in mind the following general priorities and principles in developing its recommendations:
 - The procedural rules should be simplified to prevent confusion between standard ordinary procedures (such as Options Hearings) and family procedures (such as those currently contained in Chapter 33AA);
 - Proactive judicial case management should be promoted, so that the sheriff controls the action, rather than the agents or parties;
 - The rules should be capable of consistent application across the country, with less scope for local practice;
 - Family actions are an adversarial process and should not be made too informal, but the inquisitorial nature of the child welfare hearing should be preserved;

- The welfare of the child is paramount; and
- As far as is possible, the rules should restrict the scope for undue delay arising out of procedural matters.

Recommendations

4.6 In order to give effect to these priorities and principles, the sub-committee makes the following recommendations:

4.7 **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.

4.8 **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 hearing 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 above, 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.

A flowchart outlining the proposed new case management structure can be seen at [Annex A](#) to this report.

4.9 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.

4.10 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.

4.11 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.

4.12 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.

4.13 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.

4.14 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.

4.15 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.

The sub-committee recommends that the Committee should consider consulting on this recommendation.

4.16 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.

4.17 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.

4.18 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.

4.19 **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.

Consultation

4.20 The sub-committee considers that the question of whether, and on what terms, there should be a consultation on its recommendations is for the Committee to decide.

Conclusion

4.21 The sub-committee recognises that it proposes extensive changes to the structure of hearings in family and civil partnership actions, and that these may result in more hearings at the outset of an action than may occur under the present rules. However, it considers that these hearings will allow for early judicial case management and lead to fewer hearings over the lifetime of a case. The introduction of the new hearings will be offset by the removal of the Options Hearing, continued Options Hearing, and the pre-proof hearing. Overall, the structure of hearings should be simpler, and enhance the sheriff's case management powers from the start. It is possible that the proposed new structure may also help encourage a greater settlement rate.

4.22 The proposals also adhere to one of the SCJC's guiding principles, which is that '*practice and procedure in the civil courts should be as similar as possible, where appropriate*'. The proposed new structure of hearings brings sheriff court practice more in line with procedures in the Court of Session, following recent changes to chapter 49 of the Rules of the Court of Session introduced by the Act of Sederunt (Rules of the Court of Session 1994 and Summary Application Rules 1999 Amendment) (Miscellaneous) 2017.

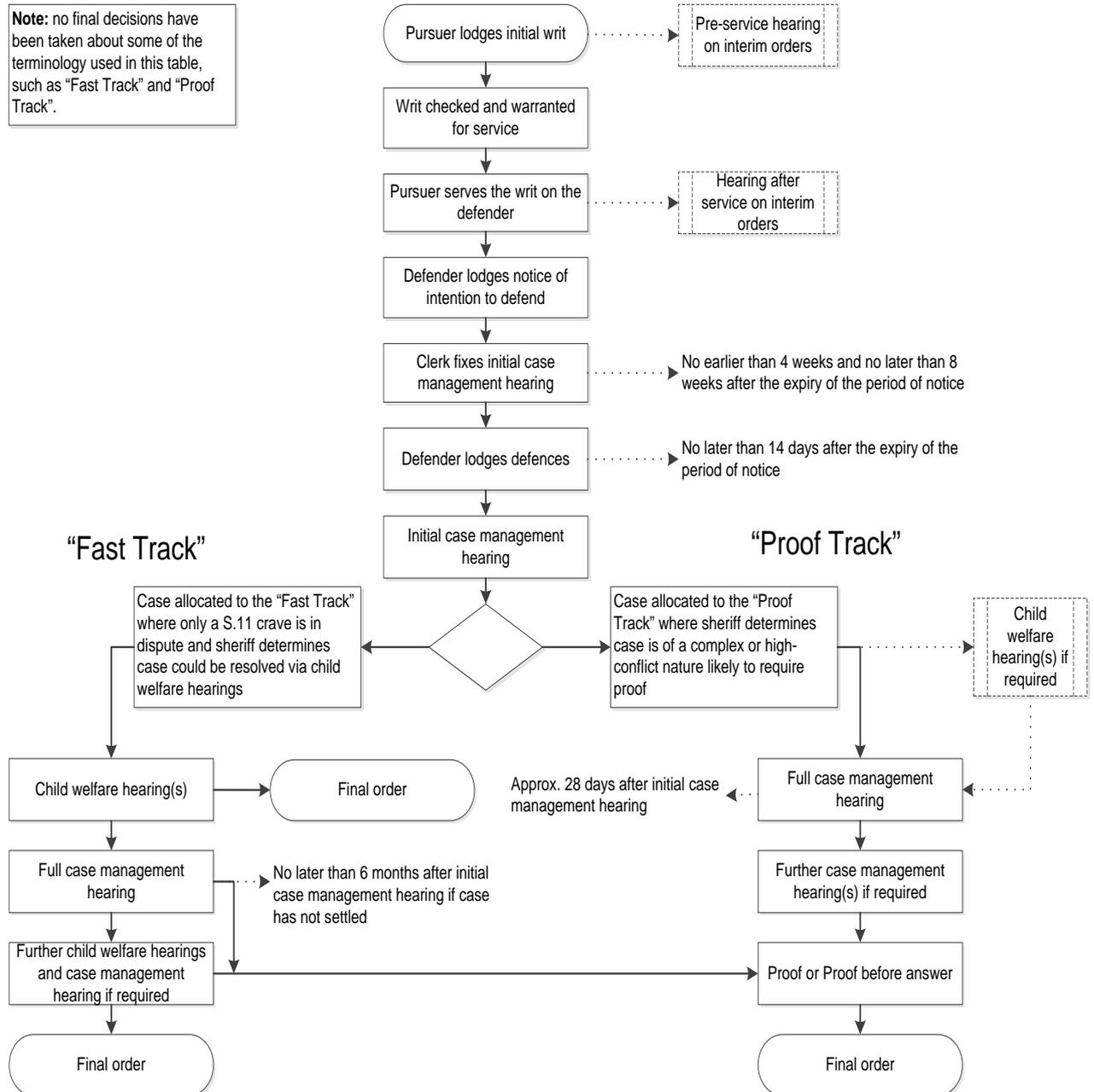
4.23 The sub-committee considers that changes to the rules are required to improve the case management of family and civil partnership actions in the sheriff court, and invites the Committee to consider and approve its recommendations.

October 2017

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Annex A: Flowchart – the proposed new case management structure in family and civil partnership actions



Annex B: Chapter 33AA of the Ordinary Cause Rules**ACT OF SEDERUNT (SHERIFF COURT ORDINARY CAUSE RULES) 1993
No.1956 (S.223)****SCHEDULE 1*****Special provisions in relation to particular causes*****CHAPTER 33AA EXPEDITIOUS RESOLUTION OF CERTAIN CAUSES****Actions lodged on or after 3 June 2013**

33AA.1. [Application of Chapter](#)

33AA.2. [Fixing date for Case Management Hearing](#)

33AA.3. [Pre-hearing conference](#)

33AA.4. [Case Management Hearing](#)

Application of Chapter

33AA.1. This Chapter applies where a cause is proceeding to proof or proof before answer in respect of a crave for an order under section 11 of the Children (Scotland) Act 1995 (court orders relating to parental responsibilities etc.).

Fixing date for Case Management Hearing

33AA.2. (1) The sheriff shall fix a date for a case management hearing—

- (a) at the Options Hearing in accordance with rule 9.12(3)(f);
- (b) at the Procedural Hearing in accordance with rule 10.6(3)(f);
- (c) on the motion of any party; or
- (d) on the sheriff's own motion.

(2) Except on cause shown, the date and time to be fixed under paragraph (1) shall be not less than 14 days and not more than 28 days after the interlocutor appointing the cause to a proof or proof before answer.

Pre-hearing conference

- 33AA.3.** (1) In advance of the case management hearing the parties shall hold a pre-hearing conference, at which parties must—
- (a) discuss settlement of the action;
 - (b) agree, so far as is possible, the matters which are not in dispute between them;
 - (c) discuss the information referred to in rule 33AA.4(1).
- (2) Prior to the case management hearing the pursuer shall lodge with the court a joint minute of the pre-hearing conference or explain to the sheriff why such a minute has not been lodged.
- (3) If a party is not present during the pre-hearing conference, that party's representative must be able to contact the party during the conference, and be in full possession of all relevant facts.

Case Management Hearing

- 33AA.4.** (1) At the case management hearing the parties must provide the sheriff with sufficient information to enable the sheriff to ascertain—
- (a) the nature of the issues in dispute, including any questions of admissibility of evidence or any other legal issues;
 - (b) the state of the pleadings and whether amendment will be required;
 - (c) the state of preparation of the parties;
 - (d) the scope for agreement of facts, questions of law and matters of evidence;
 - (e) the scope for use of affidavits and other documents in place of oral evidence;
 - (f) the scope for joint instruction of a single expert;
 - (g) the number and availability of witnesses;
 - (h) the nature of productions;
 - (i) whether sanction is sought for the employment of counsel;
 - (j) the reasonable estimate of time needed by each party for examination-in-chief, cross-examination and submissions.
- (2) Subject to paragraph (4), at the case management hearing the sheriff will fix—
- (a) a diet for proof or a proof before answer;
 - (b) a pre-proof hearing in accordance with Chapter 28A.
- (3) The diet fixed under paragraph (2)(a)—

- (a) shall be assigned for the appropriate number of days for resolution of the issues with reference to the information provided under paragraph (1) and subject to paragraph (4);
 - (b) may only be extended or varied on exceptional cause shown and subject to such orders (including awards of expenses) as the sheriff considers appropriate.
- (4) The sheriff may make such orders as thought fit to ensure compliance with this rule and the expeditious resolution of the issues in dispute, including—
- (a) restricting the issues for proof;
 - (b) excluding specified documents, reports and/or witnesses from proof;
 - (c) fixing other hearings and awarding expenses.
- (5) A case management hearing may, on cause shown, be continued to a further case management hearing.
- (6) For the purposes of rules 16.2 (decrees where party in default), 33.37 (decree by default in family action) and 33A.37 (decree by default in civil partnership action), a case management hearing shall be a diet in accordance with those rules