

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
FAMILY LAW COMMITTEE
MONDAY 22 FEBRUARY 2016 AT 10 AM
JUDGES CONFERENCE ROOM, LEVEL +2 PARLIAMENT HOUSE

MINUTES

Members Present: Lord Brailsford (Chair)

Catriona Whyte (Scottish Legal Aid Board)

Simon Stockwell (Head of Family and Property Law, Scottish Government)

Sheriff McCulloch

Sheriff Tait

Lynda Brabender (Advocate)

Stephen Brand (Solicitor)

Ian Maxwell (SCJC and Consumer representative)

Fiona Jones (Clan Childlaw)

Professor Margaret Ross (Head of the College of Arts and Social Sciences, Aberdeen University)

In attendance: Gillian Prentice (Deputy Principal Clerk of Session)

Sheriff Principal Scott (present until end of item 4.1)

Ian Clark (Head Researcher, Scottish Courts and Tribunals Service) (present until end of item 4.1)

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

Anne Hampson (Policy Officer, Scottish Civil Justice Council)

Apologies: Clair McLachlan (Solicitor)

Nicola Anderson (Policy and Legislation Branch, Scottish Courts and Tribunals Service)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present and noted apologies from Clair McLachlan and Nicola Anderson.
2. The Chair then welcomed Sheriff Principal Scott and Ian Clark who were attending in relation to Agenda Item 4.1.
3. Members agreed not to publish the following papers: 2.2, 3.2, 4.1, 4.1A-B, 4.2 and 4.2A.

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

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

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

5. The Chair advised members that the Scottish Civil Justice Council strategy meeting has been scheduled for Monday 14 March. **Members noted the date of the strategy meeting and the progress that had been made on actions since the last meeting.**

Item 3: Work Programme

Item 3.1 – Update from the Scottish Government (SG) (Oral)

6. Simon Stockwell provided members with an update. In particular, he advised that the SG had issued invitations to a Family Justice Modernisation Strategy Summit on 17 March and that, to date, 20 acceptances had been received. The Justice Committee of the Scottish Parliament was undertaking post-legislative scrutiny of the Family Law (Scotland) Act 2006 and would be taking evidence from

Professor Jane Mair and Professor Kenneth Norrie on 23 February 2016. The focus is likely to be on the provisions on cohabitation rights (in particular on dissolution) and parental responsibilities and rights including the acquisition of such rights and responsibilities by unmarried fathers. Following on from a Round Table discussion at the end of last year, the SG is considering whether to issue a consultation seeking views on the confidentiality of services provided to children when a family action is raised. Due to the dissolution of the Scottish Parliament, the SG will be in the pre-election period from 24 March until the Scottish Parliament elections on 5 May 2016. This means that while essential business will be carried out, no major new initiatives will be announced. **Members noted the update.**

Item 3.2 – Forward Work Programme (Paper 3.2)

7. **Members noted the progress that had been made on actions since the last meeting.**

Item 4: Research and consultations

Item 4.1 – Case Management in Family Actions – Research Report (Papers 4.1 and 4.1A-B)

8. Ian Clark spoke to this Agenda Item. He advised the Committee that while a low response rate to consultations was not unknown, the 13 responses which were received to the short focussed questionnaire issued to sheriffs as phase one of the Committee's proposed research into case management in family actions in Scotland meant that it was not possible to generalise the findings out to the wider sheriff population. Ian circulated a summary of the responses to closed questions and explained that in his report he had elicited the main themes from the responses and hoped that these would be of some use to the Committee. The responses to the open questions had been set out in the Report and the final section contained detailed responses suggesting how the arrangements and procedural rules for case management in family actions could be improved. Ian thought it better to include a high level of detail than to risk omitting significant points by trying to summarise the responses.

9. Members considered the Report and noted that the threads identified were similar to those identified previously and that judicial continuity was harder to achieve in some courts than it was in others. Sheriff McCulloch felt it was easier to achieve such continuity in the very large and very small courts, but less so in medium sized courts, due in part to the feasibility of continuity of the bench between callings. Some of the underlying tensions in respect of case management were identified. For example, the desire not to waste court time requires to be balanced with the need to

obtain a resolution for the parties involved, to identify the right cases to manage, and to address financial issues which may require funding solutions.

10. The Chair indicated that he was anxious to take forward work in relation to case management in sheriff courts and that it may be helpful for some members of the Committee to meet with someone from each of the Family Teams operating in Glasgow, Edinburgh and Aberdeen Sheriff Courts to understand the practice followed in these courts.

11. Sheriff Principal Scott offered to raise this at the meeting of the Sheriffs Principal later this week and Sheriff Tait indicated that she would be interested in attending such a meeting.

12. The Chair went on to explain that he had been discussing training in case management with Sheriff Cubie of the Judicial Institute who was looking at where this could be slotted into the judicial timetable and that the Lord President was also keen that such training be put in place. A suggested model was for sheriffs to observe 3-4 cases in the Court of Session in the morning and for this to be followed by a question and answer session with Lord Brailsford.

13. The Committee agreed that the next step in relation to taking forward the research should be consideration of a research specification and that an updated research specification, drafted by the Head Researcher, Scottish Courts and Tribunals Service, be presented for further discussion at a future meeting. It also agreed that the research specification should include face-to-face interviews with sheriffs, sheriff clerks and family law practitioners.

14. Ian Clark advised that sheriffs are not obliged to participate in research. They may lack relevant experience, or need to prioritise their judicial duties. Sheriff Principal Scott indicated that Sheriffs Principal can invite sheriffs to participate but that they cannot be pressured to do so. He indicated that in his experience, case management works effectively in commercial actions and, while not comparing like with like, it is important that sheriffs are tuned into the ethos of case management for it to work. He reiterated that in commercial actions, the rules give sheriffs great flexibility to do what they think is best for the parties involved in a particular case.

Item 4.2 – Hearing the Voice of the Child – Form F9 (Papers 4.2 and 4.2A)

15. **Paper 4.2** provided the Committee with an overview of the 21 responses received to the Committee's request for comments on the existing Form F9 along with suggestions for its improvement. All of those who responded agreed that the existing Form F9 was far from child friendly and there was overwhelming support for a significantly revised Form F9 to be introduced.

16. The Chair explained that since his attendance at a family law conference in Australia, where he had raised the issue of Form F9 and discovered that Scotland was almost unique in having such a form, Samoa and some South Pacific jurisdictions had started using the form. Justice Henry Abbot had also advised that the form had been adapted and was being used in the High Court of Justice in Ireland where, anecdotally, they think it works well. This of course does not mean that it cannot be improved.

17. Members considered that it would be helpful to know what other countries did in order to obtain the views of the child. **Simon Stockwell offered to send some questions to EU Network Officials** and advised that Northern Ireland was undertaking a review of family law. **Fiona Jones advised that there was research available from 2015 covering some European jurisdictions, such as Spain, Croatia, France and Germany, and agreed to circulate it to members.**

18. **Members noted the responses received in relation to revising Form F9 alongside the discussion points provided in Paper 4.2 and indicated that, as a first step, Form F9 should be revised.**

19. **The Committee then considered the priority questions set out in Paper 4.2 and agreed that:**

1) A sub-group should be set up to take forward work in relation to the revision of Form F9. Fiona Jones, Stephen Brand and Sheriff McCulloch were appointed as members of the sub-group. Secretariat/ Lord President's Private Office should provide support as appropriate, and would be in touch to make arrangements for a meeting.

2) There should be 2 steps in obtaining the views of the child:

i) intimating the proceedings to the child with an explanation of what the parents want to do and what is in dispute; and

ii) seeking the child's views.

3) A single document should be created, with additional explanations and guidance notes being added to the form itself.

4) The focus should be on developing a single version of the form that is suitable for children of all ages, at least as a starting point. The need for different versions for different age ranges could then be considered later if necessary.

5) The rules should be amended to expressly prohibit a copy of the initial writ being sent to the child in cases where the child is not a

party. Where a child subsequently becomes a party, then they will of course be entitled to receive the writ.

20. The Committee also agreed that the Lord President's Private Office prepare a draft instrument in relation to point 5) for consideration at the next meeting and that Secretariat write to those who had offered views on improving Form F9 advising them of the progress made at the 22 February meeting.

Item 5: A.O.C.B.

21. Simon Stockwell informed the Committee that he was meeting with the Ministry of Justice on 23 February to discuss UK cross border jurisdictional cases.

Item 6: Dates of future meetings

22. Members noted the dates of future meetings:

- Monday 09 May 2016 at 10 am
- Monday 20 June 2016 at 10 am

Scottish Civil Justice Council Secretariat

February 2016