

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL**  
**FAMILY LAW COMMITTEE**  
**MONDAY 10 OCTOBER 2016 AT 10 AM**  
**JUDGES DINING ROOM, PARLIAMENT HOUSE**

**MINUTES**

**Members Present:** Lord Brailsford (Chair)

Sheriff Tait

Jan Marshall (Scottish Ministers' representative)

Lynda Brabender (Advocate and SCJC)

Stephen Brand (Solicitor)

Rachael Kelsey (Solicitor)

Fiona Jones (Clan Childlaw)

Ian Maxwell (SCJC and Consumer representative)

Professor Frances Wasoff (Edinburgh University)

**In attendance:** Jackie Powell (Project Lead/Business Manager for the Integrated Case Management System) (for Item 3.1)

Colin McKay (Chief Executive of the Mental Welfare Commission for Scotland) (for Item 4.1)

Nicola Anderson (Legislation and Implementation Team, Scottish Courts and Tribunals Service)

David Ross (Integrated Case Management System Project Development)

**Support:** Inez Manson (Deputy Legal Secretary, Lord President's Private Office)

Anne Hampson (Policy Officer, Scottish Civil Justice Council)

**Apologies:** Sheriff Principal Lewis  
Catriona Whyte (Scottish Legal Aid Board)  
Simon Stockwell (Head of Family and Property Law, Scottish Government)  
Gillian Prentice (Deputy Principal Clerk of Session)

**Item 1: Welcome, apologies and agreement of private papers**

1. The Chair introduced Rachael Kelsey who was appointed to the Committee by the Scottish Civil Justice Council on 03 June 2016 and was attending her first meeting as a Committee member. He advised that Rachael is a partner at SKO, a specialist family law firm, and is accredited as a specialist in Family Law and as a Family Mediator by the Law Society of Scotland.
2. The Chair noted apologies from Sheriff Principal Lewis, Catriona Whyte, Simon Stockwell and Gillian Prentice. He advised members that that Jan Marshall was attending as the Scottish Ministers' representative.
3. The Chair then welcomed Jackie Powell who is the Project Lead/Business Manager for the new Integrated Case Management System (ICMS) and was attending the meeting to speak to Agenda Item 3.3.
4. The Chair advised members that Lynda Brabender was appointed to the Scottish Civil Justice Council on 28 September 2016 and recorded congratulations to Lynda. He informed members that Lynda had agreed to remain as a member of the Committee and that he was grateful for that.
5. The Chair went on to inform members that this was Anne Hampson's last meeting and recorded thanks to Anne for her work in supporting the Committee over the last two and a half years. He then welcomed David Ross who will be taking on the role of providing Secretariat support to the Committee.
6. The Chair advised members that Colin McKay, Chief Executive of the Mental Welfare Commission for Scotland would be joining the meeting for Agenda Item 4.1
7. Members agreed not to publish the following papers: 2.2, 3.3 and 4.1. Members agreed that, pending approval from the organisations whose responses are referred to in it, paper 5.1 could be published.

## **Item 2: Previous meeting**

### *Item 2.1 – Minutes of previous meeting (Paper 2.1)*

8. **Members agreed the minutes from the previous meeting.**

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

9. **Members noted the progress of actions and, in particular, that the Scottish Civil Justice Council (Council) approved the Committee's proposed revised remit at its 11 July 2016 meeting.**

### *Item 2.3 - Feedback from Sheriffs Principal (Oral)*

10. The Chair suggested that as Sheriff Principal Lewis was not at the meeting, the Committee may wish to postpone discussing the feedback provided, following discussion with the other Sheriffs Principal in relation to issues raised at the 09 May and 20 June Family Law Committee meetings, until Sheriff Principal Lewis was in attendance.

11. **The Committee agreed that further discussion on these matters should take place at a future meeting when Sheriff Principal Lewis was in attendance.**

## **Item 3: Work programme**

### *Item 3.1 - Update on SCTS Integrated Case Management System (Oral)*

12. Jackie Powell provided members with an update on ICMS. She explained that the update was principally in relation to business classifications which are of particular interest to the Committee. Jackie advised that there would be an opportunity to see a demonstration of ICMS after the meeting, including an illustration of what is possible in relation to family actions. Jackie explained that there were two components to the system – the internal system for case management and the external online portal and that Simple Procedure will be the first online process. The key milestone dates are 31 October 2016 when the system will 'go live' in the sheriff courts and 28 November 2016 when simple procedure actions can be submitted online via the external portal.

13. Screen shots were provided of business classifications and Jackie explained that the ICMS Team had worked closely with SCTS Legislation and Implementation Team and the Scottish Government (SG) in developing the classifications. Certain types of action have only one level of classification, while others delve down to a second and third level e.g. personal injury asbestosis cases. The language is user friendly, which is particularly important for online submissions which people may be making on their own behalf.

14. **The Committee sought clarification on some matters such as obtaining statistical information and whether there is scope to add other classifications. Jackie confirmed that the system will evolve as the project moves forward. The Chair thanked Jackie for her helpful presentation.**

*Item 3.2 – Update from the Scottish Government (Oral)*

15. Jan Marshall provided members with an update. In particular, she advised that the Minister for Community Safety and Legal Affairs provided the Convener of the Justice Committee with the SG's response to the Committee's Report on post-legislative scrutiny of the Family Law (Scotland) Act 2006 on 22 June 2016. The response is published on the Scottish Parliament's website. Regarding Child Welfare Reporters, Jan advised that she had written to the Lord President and Sheriffs Principal on 16 September 2016 inviting them to consider a proposed scheme on the training which should be required to be a child welfare reporter. These letters have been published on the Scottish Government website.

16. Jan also advised that: work was ongoing in relation to developing a guide for children on child welfare reporters; the outcome from the 17 March 2016 Family Justice Modernisation Strategy is still to be published and Ministers will consult on the way forward; there is to be a review of the Children (Scotland) Act 1995; work is continuing with early years colleagues on updating the Parenting Agreement for Scotland; and John Finnie, MSP has indicated an intention to bring forward a Member's Bill to ban smacking. **The Committee noted the update.**

*Item 3.3 – Forward Work Programme (Paper 3.3)*

17. The Chair invited members to consider the forward work programme and, in particular, item 18 which explains the interface between the Rules Rewrite project and the Family Law Committee.

18. Lynda Brabender referred to item 6, the "last day for lodging" rules. Several members agreed with her view that these rules are problematic in that they do not encourage early settlement. The Chair advised that the Family Actions User Group (FAUG) had started to give consideration to these rules in the context of Court of Session actions. He suggested that the FAUG's consideration of the matter should be allowed to continue, and that once a conclusion had been reached, the matter could be referred to the Committee to consider (and in particular to discuss the implications for family actions in the sheriff courts, which is beyond the purpose of FAUG).

19. **Members noted the progress that has been made on actions since the last meeting; agreed that a short paper of actions arising from the FAUG should be tabled for a future meeting (most likely the 13 February 2017 meeting).**

*Item 3.4 - Sir James Munby Judgment [2016] EWHC 2271 (Fam) (Oral and Paper 3.4)*

20. The Chair invited members to note, in particular, paragraphs 3 and 74 of the judgment and advised that his plans for the Judicial Institute to host a joint meeting between Scottish Family Law Judges and English Court Judges had been somewhat superseded by the judgment. However, he has since been in contact with several Judges in England who also have concerns about this matter and are keen to develop learning between the jurisdictions. The Chair also intends to contact Family Law Judges in Northern Ireland and to set up a meeting with the Judicial Institute to take this matter forward.

21. **Members noted the update and acknowledged that this matter and other long standing jurisdictional issues require to be resolved through primary legislation.**

**Item 4: Proposals for rules**

*Item 4.1 – Curators ad litem (Papers 4.1 and 4.1A)*

22. The Committee considered an open joint paper (published on the SCJC website) from the SG and the Mental Welfare Commission for Scotland (MWC) proposing amendments to the rules of court in relation to: the appointment of curators *ad litem* to defenders; the terminology of the existing rules; and the simplified divorce and dissolution forms.

23. Colin McKay spoke to this item and indicated that the proposal regarding the appointment of curators *ad litem* had arisen from a real case where a curator *ad litem* had been appointed to a person who was fully aware of what was going on in the case and had capacity to instruct representation. The curator was appointed purely because the defender had a “mental disorder”. Colin indicated that, while requests to the MWC are rare, the current role of the MWC in certifying whether the defender is capable of giving consent to the granting of a divorce decree is inappropriate. Members considered that deciding whether a person was capable of giving consent was not an easy issue and that during stressful proceedings, the ability to instruct representation may deteriorate.

24. **The Committee instructed LPPO to prepare draft rules for consideration at a future Committee meeting.**

## **Item 5: Research and consultations**

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

25. Secretariat issued a letter on 03 August 2016, which updated stakeholders on progress in relation to the review of Form F9 and invited comments on the draft replacement forms F9.1 and F9.2. In total 11 responses were received and Consultees offered a wide variety of suggestions for further improving the forms with some stakeholders holding opposing views on certain points.

26. Fiona Jones, Chair of the Committee's Form F9 subgroup, advised that the sub-group met on 15 September 2016 to consider the responses and agreed that it would not be possible to develop forms that will satisfy all stakeholders. The sub-group took account of as many comments as possible in further revising the forms, but noted that there were some irreconcilable differences in the views expressed. The Chair recorded thanks to the sub-group.

**27. The Committee noted that Scottish Women's Aid had offered to pilot the forms as part of its joint project on children's participation with the Children and Young People's Commissioner Scotland . Members agreed that this work required to be progressed. The Committee indicated that arrangements should now be made, with the other organisation who offered to assist, for groups of children to be consulted on the revised new forms.**

### *Item 5.2 - Case Management in Family Actions – Update on Phase Two Research (Oral)*

28. The Chair provided an update on progress in taking forward the research on case management in family. He confirmed that the Council approved the research specification at its meeting on 11 July 2016.

29. The Chair advised that the Lord President and the relevant Sheriffs Principal have agreed to research interviews being conducted with sheriffs and sheriff clerks in Glasgow Sheriff Court, Inverness Sheriff Court, Kirkcaldy Sheriff Court and Jedburgh Sheriff Court.

30. The Chair explained that the research specification, along with an invitation to tender, was sent to three bidders who were asked to submit a tender for the work. Following an evaluation of the three tenders received, the one submitted by Dr Richard Whitecross of Edinburgh Napier University was accepted. He advised members that a Research Advisory Group meeting would be held in the afternoon after the Committee meeting to discuss with the researcher the proposed approach to the research project, and that a further update would be provided to members at the next meeting. **Members noted the update.**

### *Item 5.3 – Family Actions User Group – Update (Oral)*

31. Inez Manson and Lynda Brabender provided an update on the work of the FAUG. Inez advised that consideration is being given to how the current Court of Session voluntary protocol works, and the suggestion that some of its provisions might usefully be formalised in rules. Once FAUG has developed this proposal, it will submit a paper to the Committee. **The Committee noted the update.**

### **Item 6: A.O.C.B.**

32. Lynda Brabender raised an issue about disclosure obligations, which had been discussed at the FAUG meeting and which she considered may require primary legislation before any rule changes can be made, obliging parties to disclose certain documents (in financial provision cases, for example). Lynda agreed to develop a paper outlining the issue for consideration at a future Committee meeting. **The Committee noted this matter.**

33. Fiona Jones advised that she, Stephen Brand and Inez Manson had attended an AVENUE event on hearing the voice of the child and that she would be happy to provide a full update at a future meeting. Fiona suggested that the Committee might want to consider inviting AVENUE to give a brief presentation to the Committee when it comes to looking at the wider issues around hearing the views of the child. **The Committee indicated that this may be helpful as its work progresses.**

34. **The Chair requested that the [decision](#) of the Honourable Mr Justice Peter Jackson [2016] EWFC 9 be circulated to members.**

### **Item 7: Dates of future meetings**

35. Members noted the date of the next meetings

- Monday 12 December 2016 at 10am
- Monday 13 February 2017 at 10am
- Monday 08 May 2017 at 10am

**Scottish Civil Justice Council Secretariat**

**October 2016**