

**JUDICIAL PROTOCOL REGULATING
DIRECT JUDICIAL COMMUNICATIONS
BETWEEN SCOTLAND, AND ENGLAND
& WALES, IN CHILDREN'S CASES**

Jointly signed by Lord Carloway, Lord President of the Court of Session, and Sir James Munby, President of the Family Division on 24 July 2018

Foreword

The Lord President of the Court of Session in Scotland and the President of the Family Division of the High Court of England and Wales, having consulted with members of the senior judiciary, are pleased to publish this *Judicial Protocol Regulating Direct Judicial Communications Between Scotland and England & Wales in Children's Cases*.

Scotland and England & Wales share a common commitment to the rule of law and to the principle that the welfare of the child is the paramount consideration when his or her needs or rights are being considered by the courts.

Increasingly, child proceedings contain a cross-border element, giving rise to a unique range of challenges. Whilst there are mechanisms in place for the exchange of information across some jurisdictions, these are limited to the sharing of information. Cross-judicial co-operation can be of critical importance in such cases, but there is an absence of mechanisms to facilitate and encourage collaborative decision making of this kind. This is compounded by there being limited understanding across jurisdictions of how the other system operates.

It was with such concerns in mind that a series of meetings took place between members of the Scottish and English judiciaries over 2017- 2018, which have led to the creation of this Judicial Protocol. The aim of the Protocol is to allow judges to communicate on a cross-border basis and to provide a framework for the mutual exchange of information through a centralised procedure. The Protocol sets out the key principles of this procedure, and how these are to operate in practice.

The Protocol is supported by supplementary information in the form of the attached *Handbook on family law relating to children in Scotland and in England & Wales*. This Handbook, prepared by family law barristers and advocates, summarises the respective legal principles in Scotland, in England and, where these differ, in Wales, and provides a central source of guidance.

Signed 'C Sutherland'

Lord Carloway, Lord President of the Court of Session

Signed 'Sir James Munby'

The Rt. Hon. Sir James Munby, President of the
Family Division

JUDICIAL PROTOCOL REGULATING DIRECT JUDICIAL COMMUNICATIONS BETWEEN SCOTLAND, AND ENGLAND & WALES, IN CHILDREN'S CASES

The Lord President of the Court of Session in Scotland, and the President of the Family Division of the High Court of England & Wales, having consulted with members of the senior judiciary in Scotland, and England & Wales, have agreed the following Protocol for the regulation of direct judicial communications between Scotland, and England & Wales, in cases relating to children:

Whereas the Lord President and the President of the Family Division:

- Recognise that Scotland and England & Wales share a common commitment to the rule of law and to the principle that the welfare of the child is the paramount consideration when his or her needs or rights are considered by the courts;
- Recognise that in cases involving children which have a cross-border element, judicial co-operation is of critical importance;
- Consider that cross-border judicial co-operation should include the early identification of cases, clear lines of communication, the free flow of relevant information and the facilitation of effective case management;
- Recognise that the removal of children from one country to another may have a harmful effect on such children;
- Recognise that it is desirable that in the regulation of cross-border judicial communications as between Scotland and England & Wales the judiciary has regard to the Principles for Direct Judicial Communications as published by the Hague Conference on Private International Law;
- Recognise the importance of negotiation, mediation and conciliation in the resolution of family disputes where appropriate; and
- Recognise the value of ongoing cross-border judicial engagement in the preceding matters.

Now therefore the Lord President and the President of the Family Division agree as follows:-

Key principles

1. The Protocol will apply to all cases involving children which have a cross-border element, as between Scotland and England & Wales. It can be invoked where proceedings may be raised in both jurisdictions.
2. The Protocol will allow members of the judiciary to communicate on a cross-border basis and provides for mutual exchange of information as to proceedings or impending proceedings in the two legal jurisdictions in an appropriate and effective manner.
3. The Lord President and the President of the Family Division will each nominate at least one liaison judge and one alternate as the primary point of contact for his jurisdiction. All communication from a judge in one jurisdiction ('the requesting judge') should be centrally transmitted through the liaison judge in that jurisdiction to the liaison judge in the other jurisdiction ('the receiving jurisdiction') who will take such steps as are necessary to have the case dealt with appropriately. The liaison judges should work with each other to advance the objectives of the Protocol. Whenever possible such communications will be in accordance with the arrangements set out in Annex I to this Protocol.
4. Nothing contained in the Protocol shall have any effect on established legal rights or remedies or provisions for mutual recognition of court orders which are available to any party to the proceedings as a matter of law.

5. Every judge engaging in direct judicial communications under the Protocol must ensure that he or she adheres to the laws of his or her own jurisdiction and maintains his or her independence when using the Protocol in his or her own jurisdiction.
6. The Protocol is supported by supplementary information in the form of a handbook serving as a summary of family law in Scotland and in England and Wales relating to children.
7. The Protocol and the accompanying handbook shall be published but should not be regarded as providing legal advice to any legal practitioner or court user.
8. The operation of this Protocol will be kept under review.

Operation of the principles

The requesting judge

- (i) It shall be for the requesting judge to prepare or approve an information sharing request ('a request') and a summary of information for the liaison judge in his jurisdiction, for onward transmission to the receiving jurisdiction.
- (ii) The request should contain sufficient details to allow any proceedings in the receiving jurisdiction to be identified. This may include case references, details of the parties, the names and dates of birth of the children, the name of the local authority or other agency involved (if applicable), the background circumstances of the parties, and any known addresses in the receiving jurisdiction.

- (iii) The request should set out in clear and concise terms the question or questions being asked of the liaison judge in the receiving jurisdiction, and any information sought. It should advise whether there is any urgency and, if so, the nature of the urgency. Where appropriate, the request may specify a deadline by which a response is sought.
- (iv) The request should be supported by a summary of information. The summary of information should be confined to those matters which are necessary and appropriate for the purposes of the request and should consist of (i) essential and relevant facts relating to the case in question; (ii) matters of practice and procedure, including the scope and effects of any court order or other remedy or potential remedy. The information provided may include details of:-
- Proceedings that are raised or may be raised in either jurisdiction;
 - The registration/recognition of orders in either jurisdiction;
 - The timetabling of cases in either jurisdiction;
 - The effect of interim orders or undertakings made in one jurisdiction upon the other;
 - The option and effect of making of 'mirror orders' in either jurisdiction;
 - The current stage and effect of court proceedings (whether live or concluded);
 - Whether certain preliminary or protective steps – e.g. the granting of a stay of proceedings, or an order for non-disclosure to a party to the action – have been made; and
 - Whether the parties appearing before the requesting judge have consented to the request.

The liaison judge

- (v) It will be for the liaison judge to provide for relevant cases, clear lines of communication and the free flow of relevant information to facilitate effective case management of those cases.

- (vi) It will be for the liaison judge to receive the request from the requesting judge and transmit it with any modifications he or she considers necessary to the liaison judge in the receiving jurisdiction.
- (vii) It will be for the liaison judge to receive any response from the receiving jurisdiction and transmit that response to the requesting judge in his or her own jurisdiction.

Documents

- (viii) Any request or response to a request in terms of the Protocol may have annexed to it documents which contain details of proceedings which have been or may be raised. These should be confined to documents necessary for the purposes of the request. They may include orders, decisions and judgments of any decision-making body including decisions of children's hearings.

Communications

- (ix) All those operating the Protocol should have regard to the following:
- The need for the request and any response to be shared where appropriate with the parties; and
 - The need for all communication to be in writing.

Signed *'C Sutherland'* *Lord Carloway, Lord President of the Court of Session*

Signed *'Sir James Munby'* *The Rt. Hon. Sir James Munby, President of the
Family Division*

ANNEX I

A request for information from a liaison judge in Scotland should be sent in the first instance to: The International Family Justice Office, Royal Courts of Justice, London by e-mail address to:

IFJOffice@hmcts.gsi.gov.uk

A request for information from a liaison judge in England or Wales should be sent in the first instance to: The Scottish International Family Justice Office, Parliament House, Edinburgh by e-mail address to:

FamilyCourt@scotcourts.gov.uk