**Response from Editors to the Children’s Hearing (Scotland) Act 2010 and the Scottish Child Law Centre**

**Consultation Questions: Act of Sederunt (Child Care and Maintenance Rules) (Amendment)(Children’s Hearings (Scotland) Act 2011) 2012**

1. **In your opinion, is rule 3.3A(4) correctly framed?**

Sections 103 and 112 of the 2011 Act provide that a child must attend a hearing. Although the 2011 Act is silent on whether a child must attend all hearings, section 27 of the 1995 Act suggests that it may be necessary for a child to attend other hearings. Rule 3.3A(4) sets out the requirement that a child must attend all court hearings unless dispensed with, and if a child does not attend the sheriff may grant a warrant to secure the attendance of the child.

**Yes x**

Please give reasons for your answer

As pointed out in the first sentence of this question the Act provides that a child must attend a hearing. We think s 3.3A accurately reflects this. We do not however understand the second sentence of the question because (a) the Act is not silent on this point and (b) s 27 of the 1995 Act deals with ‘Day care for pre-school and other children.’

1. **Should there be further provision for the role of a curator *ad litem* in applications under the 2011 Act?**

**No x**

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| Please give reasons for your answer:  While there are specialities surrounding the rôle of the curator *ad litem* in the Hearings System – for example the rule in ordinary civil business that the curator *ad litem* is *dominus litis* (see *Macphail on Sheriff Court Practice*, 3rd edn para 4.25) does not sit well with the System – and it must be recalled that the safeguarder has the powers and duties of a curator *ad litem* – we nevertheless think that the concept is reasonably well understood in practice and believe that attempting to legislate would risk creating more problems than it solved and that the courts can be relied upon satisfactorily to resolve any problems. We will however later suggest that where intimations to parties are to be made that the curator *ad litem* should be included. |

**3. In your opinion, is rule 3.5A correctly framed?**

The presumption is in favour of confidentiality, rather than matters being kept confidential only on the application of a party. The terms of the new rule are in keeping with rule 2.47. However, rule 2.47 refers only to curators and reporting officers, as such, provision has been made under Rule 3.5A (2) to extend the application of this provision to safeguarders.

**Yes x**

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| Please give reasons for your answer  We can see no logic in not extending this rule to safeguarders. We think that in practice safeguarders already regard themselves as bound by confidentiality. We believe that extending this rule to safeguarders would re-enforce .this perception and are therefore in favour of extending the application of this provision to safeguarders. |

**4. Are you of the view that procedures for appointing a safeguarder as set out in Rule 3.7 are sufficient?**

Rule 3.7 is drafted in these terms as section 31 of the 2011 Act sets out in detail the appointment procedures to be adopted. Under this act, a sheriff can only of his/her own accord appoint a safeguarder where the children’s hearing has not already appointed one (section 31((1)(a)); and all safeguarders will now be appointed only from the list maintained under section 31 of the 2011 Act.

**No No**

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| Please give reasons for your answer  We think the rule is fine as far as it goes, but we consider that the standard of excellence amongst safeguarders is very varied and that this should be addressed by introducing training. We therefore recommend   * The recognised trainers should be asked to set up an approved course and a rule should be enacted providing that after a certain date (fixed with regard to the practicalities of organizing this) only a person who has successfully completed this course should be eligible for appointment or re-appointment as safeguarder. * A rule should be enacted requiring safeguarders to attend Continuing Professional Development courses as a condition of remaining in office. * There should be provision for the mentoring of safeguarders and the monitoring of their reports. The mode of identifying the suitably qualified persons to be mentors\monitors could perhaps be addressed in the Bill, to be introduced later this year, implementing the proposals of the Civil Courts Review. These matters are mentioned in paragraphs 100 to 112 of the Report of that Review. |

1. **Are you of the view that the terms of Rule 3.8 of the Act of Sederunt (Child Care and Maintenance Rules) 1997 remain appropriate? If not, please provide details as to how this rule should be amended.**

**No**

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| Please give reasons for your answer  Considering that the safeguarder is obliged to make enquiries under r 3.8(d) we consider that the court should, whether the safeguarder intends to become a party or not, be informed of the results of these enquiries and of the safeguarder’s conclusions as to the welfare of the child. If this is not done there is a risk that relevant information will not reach the decision maker – and experience tells that this can be dangerous. In order that there be a permanent record, this report should be in writing. We would therefore recommend:   * an amendment of r 3.8(d) by inserting after ‘appropriate’ the words ‘with a view to assessing where the best interests of the child lie and transmit to the sheriff a report thereon.’ and * a new provision as follows: ‘Reports to the sheriff under paragraphs (c) and (d) hereof must, unless the safeguarder can show that exceptional circumstances make this impracticable, be made in written form’. |

**6. Should Rule 3.22 which sets out the provisions for applications for evidence of submissions by live link, also be applicable to proceedings under the 1995 Act?**

This question specifically refers to a situation where a witness may require to give evidence at an Exclusion Order hearing under the 1995 Act.

**Yes**

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**BUT SEE BELOW**

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| Please give reasons for your answer   * We can see no reason why the live link provisions should not be applicable to pending proceedings under the 1995 Act. * We note that it is proposed that live link procedure should be available for a ‘submission’, which is defined in paragraph (2) in terms of oral submissions made to the court by a party or a party’s representative. The purpose of employing the live link is to provide children and other vulnerable persons with protection from confrontation with a person who might intimidate them. In most cases submissions are made by solicitors, counsel or providers of advocacy services and we have no impression these require or desire such protection and we believe that the court would not welcome any move towards introducing submissions by live link by solicitors, counsel or providers of advocacy services. We acknowledge that a party acting for herself or himself, or a lay person, other than a person providing advocacy services, might desire such protection. We would therefore suggest (i) that paragraph (1)(b) be changed so as to read: ‘a submission is to be made by any party or party’s lay representative other than a provider of advocacy services ’; and (ii) that the definition of ‘submission’ in paragraph (2) be changed by insertion of the words ‘other than a solicitor, advocate or provider of advocacy services’ after the word ‘representative’ in line 2. * We further suggest that there should be clarification of what is intended by ‘child’ in this rule. |

**7(a) Should rule 3.64D (which applies to referrals and reviews but not appeals) be made subject to rule 3.77 (the rule for vulnerable witnesses, which applies to referrals, reviews and appeals?**

**Yes BUT SEE BELOW**

X

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| Please give reasons for your answer   * We agree that rule 3.64D should be subject to rules 3.77,but only on sufficient cause shown. * As to whether rule 3.64D should be extended to appeals we would answer ‘NO’ since there is no scope for leading evidence in the course of appeals against a sheriff’s determination. And we recommend that the words ‘or an appeal [under Part 15] of rhe 2011 Act’ be deleted from the amending rule. |

**7(b) Is there any requirement to further align those rules?.**

**Yes**

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| Please give reasons for your answer  See answer to 7(a) above. |

**7(c) If so is 7(c) If so is a prescribed form required?**

**Yes No**

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| Please give reasons for your answer  See answer to 7(a) above. |

**8. Where an application is made to the sheriff by virtue of section 94 as the child is unable to understand the grounds and where section 106(1)(b) applies, it is suggested that a fast track procedure should be adopted where each relevant person accepts the grounds at a hearing before the sheriff before the determination. The effect of section 106(1)(b) therefore is that there has to be a preliminary hearing. Section 106(4) provides that in certain circumstances, a sheriff may determine the application without a hearing (on the evidence) but this has to be done before the expiry of the period of 7 days beginning with the day on which the application is made. Rule 3.45 sets out the fast track procedures which may operate within the first seven days of the application being lodged. The Sheriff Court Rules Council would welcome views on the practical implications of the application of Rule 3.45.**

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| Please provide your comments  **Preamble**  We think the provisions in subsection (4) of section 106, are, so far as we can understand them, unworkable. In section 106 refers to an ‘Application’ it appears to refer to the application to the sheriff for proof where an explanation of the grounds for referral would not be understood by, or have not been understood by, the child. However subsection (2) enacts ‘The sheriff may determine the application without a hearing unless …. ‘. This contrast with section 105 (the situation where the grounds which were formerly not accepted but are now accepted) which enacts that the sheriff must ‘dispense with hearing such evidence’. Does ‘without a hearing’ in s 106(4) mean ‘without a hearing of evidence’? If so, why does it not say so? Why change the terminology from s 105? But if it does not mean ‘without a hearing of evidence’, what else could it mean? This seems to be the meaning pre-supposed by 3.45(4). We are satisfied from our experience that it is not practicable for children and families (who are generally the relevant persons) to contact a solicitor or other adviser within seven days of the Application to the sheriff being made, yet subsection (4) has the consequence that if the determination to dispense with the hearing of evidence is not made within this period then it cannot be made at all. We cannot think this was the intention of Parliament and it may be that the courts would find a way of interpreting this section along these lines. However we would suggest that urgent action be taken to amend s 106 as follows:   * by deleting ‘without a hearing’ in subsection (2) and paragraphs (a) and (b) thereof and substituting therefor ‘without hearing evidence’; * by deleting subsection (4).   The following comments are made on the basis that s 106 can be interpreted as above.  **Sub-paragraph (3):**  The idea of a procedural hearing is in principle a good one. At present, in a large jurisdiction such as Glasgow, ten or so proofs are set down but very few proceed on the day because proper instructions have not been obtained and a fresh diet has to be fixed – ie the proof hearing becomes a procedural hearing in all but name, but since it is a proof hearing there are numerous witnesses in attendance whose time is wasted. However this sub-paragraph refers only to cases under s 94(2)(a) (the grounds have not been understood). Procedural hearings will be helpful in such cases but there is no logic in not providing for procedural hearings in s 93(2)(a) cases (the grounds not accepted), since it often happens that parents and children have not seen the solicitor (or curator *ad litem*) until the morning of the proof hearing and the true stance of the parties has not been explored. The result is the fixing of a further proof diet which may well be told that the case has settled, but again witnesses may have been cited and may suffer a further wasted day. Consequently we agree that procedural hearings should be introduced but recommend that they be introduced in s 93(2)(a) cases also.  **Sub-paragraph (4):**   1. ‘The sheriff may’: We think, for the reasons stated above,’ that fixing a procedural hearing should be the norm and would recommend ‘The sheriff, unless she or he finds good cause to fix a proof hearing immediately, must …’. 2. ‘ … each relevant person’: This seems to be a mistake. Section 94(1) (and s 93(2)(a)) make it clear that the child and relevant persons are the people who have not understood (or have not accepted) the grounds. We recommend ‘the child and each relevant person’.   **Sub-paragraph (5):**  We think 7 days is far too short a timescale since in our experience a solicitor will not be able to be contacted and instructed within this time. Consequently we recommend ‘18 days’, with an express provision entitling the sheriff, on sufficient cause shown, to fix a continued procedural hearing, perhaps subject to a time limit.  **Sub-paragraph (7)(a)**  For the reasons given above under Sub-paragraph (4)(ii) we think this should be:‘the child or a relevant person’.  **THERE IS NO ‘(7)(b)’**  **Sub-paragraph (7)(c)**  We don’t see the logic of this. The thrust of s 106(2) is to allow the sheriff to proceed without hearing evidence, which is what this provision appears to rule out.  We further recommend:  **[1]** In Rule 3.45, insert after paragraph (4):  (5) At a procedural hearing under paragraph (4) hereof parties may address the court on such preliminary matters as seem appropriate to parties and to the court and must, without prejudice to the generality, estimate the duration of the proof hearing and the court, in order to promote the expeditious progress of the application, must make an order fixing the duration of the proof hearing, which order may, in the course of the proof hearing, be varied on sufficient cause shown by one or more of the parties, or *ex proprio motu*. Agreement of all parties shall not of itself constitute sufficient cause.  (6) The holding or not by the court of a procedural hearing under this rule shall not debar the court from fixing a further procedural hearing or a pre-proof hearing in order to deal with any matter related to the promoting the expeditious progress of the application and making such orders at such hearing(s) as will tend to effect this.  [2] In Rule 3.47 (Hearing of evidence) insert as (2): ‘The hearing of evidence shall proceed from day to day until it is concluded, except where the sheriff, on sufficient cause shown by one or more of the parties in at a procedural hearing or in the course of the proof hearing, or *ex proprio motu*, otherwise directs. Agreement of all parties shall not of itself constitute sufficient cause.’  Reasons:   * It is notorious that hearings cases, like family cases in the sheriff court, are sometimes unnecessarily protracted and spread over long periods with lengthy intervening gaps. There have been strong comments deploring this in the Supreme Court (*NJDB v JEG and Anr* [2012] UKSC 21 at para 36) and the Inner House (*B v Authority Reporter for Edinburgh* 2011 SLT 1194 at para 21). This is sometimes caused by parties’ agents/counsel committing themselves to other business and sometimes owing to the exigencies of court managers. Provisions enabling the court make orders as suggested above would address this issue while still giving the court the power to vary these orders when necessary. * The proposed provision for the proof to proceed from day to day until it is concluded is based on s 91 of the Criminal Procedure (Scotland) Act 1995 which makes such a provision in relation to criminal jury trials. Section 91 presents difficulties in the management of jury trials but in practice these difficulties are overcome. The issues in many children's hearings proof hearings are just as important as many jury trials – sometimes more so. The provision empowering the sheriff to waive the rule for sufficient reason would act as a safety net. * Rule 4(1) of the 2009 Adoption Rules (SI 2009/284) provides that the sheriff may ‘make such order as he thinks fit for the expeditious progress of an application’. This provides some precedent for our proposed rule allowing the court to make an order at a procedural hearing fixing the duration of the proof. Once again the power vested in the court to vary such order on sufficient cause shown would act as a safety net. |

**9. When an application for a Stated Case is lodged under Part 15 of the 2011 Act should the lodging of the appeal be intimated to the child and/or the relevant person representative?**

**Rule 3.59 as currently drafted does not require the lodging of an appeal to be intimated on the representatives of the child or relevant person**. **Do you agree with the terms of this rule?**

**Yes**

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| Please give reasons for your answer  As we read r 3.59, as proposed to be amended, it does, in para (2) (b) and (c), require the intimation of the lodging of the appeal to ‘the appellant) except where service on the child has been dispensed with in terms of rule 3.3, and on the ‘relevant person (if not the appellant). We therefore ‘agree with the terms of this rule*’*, subject to, as noted in our observations under Question 13, our recommendation that ‘any curator *ad litem*’ should be added to the list of persons to be intimated to. |

1. **Are any rules required in respect of leave to appeal in frivolous and**

**vexatious appeals under section 159 of the 2011 Act?**

**No**

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| Please give reasons for your answer  The categories of what is frivolous and vexatious are many and various. We think that attempting to create a prescribed list would run the risk of providing scope for unnecessary technical arguments. We think this provision will be used comparatively sparingly and that the judiciary will employ it sensibly. |

**11. Should there be provision in the rules for an application to be made to the court which has jurisdiction over the child? What in your view would be the advantage and disadvantage of such a provision?**

**Yes**

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| Please give reasons for your answer  We think the principal issue here is the provision in s 102(2) of the Act that in an ‘alleged offence by the child case’ the application for a proof hearing must be made to the sheriff having jurisdiction to try the case in a criminal prosecution. There are arguments on both sides. This provision tends to be suitable for witnesses, who will generally live near the locus of the offence. It does not suit the child and family, who may live far away from that locus, eg where the alleged offence took place in a place far away from the family home. There is a general principle that jurisdiction should follow the child – see the observations of the Sheriff Principal in *Principal Reporter v Glasow* *City Council* 2011 FamLR 118. However in some cases, eg where there are many ‘local’ witnesses, the convenience of these witnesses (who might be children) perhaps ought to prevail. We would suggest that a solution would be for the application to be made in the first instance to the sheriff having jurisdiction over the child’s place of residence, with provision for power to that sheriff to transfer the case on the motion of the Reporter or other party where the balance of convenience so indicated. Having regard however to the .clear terms of s 102(2) of the Act, we wonder whether the provisions of s 195 in relation to the competence of subordinate legislation are strong enough to allow a provision of this sort in these Rules. |

**12. Should there be provision in the rules for the transfer of cases**

**from one sheriff court to another, on cause shown, and should any**

**criteria be specified for such a transfer?**

**Yes**

Xx

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| Please give reasons for your answer  See discussion under Question 11 above. We think there are obvious advantages in giving sheriffs a discretion to transfer cases. In *Sloan, Petitioner* 1991 SLT 527 the First Division required to employ the *nobile* *officium* to allow some evidence to be heard in Inverness in a case where the original jurisdiction was Kirkwall. At p 529L the Court commented that it had resort to the *nobile officium* because the then current Rules did not allow for this. A rule along the lines proposed would remedy this. However, as mentioned above in our discussion of Question 11, it may be that in cases involving an alleged offence by the child such a provision would not be competent within subordinate legislation, standing the mandatory wording of s 102(2), However this would not prevent a rule being enacted to allow transfer in all cases except those governed by s 102(2).  We do not think criteria need be specified. The well-known principles of *forum non conveniens* will be able to be applied. |

**13. Please provide any further comments on the proposed rules, referring to the numbered rule where appropriate in your comments.**

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| Please provide your comments  See separate sheets. |