

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

FAMILY LAW COMMITTEE

MONDAY 23 OCTOBER 2017 AT 10 AM

JUDGES' CONFERENCE ROOM, PARLIAMENT HOUSE, EDINBURGH

MINUTES

- Members Present:** Lord Brailsford (Chair)
Catriona Whyte (Scottish Legal Aid Board representative)
Simon Stockwell (Scottish Government representative)
Sheriff Principal Lewis
Lynda Brabender (Advocate, SCJC member)
Stephen Brand (Solicitor)
Rachael Kelsey (Solicitor)
Ian Maxwell (SCJC member)
Fiona Jones (Clan Childlaw)
Professor Frances Wasoff
- In attendance:** David Smith (Legislation Implementation Team, Scottish Courts and Tribunals Service)
Yvonne Anderson (Depute in Charge of Offices of the Court of Session)
- Support:** Karen Stewart (Business & Policy Manager, Scottish Civil Justice Council)
Inez Manson (Deputy Legal Secretary, Lord President's Private Office)
Ian Vickerstaff (Deputy Legal Secretary, Rules Rewrite Drafting Team)
John Thomson (Deputy Legal Secretary, Lord President's Private Office) – for Item 5.2 only
- Apologies:** Sheriff Tait

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those members present and noted apologies from Sheriff Tait. The Chair and members expressed their congratulations to Lynda Brabender on her recent appointment to Queen's Counsel. The Chair welcomed Ian Vickerstaff from the Rules Rewrite Drafting Team, who was attending for training purposes and informed members that John Thomson would join the meeting for Item 5.2.
2. Members agreed not to publish the following papers: **2.2, 3.2, 3.3, 4.1, 4.1A, 5.1, 5.1A, 5.2, 5.2A**

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

3. Simon Stockwell provided an update about the Family Dispute Resolution Pilot project and advised that funding solutions for the project are under discussion with SLAB.
4. **The Committee approved the minutes of the previous meeting.**

Item 2.2 – Progress of actions from previous meetings (Paper 2.2)

5. Simon Stockwell noted that a joint policy paper has been submitted with proposals relating to the taking of evidence of child and vulnerable witnesses in children's hearing proceedings. Lynda Brabender suggested that this item should be progressed as a Committee priority. Sheriff Principal Lewis and Simon Stockwell noted agreement. Inez Manson advised that there are some further policy issues that could usefully be progressed before the policy paper is considered by the Committee. She indicated that background work would be ongoing before the Committee next meets.
6. **The Committee noted the progress that had been made on actions since the previous meeting.**

Item 3: Work programme

Item 3.1 – Update from the Scottish Government (Oral)

7. Simon Stockwell provided an update on legislative developments in the Scottish Government. In particular, the Scottish Government is working on a

consultation on the review of Part 1 of the Children (Scotland) Act 1995 and some interviews have been held with practitioners and court users. He noted that some of the proposed changes would require primary legislation in due course. Simon intimated that the Scottish Government plans to issue a consultation on reforming the Gender Recognition Act 2004 and on intersex people.

8. Simon advised that a meeting with the Ministry of Justice is scheduled for 31 October 2017 on *Brexit* in the context of civil and family law.

9. He also anticipated that a member's Bill will be launched on the physical punishment of children.

Item 3.2 – Forward Work Programme (Paper 3.2)

10. The Chairman explained the background to recent resourcing changes within the Secretariat. It was noted that the lead FLC policy officer has been temporarily seconded to a business critical post elsewhere in the organisation for a period of four months. The Chairman advised that the Secretariat has discussed with him and the Lord President the impact this will have upon the support available to the Committee.

11. Members discussed the prospective priorities for the Committee over the next four months in the context of available resources.

12. The Committee agreed that the priorities for the next 4 months are to progress work on: drafting rules for new Form F9; preparation of a consultation on the case management report; drafting rules and an accompanying consultation on simplified divorce and dissolution proceedings; and background work on bringing proposals to the Committee relating to the cross-examination of child and vulnerable witnesses in children's hearing proceedings.

13. Inez Manson advised that she will to continue work to progress these matters between now and the next meeting where resources permitted and the Secretariat will consider what resources can be made available in this regard.

14. Ian Maxwell asked whether the Committee is holding enough meetings. Karen Stewart provided information about the business strategy for the planning of Council and Committee meetings and noted related changes recently made to the Council's Standing Orders in this regard.

15. Sheriff Principal Lewis noted that while the full Committee had not met over the summer, there had been three sub-committee meetings to progress the recommendations of the case management report.

16. **The Committee agreed that, for future meeting planning purposes, July and August 2018 are to be avoided as well as mid to end December 2018. The Secretariat noted this request.**

Item 3.3 – SCCR: Implementation of Recommendations (Paper 3.3)

17. **Paper 3.3** aimed to provide a summarised round-up of the current position regarding the implementation of various SCCR recommendations pertaining to family proceedings. The Committee agreed that due to the overlap with the sub-committee's recommendations on case management, it would be beneficial for these SCCR recommendations to be considered at a later date. It was noted also that certain aspects of the paper would benefit from revision and some members indicated that they would provide written comments to assist with this.

18. **The Committee agreed that a revised paper be prepared and tabled for a future meeting. Members who wished to provide comments should send these to the Secretariat.**

Item 4: Research and consultations

Item 4.1 – Hearing the Voice of the Child – Form F9 (Papers 4.1 and 4.1A)

19. Inez Manson introduced the papers. **Paper 4.1** sets out the background to the recent work of the Form F9 sub-group. This has involved working with a graphic designer to apply artwork to the documents. **Paper 4.1A** contained revised forms and accompanying documents for members' consideration.

20. **The Committee considered the revised draft forms and accompanying documents set out in Paper 4.1A and approved the revised documents subject to some minor amendments.**

21. **The Committee instructed draft rules to be prepared for consideration at the next suitable meeting.**

22. **The Committee noted that guidance was being prepared by LPPO about the use and completion of the new forms. Inez agreed to circulate an initial draft by email in advance of the next Committee meeting, so that members could provide feedback as well as any suggestions for inclusion in the guidance.**

23. Simon Stockwell suggested that the original SG policy paper from which this work emanated could be reviewed to check progress with other policy matters raised in it. **The Committee agreed to do so in due course, and the SG and the**

Secretariat would discuss before the next meeting of the Committee on 5 February 2018

Item 4.2 - Report by SLAB: Child Welfare Reporters (Paper 4.2)

24. Catriona Whyte provided an overview of **Paper 4.2** which was prepared by the Scottish Legal Aid Board (SLAB) at the Committee's request. The paper contained statistics about the use made of child welfare reporters and the costs incurred by SLAB for this work. She highlighted that there has been an overall drop in costs since the new child welfare reporter rules were introduced at the end of 2015, and noted also that there was wide variation in the use of reports throughout Scotland.

25. Ian Maxwell asked if statistics were available on cases where Legal Aid is refused due to mediation not having been carried out first. Catriona Whyte clarified that it is not a requirement for parties to attend mediation prior to making an application for Legal Aid.

26. **The Committee noted the report.**

Item 5: Proposals for rules

Item 5.1 – Proposals for Rules: Report of the FLC Sub-Committee on Case Management in Family Actions (Papers 5.1 and 5.1A-C)

27. Sheriff Principal Lewis expressed thanks to David Ross and Inez Manson for the high standard of support afforded to the sub-committee and for the preparation of the sub-committee report, set out in **Paper 5.1A**. She indicated that this structure had worked exceptionally well for this piece of detailed policy work.

28. Inez Manson introduced the papers:

- **Paper 5.1** provided background information about the establishment and work of the FLC sub-committee and information and options for next steps for Committee consideration.
- **Paper 5.1A** set out the sub-committee's recommendations on improving case management in family and civil partnership actions and discussed these recommendations in detail. The sub-committee's recommendations take account of the recommendations made by Dr Whitecross and Dr Lindsay in their research report, as well as recommendations made by the Scottish Government in its policy paper.

- **Paper 5.1B** – research report by Dr Richard Whitecross
- **Paper 5.1C** – Scottish Government policy paper

29. The Committee discussed the recommendations in detail and a number of policy matters arising, including: the stage in proceedings at which a proof date should be fixed; the procedures for handling sisted cases; and judicial continuity in family actions.

30. Simon Stockwell asked for an update on the work mentioned in the sub-committee's report in relation to seeking information from SCTS about what happens in practice when an issue about the safety of a vulnerable party at child welfare hearings is raised. David Smith advised that he hoped he would be provided with the relevant information in approximately six weeks.

31. **The Committee approved the sub-committee's recommendations set out in Paper 5.1A.**

32. Ian Maxwell raised the question of the placement of potential rules and the handling of transitional and savings provisions. **The Committee agreed that these matters will be for the Committee to consider in due course.**

33. **The Committee considered the next steps for this work and agreed that permission to carry out a public consultation on the report's recommendations should be sought from the Council.**

34. **Pending any potential consultation, the Committee agreed that a revised report should be circulated to members for approval in order that it may be published on the SCJC website.**

Item 5.2 – Proposals for Rules: Extension of Simplified Divorce and Dissolution (Papers 5.2 and 5.2A)

35. John Thomson attended the meeting and introduced **Paper 5.2** which provided background information about the work to date on changing the scope of the procedures for handling simplified divorce and dissolution cases in the courts. He explained that the SCJC and Scottish Government are progressing this work jointly and that there will be consultation by both parties on their own respective measures which are required to implement the proposed changes.

36. He explained that draft rules had been approved previously for the purpose of consultation but since that time, some additional policy matters have arisen which require consideration. These are set out in Paper 5.2 for members' consideration.

37. He advised that **Paper 5.2A** contains revised draft rules for the purpose of consultation for members' consideration.
38. The Committee considered and discussed the matters set out in the papers and how it is intended the revised simplified procedure will work operationally.
39. **The Committee agreed that the draft rules be amended to make provision:**
- **concerning the test the court should apply when determining whether to fix a hearing to inquire further regarding the arrangements for the upbringing of a child;**
 - **for applications initially to remain subject to the simplified procedure when such hearings are ordered;**
 - **to dispense with the requirement to intimate on the child when such hearings are ordered; and**
 - **for it only to be necessary for applications to be transferred out of the simplified procedure when the court had a continuing concern following the hearing.**
40. The Committee noted that the Scottish Government and Scottish Legal Aid Board would require to consider what legislation may be required to support the provision of funding for this type of hearing.
41. **The Committee instructed LPPO to prepare revised draft rules for consideration and that these could be issued to members via correspondence.**

Item 6: AOB

42. Simon Stockwell advised that the civil justice statistics to be published in 2018 would not have additional information on ancillary craves and on the length of time cases took. However, it was still hoped to include these improvements in future years.
43. Fiona Jones advised that she would circulate a report for members' information on the topic of the impact of *Brexit* upon children in cross-border family actions.

Item 7: Dates of future meetings

44. Members noted the future meeting dates:
- 5 February 2018 at 10am

- 9 April 2018 at 10am

Scottish Civil Justice Council Secretariat

October 2017