

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
FAMILY LAW COMMITTEE
MONDAY 30 APRIL 2018 AT 10 AM
JUDGES' CONFERENCE ROOM, PARLIAMENT HOUSE, EDINBURGH

MINUTES

Members Present: Lord Brailsford (Chair)
Lynda Brabender QC (SCJC member)
Stephen Brand (Solicitor)
Ian Maxwell (SCJC member)
Fiona Jones (Clan Childlaw)
Professor Frances Wasoff
Catriona Whyte (Scottish Legal Aid Board representative)
Simon Stockwell (Scottish Government representative)

In attendance: Yvonne Anderson (Clerking Services Manager - Civil)

Support: Inez Manson (Deputy Legal Secretary, Lord President's Private Office)
David Ross (Policy Officer, Scottish Civil Justice Council secretariat)

Apologies: Sheriff Principal Lewis
Sheriff Tait
Rachael Kelsey (Solicitor)
David Smith (Deputy Head of Legislation Implementation Team, Scottish Courts and Tribunals Service)
Nicola Anderson (Head of Legislation Implementation Team, Scottish Courts and Tribunals Service)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those members present and noted apologies from Sheriff Principal Lewis, Sheriff Tait, Rachael Kelsey, David Smith, and Nicola Anderson. The Chair informed members that Stephen Brand will be retiring from practice at the end of May 2018 and had formally tendered his resignation from the

Committee. On behalf of all members, the Chair thanked Stephen for his contribution to the Committee and wished him well in his retirement.

2. Members agreed not to publish the following papers: **2.2, 4.1, 4.1A, 5.1, 5.1A, 5.1B, 5.1C, 5.1D, 5.2**

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

3. Simon Stockwell proposed an amendment to paragraph 25 of the draft minutes of the meeting on 05 February 2018.

4. **The Committee agreed the amendment to the minutes at paragraph 25 and approved the minutes, subject to the agreed amendment.**

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

5. **The Committee noted the progress that had been made on actions since the previous meeting and the update in relation to future matters.**

Item 3: Work programme

Item 3.1 – Update from the Scottish Government on potential UK or Scottish Government legislation or proposals which might impact on court rules or procedures (Oral)

6. Simon Stockwell advised that he would provide the secretariat with a written update on potential UK or Scottish Government legislation or proposals which might impact on court rules or procedures, for circulation to members.

7. Inez Manson provided an update on two proposals from the UK Government which will require court rules. The first relates to the removal of passports from child maintenance defaulters. A policy paper has been received from the Department for Work and Pensions and draft rules are being prepared with a view to being issued to members by correspondence in May. The second relates to parental orders under the Human Fertilisation and Embryology Act 2008. Inez advised that it is intended to start work on draft rules later in the summer.

Item 4: Research and consultations

Item 4.1 – Consultation on the Case Management of Family and Civil Partnership Actions in the Sheriff Court (Papers 4.1 and 4.1A)

8. Inez Manson introduced Paper 4.1, which invited members to consider the approach to the Committee's proposed consultation on the case management of family and civil partnership actions in the sheriff court. The draft consultation document was provided at Paper 4.1A. Inez explained that the consultation is based on the recommendations made in the report by the Committee's sub-committee on case management. The report was considered by the Committee at its meeting on 23 October 2017.

9. Members noted the proposed consultation timescale of 12 weeks is in line with UK Government guidelines. Discussion took place as to whether it would be possible to undertake any work on draft rules in parallel with the consultation. Members agreed that sufficient time should be allowed for the consultation and analysis of responses to be completed before any consideration is given to drafting rules.

10. It was noted that, subject to the Committee and Council approving the consultation document, the consultation is intended to run over summer 2018. Inez Manson advised that the Lord President's Private Office and the secretariat hope to be able to provide an initial overview of the responses for the Committee's meeting on 08 October 2018.

11. Members indicated that in addition to publishing the consultation on the SCJC website, it would be helpful if it was also published on the Judicial Hub. Members hoped that this might encourage individual sheriffs to express their views, if they wish to do so.

12. **The Committee considered the draft consultation document at Paper 4.1A and**

- **indicated that it was content for the draft consultation document to be submitted to the Council for approval; and**
- **agreed the proposed timescale for the consultation.**

Item 5: Proposals for rules

Item 5.1 – Hearing the Voice of the Child – Form F9 (Papers 5.1 and 5.1A-D)

13. Inez Manson introduced Paper 5.1, which invited members to consider revised draft rules (at Paper 5.1A) on the new Form F9 for seeking the views of the child in family actions, and draft guidance for court users on preparing the new form (at Paper 5.1D). Comparison documents showing the changes that had been made to the draft rules and Form F9 since the last meeting were provided at Papers 5.1B and 5.1C.

14. Inez advised that the rules had been revised to incorporate members' feedback and to address operational points raised by SCTS. Minor changes to the form had been made to simplify its content. Discussion took place regarding the form of warrant to intimate and seek views in Form F9, the question of whether and how the sheriff should seek the child's views when an interim section 11 order is sought, the matter of sending the form to young children, and where the guidance should sit in relation to the rules.

15. The Committee considered and discussed the revised draft instrument and provided feedback on the issues raised in Paper 5.1. In particular, members agreed that even though narrative is not normally included in rules, the draft rules should continue to refer to the F9 being designed to be sent to children as young as age 5. It was hoped this might help bring about a change in practice and lead to a greater number of younger children being asked for views.

16. Members also agreed that rule 33.34(2) should be amended to make it clear that the notice of intention to defend must be intimated to the pursuer. Members suggested various minor amendments to the Form F9 and to the draft guidance, and agreed that the guidance should be referred to (and a link provided) in a footnote rather than in the operative provisions of the instrument.

17. Members agreed that, subject to these minor amendments, they were content for the draft instrument to be expanded to include provision about Chapter 33A of the Ordinary Cause Rules and Chapter 49 of the Rules of the Court of Session. It was agreed that the expanded instrument would be prepared for consideration at the next appropriate meeting.

Item 5.2 – Personal Examination of Child and Other Vulnerable Witnesses in Children's Referral Proof and Appeal Proceedings (Papers 5.2 and 5.2A)

18. The Chair introduced Paper 5.2, which invited members to consider an updated joint policy paper (at Paper 5.2A) by the Scottish Government and the Scottish Children's Reporter Administration ("SCRA") requesting that rules be made to prohibit the personal examination of a child or other vulnerable witness by a party in court proceedings under the Children's Hearings (Scotland) Act 2011.

19. The Chair noted that at its meeting in December 2016, the Committee had considered an earlier policy paper on this matter and had agreed in principle that amendment of the rules is required. The Committee invited the Scottish Government and SCRA to submit a paper outlining detailed proposals for rules. The Chair invited Simon Stockwell to speak to Paper 5.2A.

20. Simon advised that Scottish Government had consulted with stakeholders in summer 2017 to develop the proposals. All stakeholders were supportive of the policy. Simon advised that the proposals will be included in the Scottish Government's forthcoming consultation on part 1 of the Children (Scotland) Act 1995. The consultation will also cover banning personal cross-examination of domestic abuse victims at proofs in cases with a crave for an order under section 11 of the 1995 Act, and the protection of domestic abuse victims and other vulnerable parties at child welfare hearings.

21. Simon asked if members had a view on whether the Committee could take any steps in relation to the protection of domestic abuse victims at child welfare hearings. Members noted that the rules provide for a party to be excused attendance at a child welfare hearing if cause is shown as to why they should be so excused. The lack of such motions being made to the court was noted. Members felt that, rather than being a matter for the Committee, it may be more appropriate for the Scottish Government to liaise with the Law Society of Scotland about issuing a circular on the matter.

22. Members discussed Papers 5.2 and 5.2A. It was noted that the Faculty of Advocates has suggested that primary legislation is required before any changes to rules can be made.

23. Lynda Brabender suggested that changes to Rule 3.47 of the Child Care and Maintenance Rules could be considered in advance of any changes to primary legislation. Simon Stockwell advised he would discuss such a change with colleagues and with SCRA, and would liaise with the Lord President's Private Office and the secretariat about providing a further revised policy paper for a future meeting.

24. Members noted that the Scottish Government and SCRA will consider what specific changes could be made to the Child Care and Maintenance Rules, and agreed to consider a revised policy paper at the next suitable meeting.

Item 6: AOB

25. No other business was raised.

Item 7: Dates of future meetings

26. Members noted the future meeting dates:

- 2 July 2018 at 10am

- 8 October 2018 at 10am (provisional)

Scottish Civil Justice Council Secretariat

May 2018