FAMILY JUSTICE COUNCIL RESPONSE TO THE HMCS CONSULTATION PAPER ON FAMILY PROCEDURE RULES (CP 19/06)

INTRODUCTION

ANSWERS TO QUESTIONS

Part 1 – Modernisation of Language and Process

Q1. Yes, subject to the email systems of both the sender and receiver being protected by appropriate encryption and to the restrictions referred to below. The Council also notes that some key organisations participating in the family justice system, notably the NHS, have protocols governing what sort of information may, and may not, be sent by email in order to protect patient confidentiality. It is unlikely, therefore, that any reports by medical experts could be served by email.

Q2. Post and faxes to a busy office will tend to go to a central point. The risk with emails is that they can be sent direct to an individual's computer and, if unknown to the sender, that individual is away on holiday or ill, or their particular computer is broken, or they have slightly changed their email address, there is a much greater risk that the email can remain unseen. Therefore, the Council considers that it would be essential for the party to be served to agree to accept service by email, although the necessary prior agreement could also be secured by email.

Q3. For similar reasons, although faxes are easier to control, if the rule is going to apply to unrepresented parties, again the Council feels it is right that prior agreement in writing should be obtained, before service by fax.

Q4. Yes.

Q5. Terms such as “Ancillary Relief” and “Maintenance Pending Suit” cause confusion to lay clients and the proposed new terms are needed. The Council is less convinced that terms such as “Decree Nisi” and “Decree Absolute” should be replaced. These relate to specific orders and are better understood by lay clients. The Council has some concern that the proposed new terms of a “Conditional Order” and a “Final Order” are both terms that are used extensively in other areas of law and could cause more confusion. If a client is asked whether they have their Decree Absolute it is generally well understood that this refers to a particular part of the divorce process. If a client is asked whether they have their “final order” it will not be clear whether divorce proceedings, the financial aspects or even children matters are being referred to. For the same reason, the Council would retain “Petition” to distinguish it from all the other applications that can be made.

Q6. The Council feels that the current jurisdictional questions on the petition are unclear and require re-drafting. Another confusion that lay clients often have is whether reference to giving details of children is only those children currently under 18 or all children born to the parties whatever their current age. Reference to the “prayer” sounds very old fashioned as is reference to “the suit” and reference to the marriage being “dissolved”. It would be useful to have some consistency between the use of the word “maintenance” and “periodical payments”. Likewise, reference to “a secured provision order” often confuses clients.

Q7. It is probably an improvement, but respondent is still confusing when the respondent to the petition is also the applicant in a financial application. A return to the use of “Husband” and “Wife” would be less confusing though provision would also have to be made for civil partners.

Part 2 – Matrimonial and Civil Partnership Proceedings

Q8. Yes. Although respondents can, theoretically, present a free standing petition, rather than a cross petition, this is rarely done and it is sensible to abolish it

as proposed. As the time to submit the cross application is 21 days after the time of acknowledging service this makes a total of over 28 days and would normally be quite adequate.

Q9. Yes. In practice, there is rarely a genuine reason why the co-respondent needs to be named. A bona fide reason for doing so is to seek to recover the costs of the petition from the co-respondent although, in practise, this is very rare.

Q10. Yes. The rules should prohibit co-respondents being named in the petition unless there is a good reason for doing so. For example, if the petition is defended or there is a cross-petition the person will then need to be named. Whilst this might require a second round of pleadings in defended cases this would happen only rarely and would probably result in a further disincentive for the respondent to defend.

A particular problem with the rules, as they currently operate, is that they force solicitors to advise clients to give false evidence to the court, which is undesirable from the perspective of public policy. This is because the client will often know who the co-respondent is but solicitors persuade them that they should put in the petition that they do not know the name to avoid having to serve the co-respondent. Subsequently, affidavits are sworn to confirm the truth of the petition and clients swear then that they do not know the name of the co-respondent when they clearly do. It would be far better if the rules can be amended to avoid this situation.

Q11. Yes. It would be unacceptable if a person could be named as having committed adultery within divorce proceedings, and a finding made on that allegation, without that person being told of it and having an opportunity to respond. Hence it is far better for the person not to be named at all.

Q12. Yes. The Council agrees that the current regime where all nullity cases require a formal hearing in open court with oral evidence requires reform. We note:

- the evidence in such cases is often of an intimate or distressing nature
- it is rare for such applications to be refused
- hearings involve significant costs to the public purse or to the private individual
- such cases often involve members of BME communities where divorce is not a realistic alternative
- these cases consume the time of the overloaded County Court Judge - time which can be better occupied

The Council agrees that in uncontested cases a modified from of “special procedure” is appropriate. Clearly it will be necessary for the court to be alert to potential abuses of the procedure. Immigration fraud is a particular concern. However, District Judges are already accustomed to the careful assessment of the merits of granting a decree of divorce under the special procedure in such cases. If there is genuine doubt, the case can then be referred for an oral hearing

Q13. From the practitioner’s point of view in filling in the document, it is relatively straight forward and does not cause great difficulty and does have the merit of focusing the client’s mind to the questions raised. The only question that often causes difficulty is the one about the financial provision for the children when things are still often very uncertain at that time. The other difficulty is what the status of the answers relating to the current contact arrangements are. Clients, and in particular unrepresented parties, are often confused as to whether what has been said is in fact binding. On the other hand, filling in the form sometimes concentrates the parties minds on questions such as who is looking after the child at various parts of the day and what the contact arrangements should be – like a mini parenting plan. Also, solicitors rarely encounter much resistance from their clients in completing the form.

The Council accepts, therefore, that there is scope to shorten the Statement of Arrangements, but feels that the proposal in paragraph 34 of the paper would seek to shorten the document too much.

Q14. Probably, a separate document.

Q15. The simplest solution would probably be to have one petition but with a page that does not need to be answered where there are no children.

Q16, Yes. Sometimes, the first names are not sufficient.

Q17. Yes. The solicitor drawing these documents up you cannot swear them himself and can spend a disproportionate time having to arrange for clients to see other solicitors, ensure they can get an appointment and have the correct change for the fee. Alternatively, clients can go all the way down to the court office to sign. When taking a swear, there is the embarrassment of trying to establish what religion the person is and whether they want to swear and, if so, how, or whether, they want to affirm. Against that, the Council doubts that the procedure deters a person who is intending to give false evidence. The procedure is not effective and should be abolished.

Q18. Yes. It seems sensible and as we are talking about merely a signature as a statement of truth rather than a swearing it would not add too much work and does result in ensuring the client sees the petition/application before it is finally issued.

Q19. Yes.

Q20. If finances are to be included in this then, as well as the Form E which is an affidavit and therefore will presumably become a statement of truth, there is the Reply to the Questionnaire that often follows the first appointment and can contain important evidential points that could probably benefit from being signed with a statement of truth.

Q21. Yes.

Q22. Yes.

Part 3 – Financial Proceedings

Q23. Yes. The Council's Money and Property Sub-Committee has had notice of this reform has already submitted its views to the FPRC. The Council agrees that Form E, amended as may be necessary for each type of application, First Appointment and, especially, FDRs should be common to all forms of family financial hearings.

Q24. See above

Q25. See above

Q26. Yes.

Q27. Yes.

Q28. Yes

Financial Proceedings in the Magistrates' Courts

Q29. Yes, because the Council considers that rules should be harmonised between different levels of court as far as possible. However, the Council does not consider that the Form E requires further modification given the recent amendments made. The current Form ensures full disclosure.

Making an application for a financial order

Q30. No. The Council consider that the present method is fair and should not be changed because it is protective. The application is only activated when a Form A

is issued. The Respondent should be given the same opportunity to make their application for ancillary relief (financial order) in the Acknowledgment of Service (Response) – again only to be activated when a Form A is issued.

Q31. No see above.

Part 4 – Children's Proceedings

Q32. The Council considers that the proposed changes to Children's proceedings are generally sensible and welcomes them. However, it is important not to complicate private law proceedings unnecessarily. Thus, as proposed, the case management tools should be an option but it is important that they are chosen in relevant cases and not taken as a starting point.

Q33. The Council has been made aware of some confusion amongst practitioners about the Private Law Programme - whether it is operating, in what way and where. The Council has received feedback which suggests that the Programme is being implemented unevenly across the country and that the debate as to whether it should be enshrined in a practice direction should be revisited.

Q34. It would be useful to have dedicated forms for public law, not only care and supervision, but also contact with a child in care and discharge of care order.

Q35. Yes. The Council is concerned about the lack of information available in respect of the ethnicity of parents and children in family proceedings and would urge HMCS to take steps to address this issue.

In the Council's view the collation of statistics on ethnicity is essential in a number of areas including research, appropriate allocation of resources and any effective assessment of the family justice system's ability to meet the needs of children and families from different ethnic backgrounds. It is our understanding that each public

body is responsible for ethnic monitoring to ensure it meets the needs of the communities it serves.

It is not possible, at present, to identify the ethnic group of a child or parents from *FamilyMan*, the data system used for tracking public law files in courts, as it does not contain any data field for ethnicity and so there is no way of identifying cases by ethnicity.

The Council suggests that this problem could be solved in a relatively quick and cost-effective way. The C1 and C2 application forms could be amended to include a question as to ethnicity of the child and his or her parents, in the same tick-box format as that which is used on the national census forms.

PART 5 - FAMILY PROCEEDINGS IN MAGISTRATES' COURTS

Q36. Yes. There is a need to align the rules across the different levels of courts so as to prevent unnecessary transfers, due to differences in the availability of powers, and to assist in the broader drive towards a single family court.

Written Reasons

Q37. The Council is unclear as to the purpose behind the proposal in Para 85. No-one would suggest that magistrates should not discuss and agree their reasoning before making an order. What takes the time is getting this document into perfect order before announcing the decision. If the proposal is to enable the Bench to announce their order and an outline of their reasons, with the full document to follow, then that would assist in preventing delay on the day for the parties involved.

These issues were fully debated and consulted on informally by members of the working party chaired by HHJ Donald Cryan. The Council suggests reference to the conclusions of the "Report of the Working Party to Consider Delay in Family Proceedings Courts under the Children Act 1989".

Q38. It would be sensible for the powers outlined in Paras. 73 – 85 of the consultation paper to apply to FPCs.

In relation to Para 82, Power to Grant Interim Injunctions, the FPC does have power under the Family Law Act 1996 to grant non-molestation and occupation orders. There have been instances where cases have had to be transferred in order to invoke the power of the court to grant injunctive relief. In line with the thrust of the proposed amendments, to create "a level playing field" – in terms of powers available to the judiciary at all tiers, the Council would support this power being given to FPCs.

In view of the transparency debate and the need for an agreed set of findings and reasons at all tiers, consideration should be given to aligning the need for "judgments" and reasons in all courts. The Council would prefer to see the rest of the system coming into line with the practice of the Magistrates' Courts and would refer to paragraphs 26 to 33 in its response to the DCA consultation paper on transparency on the importance of transcripts of judgments being made available in family proceedings:

www.family-justicecouncil.org.uk/docs/Further_revised_response_to_transparency.pdf

Other Areas of Alignment

Q39 & Q40. In the answer to these questions the Council would make the following points:

i) the Council is currently considering its response to the consultation on the separate representation of children and would welcome the ability to join a child in proceedings, similar to R9.5, and to allow a child to initiate proceedings at FPC level.

ii) the inability to appoint the Official Solicitor at FPC level means that cases involving parents with mental health problems are often transferred for no other reason, or transferred at a late stage if the mental health of a party deteriorates.

iii) enforcement powers – in terms of breaches of non-molestation orders – need to be aligned.

iv) all Practice Directions, e.g. those relating to bundles should apply at FPC level (see again the Cryan Report).

PART 6 - APPEALS

Q41, 42 & 43

This has been discussed over many years, since the Bowman Review published in 1997. A note on Routes of Appeal from FPCs and the Magistrates' Courts is attached at Annex 1.

The Council would endorse the findings of the Family Appeals Review Group in its report of July 1998 and the Family Procedure Rule Committee in its report of July 2005.

The latter makes it clear, at paragraph 4.3, that much will be dependent upon the allocation of first instance hearings. It would be helpful to know if there are any current plans to look at allocation.

Paragrah 4.4 of the Report of the FPRC also requests that the Lord Chancellor should re-visit S.56 AJA 1999 if the flexibility needed to allocate an appeal to an appropriate tribunal is prohibited by that section.

It would be helpful to know if this is being taken forward as appeals from FPCs can vary from a simple financial variation to a complex public law case.

As the 2005 Report makes clear, there are pros and cons as set out at paragraphs 5.3 to 5.11. The choice seems to be:-

i) all appeals to the County Court, or
ii) appeals under the Children Act 1989 (and I would add the ACA 2002) go to the High Court and all other appeals to the County Court.

The Council would prefer the latter option but can see the rationale behind the option 1.

The Council agrees with the proposal for a simple and single form of appeal notice, to be prescribed, to initiate all appeals from FPCs.

Family Justice Council

December 2006

Annex 1

FAMILY APPEALS REVIEW GROUP

NOTE BY ELAINE LAKEN

Routes of Appeal from Family Proceedings / Magistrates' Courts

1 Children Act 1989

i) Section 94 states that, subject to any provision to the contrary, appeals lie *to the High Court* against making / refusal to make an order.

ii) (NB: This does not apply to Sch 1 orders interim orders for pps.)

iii) A Practice Direction regulates these appeals (1992 1 AER 864) and (also see 1992 2 FLR 503 *Children Act 1989 – Appeals).*

iv) There is no power to stay an order pending appeal but application can be made to the High Court for such.

v) EPOs – Re. P 1996 1 FLR 482 drew attention to the problem if an FPC refuses to extend.

vi) Appeal against an application to vary a financial order under the repealed Guardianship of Minors Act 1971 is to be by way of notice of motion and not under S.94 (*B v B 1995 1 FLR 459*).

vii) With secure accommodation order, the District Registry is to be informed immediately of an appeal to ensure a hearing before a HC Judge as soon as possible. R v Oxford CC 1992 Fam 150.

2 i) Adoption Act 1976

S.63 provides where the court makes / refuses an order, an appeal lies to the High Court. To be heard and determined by a Divisional Court of the Family Division (Order 90 & 9 Rules of the Supreme

Court). Procedure set out in *Practice Direction 1973 1 AER 64* as modified by PD (Divisional Court: Appeal) 1977 2 AER 543.

ii) **Adoption & Children Act 2002**

S.94 Children Act 1989 applies and appeals lie to the High Court but procedurally Part 19 of the Family Procedure (Adoption) Rules 2005 apply.

3 Domestic Proceedings & Magistrates' Courts Act 1978

S.29 of the Act provides that where a Magistrates' Court makes or refuses to make, varies or refuses to vary, revokes or refuses to revoke an order (other than an interim maintenance order) under Part 1 of the Act, an appeal lies to the High Court. Notice of motion is made (FPR r 8.2 Practice Direction 1977 2 AER 543) lodged in the Principal Registry. The determination of the appeal is by the Divisional Court of the Family Division.

4 Part IV Family Law Act 1996

Section 61 provides for appeal to the High Court. Notice of motion as above but notice is lodged in the registry nearest to the Magistrates' Court from which the appeal is brought.

5 Child Support Act 1991

The Child Support Appeals (Jurisdiction of Courts) Order 1993 provides that appeals under S.20 (decision of child support officer in relation to parentage) are to be made to the courts, initially a Magistrates' Court (FPC). However, if an FPC makes a declaration of parentage under S.27, there is no right of appeal. See T v CSA 1997 4 AER 27 which suggests the Lord Chancellor should make Rules under S.45 (1) (b). Also in this case it was held that the High Court can, in the absence of any other available relief, make a declaration under RSC Ord 15 r 16.

6 Section 63 Magistrates' Courts Act 1980

Breach of orders, other than for payment of money ('contempt' of orders) – power to commit to prison for up to two months / fine). Appeals lie to the Divisional Court of the High Court – see Section 13 of the Administration of Justice Act 1960 and Ord 109 r 2 of the Rules of the Supreme Court 1965.

7 S.95 MCA 1980 – Remission of Arrears

There is no specific provision for any appeal to the High Court against an order to remit or refusal to remit arrears. Therefore, the decision can only be challenged by case stated on the ground of error of law or excess of jurisdiction (procedure in accordance with S.111 MCA 1980). *See Berry v Berry [1987 Fam 1].*

8 High Court / County Court Maintenance Orders Registered in Magistrates' Courts

Where the court varies or refuses to vary such an order then S.4(7) Maintenance Orders Act 1958 provides that appeal shall lie to the High Court. R 7.8 FPR provides the appeal is determined by a Division Court of the Family Division.

9 REMO (Reciprocal Enforcement of Maintenance Orders)

A right of appeal is usually included in the relevant legislation, e.g. the Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1993 provides (in Schedule 3, Para. 12) that where a registering court makes / refuses to make an order varying a registered order, the payer or payee shall have the like right of appeal (if any) as he would have if the order had been made by the registering court.

10 Transfer

Article 9 of the Children (Allocation of Proceedings) Order '91 provides for a party who has requested transfer (public and private law proceedings under the Children Act) to apply to the local care centre. NB: Although *Article 8* states transfer can be of *Adoption Act* and Children Act proceedings there appears to be no right to apply for transfer up if the FPC refuses to transfer *adoption.*

Article 11 allows the County Court to transfer down both public and private law proceedings. An appeal can be made against that decision to High Court or Circuit Judge. See Children (Allocation of Proceedings)(Appeals) Order 1991.

11 Other Legislation Commonly Used in FPCs

i) Family Law Act 1986 – Applications under S.33 r 34.

ii) Blood Test Directions – Directions given in accordance with Section 20 Family Law Reform Act 1969.*

iii) The Human Fertilisation & Embryology Act – Gives no right of appeal (other than judicial review / case stated if appropriate).

* Now "Scientific Tests".

12 Declarations of Parentage

S.60 Family law Act 1986

An appeal lies to the High Court against:-

a) the making by a Magistrates' Court of a declaration under S.55A.

b) any refusal by a Magistrates' Court to make such a declaration, or

c) any order made under S.55A(6) [order that cannot apply again without leave].