

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

FAMILY LAW COMMITTEE

MONDAY 08 MAY 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
Sheriff Tait
Lynda Brabender (Advocate, SCJC member)
Fiona Jones (Clan Childlaw)
Rachael Kelsey (Solicitor)
Professor Frances Wasoff (Edinburgh University)
Ian Maxwell (SCJC member)

In attendance: Nicola Anderson (Legislation Implementation Team, Scottish Courts and Tribunals Service)
Kenneth Htet-Khin (Head of the Rules Rewrite Drafting Team)
Julie Davidson (Member of the Rules Rewrite Drafting Team)
John Thomson (Deputy Legal Secretary, Lord President's Private Office) – for Item 5.2 only

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

Apologies: Stephen Brand (Solicitor)
Yvonne Anderson (Acting Deputy Principal Clerk of Session)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those members present and noted apologies from Stephen Brand and Yvonne Anderson. The Chair also welcomed Kenneth Htet-Khin and Julie Davidson, who were attending to speak to Item 3.3 on the agenda, 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, 4.1, 4.1A, 4.1B, 4.2, 5.1, 5.2**
3. Members agreed to publish the following papers: **3.3, 4.1C, 4.1D, 4.1E, 4.1F, 4.2A**

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

4. Simon Stockwell suggested amendments to the minutes at paragraphs 24 and 25.
5. **The Committee agreed the amendments and approved the minutes subject to the agreed amendments.**

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

6. Simon Stockwell asked for an update regarding action point 8 in **Paper 2.2**, concerning the draft instrument on the appointment of curators *ad litem* to defenders in family actions, which was approved by the Committee on 12 December 2016. Inez Manson advised that the instrument was made on 26 April 2017 and will come into force on 01 June 2017. The Court of Session made no modifications to the draft approved by the Scottish Civil Justice Council.
7. **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)

8. Simon Stockwell provided an update on legislative developments in the Scottish Government. In particular, he advised that there has been a declaration of incompatibility with the ECHR in the English courts in relation to the Human Fertilisation & Embryology Act 2008 and single people. This is a reserved matter. The UK Government announced in 2016 that it was planning to make a Remedial Order, which will cover Scotland, to address the incompatibility. The Remedial Order would allow single people to obtain Parental Orders. In view of the upcoming UK election, decisions on the timing of introducing a remedial order to the UK Parliament will be a matter for the incoming UK administration. The Remedial Order is expected later this year. There may be some minor consequential implications for court rules and the Department of Health and the Scottish Government will keep the Committee informed.

9. Simon advised that the Scottish Parliament's Public Petitions Committee has considered a petition calling on the Scottish Government to review the operation of child contact centres under section 11 of the Children (Scotland) Act 1995. Simon advised that the Scottish Government's forthcoming review of Part 1 of the Children (Scotland) Act 1995 will consider the role of child contact centres, and whether any regulation is needed.

10. Simon also advised that the Scottish Government may submit a policy paper to the Committee in due course concerning direct applications to the court under the EU Maintenance Regulation.

Item 3.2 – Forward Work Programme (Paper 3.2)

11. Lynda Brabender advised that the Court of Session's Family Actions User Group ("FAUG") recently agreed that Item 6 of **Paper 3.2**, concerning the review of "last date for lodging" rules, should be taken forward by the Committee. Lynda asked for the Committee's view on whether the matter should be considered by FAUG before coming to the Committee, or whether the Committee should deal with it. Discussion took place regarding the appropriate forum to take the item forward.

12. The Committee agreed that in the first instance FAUG should consider the "last date for lodging" rules as they apply in the Court of Session, and report its conclusions to the Committee for wider consideration.

13. Ian Maxwell asked if Item 17 of **Paper 3.2** would be taken forward by the Committee or by the Scottish Courts and Tribunals Service's ("SCTS") Legislation Implementation Team ("LIT"). The item concerns a point raised by Relationships Scotland about contact centres not routinely being sent a copy of the court interlocutor which orders contact at a contact centre. Simon Stockwell said that he had discussed the matter with Relationships Scotland and LIT, and understood that the court does not always know which contact centre to write to. Rachael Kelsey advised that in her experience as Chair of Family Mediation Lothian, receipt of a court interlocutor does not impose an obligation on the contact centre to do anything, and that contact centres wait for parties to contact them before they take any action.

14. Ian Maxwell asked when it is intended to commence the review of the rules concerning child welfare reporters, as outlined at Item 24 of **Paper 3.2**. Discussion took place regarding the timing and nature of such a review. It was noted that it would be helpful to have statistics on the number of child welfare reporters appointed in order to help determine whether a review of the rules is required, and if so what it should consist of. Catriona Whyte advised that the Scottish Legal Aid Board ("SLAB") gathers statistics on the appointment of child welfare reporters in legal aid cases.

15. **The Committee requested SLAB to provide statistics on the appointment of child welfare reporters for its next meeting.**

16. Simon Stockwell advised that the Scottish Government will submit a policy paper concerning item 19 of **Paper 3.2** in due course.

17. **The Committee noted the content of Paper 3.2 and the progress that has been made on actions since the last meeting.**

Item 3.3 – Update on the Rules Rewrite Project: The New Civil Procedure Rules (Oral and Paper 3.3)

18. Kenneth Htet-Khin introduced *The New Civil Procedure Rules – First Report (Paper 3.3)*. He advised that it outlined the direction of travel for the Rules Rewrite Project and brought together a number of discussion papers which have been considered by the Rules Rewrite Committee and the Scottish Civil Justice Council (“SCJC”). Kenny highlighted a number of matters in the report of relevance to the Committee, including the model for initial case management and its recommendations about case management powers and the evidence of expert witnesses. Kenny then invited Julie Davidson to provide an update about the project’s work in relation to information and communications technology. Julie informed members about the development of an online portal for civil cases, and outlined recommendations aimed at helping the civil courts in Scotland move away from written material in favour of electronic evidence and recordings.

19. Kenny concluded by informing members that the SCJC favours a ‘big bang’ approach to the implementation of the new rules, and that the upcoming work of the project has been divided into six work-streams, which will involve each of the SCJC’s committees. Discussion took place regarding the report and its implications for the work being undertaken by the Committee.

20. **The Committee noted the update provided by Kenneth Htet-Khin and Julie Davidson.**

Item 4: Research and consultations

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

21. Inez Manson introduced **Papers 4.1 and 4.1A-F**. Inez advised that the new forms that will replace Forms F9, CP7 and 49.8-N for intimating the action to the child and seeking the child’s views were revised by the Form F9 sub-group to take account of feedback from children and young people. The feedback was obtained from consultation sessions during the first quarter of 2017 conducted by the Children’s Parliament (**Paper 4.1C**) and jointly by Scottish Women’s Aid and the

Children and Young People's Commissioner Scotland (**Papers 4.1D-E**). Solicitors at Clan Childlaw also provided feedback from children (**Paper 4.1F**).

22. Inez advised that the draft forms at **Paper 4.1A** had been revised to simplify vocabulary and language and to address children's concerns about disclosing personal information. The Committee discussed in detail the content and structure of the revised draft forms.

23. **The Committee, having considered Papers 4.1 and 4.1A-F:**

- (i) agreed that there should not be a separate form for younger children;**
- (ii) agreed that the form should contain a sign-off from the Sheriff Clerk or Depute Clerk of Session, and instructed LPPO and the Secretariat to make enquiries about how this will be implemented operationally;**
- (iii) agreed that it is not feasible at present for the court to provide feedback to children after a decision has been made;**
- (iv) agreed to seek the Council's approval for funding to instruct a graphic designer to redesign the forms;**
- (v) agreed that the forms should not contain a 'tick-list' of options for methods of communicating the child's views;**
- (vi) decided against remitting the question of the accessibility of the new forms to the Access to Justice Committee, on the basis that in this case, the form has been designed to be easily understood by children and is only one of several methods available to the court for seeking the child's views; and**
- (vii) approved the revised draft forms.**

24. **The Committee also noted that the following steps will be taken over the summer in relation to the development of the forms:**

- (i) the Form F9 sub-group will provide feedback to the consultees and start coming up with a bank of style phrases to describe disputes in child-friendly language, which could later be included in a guidance document;**
- (ii) LPPO and the Secretariat will complete a Child Rights and Wellbeing Impact Assessment in respect of the work undertaken**

by the Committee in redesigning the forms, assisted by Fiona Jones;

- (iii) LPPO will prepare revised draft rules for consideration at the next suitable meeting.**

25. Simon Stockwell asked members to note that the Brussels II Regulation (EC) No 2201/2003 (also called Brussels IIA) is being renegotiated, and that the voice of the child will be discussed as part of the process. Simon advised that the renegotiation is unlikely to be concluded before Brexit, but that some matters may nevertheless require to be considered by the Committee. **The Committee noted the position.**

Item 4.2 – Case Management in Family Actions – Research Report by Dr Richard Whitecross (Papers 4.2 and 4.2A)

26. The Chair proposed to members that as Agenda Item 4.2 overlapped with Agenda Item 5.1, it would be helpful to consider them together.

27. **The Committee agreed that it would be helpful to consider Papers 4.2 and 4.2A alongside Agenda Item 5.1.**

Item 5: Proposals for rules: policy development

Item 5.1 – Case Management in Family Actions – Policy Paper by the Scottish Government (Papers 5.1 and 5.1A-B)

28. The Chair advised members that he thought that a suitable way to take forward the recommendations made by Dr Whitecross in **Paper 4.2A**, and the recommendations made by the Scottish Government in **Paper 5.1A**, would be to establish a subcommittee, consisting of no more than five members. The Chair then invited discussion of **Papers 4.2A and 5.1A** and asked for members' views on the establishment of a subcommittee.

29. The Committee noted that the recommendations would have significant practical implications for the case management of family actions in the sheriff court, but that **Paper 4.2A** now provided it with empirical rather than anecdotal evidence on which to base its consideration of this matter.

30. **The Committee agreed to establish a subcommittee to take forward the recommendations made in the Research Report by Dr Whitecross at Paper 4.2A and the recommendations made by the Scottish Government at Paper 5.1A.**

31. The Committee agreed that the subcommittee should consist of a shrieval member, Simon Stockwell, a practitioner member, and Ian Maxwell, supported by LPPO and the Secretariat. It was noted that Sheriff Principal Lewis and Sheriff Tait would discuss which of them would be best placed to serve on the subcommittee, and that both might do so if their diaries permitted. It was also noted that the Committee's practitioner members would discuss which of them would be best placed to serve on the subcommittee.

32. The Committee agreed that the subcommittee should prepare in early course a paper setting out a response to the recommendations made by Dr Whitecross and by the Scottish Government.

33. The Committee instructed LPPO and the Secretariat to liaise with the members of the subcommittee to arrange suitable meeting dates.

Item 5.2 – Extension of Simplified Divorce and Dissolution (Papers 5.2 and 5.2A-B)

34. John Thomson introduced **Paper 5.2**, which asked for members' views on whether it was appropriate to continue to make provision for simplified divorce and dissolution where the ground of divorce or dissolution is the issuing of an interim Gender Recognition Certificate ("GRC"). John explained that the Scottish Government disappplied the need for third party evidence in relation to divorces and dissolutions based on the parties' separation, but this had not been done for GRC divorces and dissolutions as the view taken was the interim GRC provided the third party evidence. As a result of changes made by the Marriage and Civil Partnership (Scotland) Act 2014, it is now necessary in GRC divorces and dissolutions to establish by evidence, both that the Gender Recognition Panel ("GRP") has issued an interim GRC to a party to the marriage, and also that the GRP has not subsequently issued that party with a full GRC. It is not clear how this could be achieved in simplified procedure.

35. Simon Stockwell advised that the Scottish Government considered that simplified divorce or dissolution on the grounds of the issue of an interim GRC should remain as such cases are, like non-cohabitation, a no-fault basis for obtaining a divorce or dissolution.

36. Members discussed the implications of removing GRC divorces and dissolutions from simplified procedure. It was noted that the number of such cases is low, and that removing them would simplify the rules and associated forms and guidance notes. Members also considered the fact that the ordinary procedure would remain available, as would simplified divorce and dissolution based on the parties' separation.

37. **The Committee agreed that simplified divorce and dissolution should no longer continue to be provided for where the ground of divorce or dissolution is the issuing of an interim Gender Recognition Certificate.**

38. **The Committee instructed LPPO to prepare revised draft rules for consideration at its next meeting, so that the planned consultations could then take place on extending simplified divorce and dissolution to cases where there are children under 16 but no dispute over their welfare.**

Item 6: A.O.C.B.

39. Simon Stockwell advised that the Scottish Government has to do further work on Child Welfare Reporters, and proposed to circulate drafts of its guide for children, and updated drafts of the guidance for parties, and instructions to reporters to the members of its Working Group on Child Welfare Reporters. **The Committee noted this.**

40. Simon also advised that the Scottish Parliament's Public Petitions Committee was due to resume consideration on Thursday 11 May of the petition on recording child welfare hearings. Simon advised members that the Scottish Government is likely to tell the Public Petitions Committee that the question of child welfare hearings will be considered by the case management subcommittee.

41. Ian Maxwell asked if a Sheriff Appeal Court judgment concerning evidential welfare child welfare hearings was pending. Sheriff Principal Lewis advised that the judgment in question had been published on the Scottish Courts and Tribunals Service's website, but that the appeal did not in fact concern the question of evidential child welfare hearings.

42. Ian Maxwell asked if there was an update concerning the Family Dispute Resolution Pilot. Catriona Whyte advised that SLAB is looking into how the pilot will be funded, and will keep Scottish Government, CALM Scotland and Relationships Scotland informed about the position.

Item 7: Dates of future meetings

43. Members noted the date and time of the next meeting:

- Monday 23 October 2017 at 10am

**Scottish Civil Justice Council Secretariat
May 2017**