RESPONSE

OF THE FACULTY OF ADVOCATES

to the Review of Sheriff Appeal Court Rules proposed by the Scottish Civil Justice Council

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1. The Faculty of Advocates welcomes the opportunity to comment upon the proposed changes to the Sheriff Appeal Court Rules. In particular, the Faculty supports the policy rationale which underlies the main proposals with the result that many of the comments within this response are on matters of detail rather than significant disagreements on the approach.

Terminology

2. The Faculty accepts that the current terminology of "standard appeal procedure" and "accelerated appeal procedure" may be apt to mislead. The proposal to adopt the descriptions of "procedure before one appeal sheriff" and "procedure before three appeal sheriffs" is an improvement although the wording is ungainly and, as noted in the outline, will not reflect what happens in practice on all occasions. One alternative option would be to adopt the language of chapter 6A appeals and chapter 7 appeals. While such wording is not as descriptive of the appeal process, it has the merit of simplicity. We suspect that the profession would readily understand and embrace this terminology.

Determining the Appeal Procedure to be adopted

3. The draft provisions whereby the parties to the appeal are to inform the court of their views on the appropriate mode of appeal could be clarified. One minor observation is that the order of options should be consistent. So, for example, draft rule 6.2(2)(e) which applies to the appellant refers to procedure before three appeal sheriffs and then to procedure before one appeal sheriff. Draft rule 6.5(5)(a), which relates to the respondent, reverses that order by referring to procedure before one appeal sheriff and then to procedure before three appeal sheriffs. We also consider

that the wording of draft rule 6.5(5)(a) could be simplified since some respondents may not be natural persons. Rather than referring to "his or her view" or "he and she", we would suggest that the wording should require the respondent or other interested party to state whether the appeal should proceed before one appeal sheriff or three appeal sheriffs and the reasons on which that proposal is based.

4. In terms of the types of appeal which are presumed to be heard by a single appeal sheriff (see draft rule 6.6(4)), the Faculty considers that appeals on issues of expenses alone should be included in that list.

5. Draft Rule 6A.6 enables an appeal allocated to the single appeal sheriff procedure to be removed from that procedure and to proceed instead under the three appeal sheriffs procedure. An application for such a transfer may be made by one of the parties. The rule as currently drafted does not contain any test which the party must satisfy to alter the previous decision that the appeal should be heard under chapter 6A. In principle, it appears to the Faculty that some hurdle should be overcome since the procedural sheriff has already heard parties as to the appropriate procedure and has taken a decision that chapter 6A is appropriate. One option might be to require the party applying to demonstrate cause or special cause. Alternatively, the party might be required to make the application on the basis of facts which were not before the procedural sheriff when the original determination was made.

6. In terms of the wording of draft rule 6A.6, the concluding words of 6A.6(1) demonstrate how ungainly the wording becomes using the proposed terminology. The third reference to "appeal" in those concluding words should, we think, refer to "procedure".

7. We also consider that the cross reference in draft rule 6A.(6)(3) should be to rule 6.6 rather than 6.6(3). In that regard, we note that some draft rules (such as 6.5(5)(d) and 6.5C(4)(c)) refer to rule 6.6 whereas other draft rules make the cross-reference to rule 6.6(3) (see rule 6.2(2)(e) and 6A.6(3)). We prefer the cross reference to be to rule 6.6 but the main point is to have a consistent cross reference.

8. The points made in paragraphs 5-7 above apply equally to the new draft rule 7.18 which deals with an appeal under chapter 7 being transferred to chapter 6A.

<u>Timescales for the Lodging of Answers & Cross Appeals</u>

9. The Faculty agrees that 14 days should be sufficient in most cases for the respondent to lodge Answers and any grounds for a cross appeal. However, some further thought might be given to the wording of the proposed rules.

a. The new draft rule 6.5(2A) is arguably unnecessary. The current rule 6.5(2)(a) gives the appellant the right to apply to alter the time periods for intimation and lodging of answers (and now also for grounds of the cross appeal).

b. It would appear that the respondent must lodge grounds of cross appeal within the 14 day period after intimation (or such other period as set by the court). Potentially, the 14 day period could have been shortened on an application of the appellant under 6.5(2) before the respondent has entered the appeal process. We consider that some provision should be included in the rules to allow the respondent, on cause shown, to lodge grounds of cross appeal after the expiry of that period.

c. The concluding words of rule 6.5A(1) omit the word "under" from between "order" and "rule 6.5(2)". However, we also consider that the reference to rule 6.5(2) could be omitted since the order for intimation is under rule 6.5(1) alone whether or not the time period has been altered under the power contained in rule 6.5(2).

Urgent Disposal of Appeals

10. The Faculty wishes to strongly endorse the inclusion of adoption and permanence orders in the list of appeals in which urgent disposal is mandatory. This recognition of the need for the swift disposal of appeals concerned with the arrangements for the care of children is welcomed. As a matter of drafting, the references in draft rules 6.5B(6)(b) and (c) to "adoption" and "permanence" are insufficient as these are not defined terms. Reference would need to be made to sections 28 & 80 of the Adoption and Children (Scotland) Act 2007.

Competency of Appeals

11. The proposal to allow the clerk to make a reference to the procedural sheriff on an issue of competency appears to the Faculty to be a sensible addition to the rules.

Periods for Lodging Notes of Argument and Appendices under chapter 7

12. In general, the Faculty agrees with the proposed changes to the timescales. However, the Faculty does question the timescale for the intimation of estimates of duration for the appeal under rule 7.13. The draft rules require estimates 14 days before the procedural hearing. In many cases that period will be fine. However, accurate estimates must be the aim of the rule and these cannot be made until the

notes of arguments and appendix (if there is one) have been lodged. As the period for notes of argument will now be determined by the timetable (see rule 7.12) it will be important to ensure that these will have been exchanged well in advance of the date by which the estimate of duration is required.

13. The Faculty considers that the draft rule 7.14A (and by implication rule 6A.4) might helpfully be tightened up. There should be a single joint bundle of authorities which includes an index. The Faculty also favours a clear timetable for lodging the authorities (subject to power to alter) such as that the joint bundle is to be lodged not later than 7 days before the appeal hearing unless the procedural Appeal Sheriff directs otherwise.

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