

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
FAMILY LAW COMMITTEE
MONDAY 12 DECEMBER 2016 AT 10 AM
JUDGES DINING ROOM, PARLIAMENT HOUSE, EDINBURGH

MINUTES

Members Present: Lord Brailsford (Chair)

Catriona Whyte (Scottish Legal Aid Board representative)

Tom McNamara (Scottish Government representative)

Sheriff Tait

Lynda Brabender (Advocate, SCJC member)

Stephen Brand (Solicitor)

Fiona Jones (Clan Childlaw)

Professor Frances Wasoff (Edinburgh University)

Ian Maxwell (SCJC member)

In attendance: Malcolm Schaffer (Scottish Children's Reporter Administration)
(until Item 4.1)

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

Karen Stewart (Business and Policy Manager, Scottish Civil Justice Council)

David Ross (Policy Officer, Scottish Civil Justice Council)

Apologies: Sheriff Principal Lewis

Rachael Kelsey (Solicitor)

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

Simon Stockwell (Scottish Government representative)

Gillian Prentice (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 Sheriff Principal Lewis, Nicola Anderson and Simon Stockwell. Gillian Prentice and Rachael Kelsey were absent. He advised members that Tom McNamara is the Scottish Ministers' representative for this meeting.
2. The Chair welcomed Malcom Schaffer of the Scottish Children's Reporter Administration, who has attended the meeting to speak to Agenda Item 4.1.
3. Members agreed not to publish the following papers: **2.2, 3.3, 4.1, 4.2, 4.2A, 4.3 and 4.3A.**

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

4. **The Committee approved the minutes from the previous meeting.**

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.**

Item 3: Work programme

Item 3.1 – Update from the Scottish Government (Oral)

6. Tom McNamara provided an update on legislative developments in the Scottish Government. He advised a further announcement about the independent review of the care system is expected early in the New Year; the Permanence And Care Excellence (PACE) programme, which aims to reduce delays in looked after children achieving permanence, currently being piloted will commence in four more local authority areas in March 2017. He advised that reductions in the average duration of permanence proceedings have been seen in Renfrewshire as a result of

the scheme; he advised that the Scottish Government has announced plans to increase the age of criminal responsibility in Scotland from 8 to 12.

7. Ian Maxwell noted concern at the time being taken to establish a scheme for the training of child welfare reporters. Inez Manson advised that the Lord President's Private Office was considering the issues raised in the letter from the Scottish Government to the Lord President, and that a response would be issued shortly. .

Item 3.2 – Forward Work Programme (Paper 3.3)

8. **The Committee noted the content of Paper 3.3 and the progress that has been made on actions since the last meeting.**

Item 4: Proposals for rules

Item 4.1 – Policy Proposal: Personal Examination of Child and Other Vulnerable Witnesses in Children's Hearings (Papers 4.1, 4.1A, 4.1B, 4.1C)

9. Tom McNamara introduced the policy proposal set out in **Paper 4.1A** which invites the Committee to consider making rules of court to prohibit parties from personally conducting the examination of children and other vulnerable witnesses in proceedings under the Children's Hearings (Scotland) Act 2011.

10. Malcolm Schaffer explained that the Scottish Government and the Scottish Children's Reporter Administration (SCRA) are concerned about examination of child and other vulnerable witnesses by parties in Children's Hearings proceedings. He outlined a number of scenarios and explained the potential impact upon child and other vulnerable witnesses of any examination which is permitted to be carried out by a party in these types of proceedings. In particular, Mr Schaffer intimated that the fact such examination could potentially happen in every case, can seriously affect the children involved.

11. Mr Schaffer suggested that existing rules provisions provide insufficient safeguards for children and other vulnerable witnesses. In particular, he considered that Rule 3.47 of the Act of Sederunt (Child Care and Maintenance Rules) 1997, which sets out the power of the sheriff to exclude any person while a child is giving evidence, is ineffective. Accordingly he invited the Committee to consider a mechanism to address the issues by revision of the rules. The Scottish Government share the view of SCRA that a rule change is required, particularly in the context of the ongoing Evidence and Procedure Review.

The Committee noted the views of Mr Schaffer and Ms Whyte, who indicated that the proposed rule changes would not have significant cost implications.

The Committee discussed the issues raised and agreed in principle that amendment of the rules is required. In particular, the Committee agreed that a child witness involved in proceedings under the Children's Hearings (Scotland) Act 2011 should, at the very least, be afforded the same protections as a child witness involved in criminal court proceedings.

12. The Committee invited the Scottish Government and SCRA to submit a paper outlining detailed proposals for rules for the Committee's consideration at a future meeting.

Item 4.2 – Proposal for Rules: Hearing the Voice of the Child - Form F9 (Papers 4.2, 4.2A)

13. Inez Manson provided an overview of **Papers 4.2 and 4.2A** and provided background information on how and when the views of the child are sought under current rules provisions. The Committee discussed the outline draft rules contained in **Paper 4.2A**, and made decisions on a number of policy questions.

14. **The Committee agreed:**

- **The views of a child should not be sought in an undefended family action, on the basis that there is no dispute before the court.**
- **The form seeking views of the child should be sent to a child on receipt of a Notice of Intention to Defend in a related family action and when answers are lodged in response to a minute seeking variation of decree.**
- **There is no requirement for rules to prescribe a 'prompt' to the sheriff about the methods that he/she might consider using to obtain the views of the child.**
- **The rules should include a discretionary 'catch all' provision permitting a form seeking views to be sent to a child as directed by the sheriff.**
- **The rules should include a statement making it clear that the forms are designed to be sent to children as young as age 5.**
- **The rules should require a copy of the completed Form to be lodged with the court.**

15. The Committee instructed the LPPO to prepare revised draft rules for consideration by the Committee at the next meeting.

Item 4.3 – Proposal for Rules: Curators ad litem (Papers 4.3, 4.3A-B)

16. Inez Manson provided an overview of the draft rules in **Paper 4.3A**. She provided feedback on the draft rules from Colin McKay, Chief Executive of the Mental Welfare Commission.

17. **The Committee considered the draft rules and agreed a number of drafting points. In particular, the Committee:**

- **approved the definition of “incapable” given in the draft rules.**
- **decided that the sheriff court ordinary cause rules should provide that the court will appoint a curator *ad litem* after the expiry of the period for lodging defences.**
- **approved the policy points discussed in relation to the medical evidence to be provided by a curator *ad litem*.**
- **approved the policy points discussed in relation to the periodic review of the defender’s capacity.**
- **decided that the Rules of the Court of Session should be amended to widen the scope for appointment of curators to encompass family and civil partnership actions and not be restricted to actions of divorce, dissolution or separation. This would achieve consistency of application in the Rules of the Court of Session and sheriff court rules.**

18. **The Committee approved the draft rules subject to the agreed revisions, and agreed they be submitted to the Scottish Civil Justice Council for consideration and approval.**

Item 5: Research and consultations

Item 5.1 – Case Management in Family Actions – Update on Phase Two Research (Oral)

19. Inez Manson provided an update on the progress of the research by Dr Richard Whitecross into case management in family actions. She advised that a number of interviews have already taken place with judiciary and court staff and that interviews with practitioners are soon to commence. The interim report is due by 27 January 2017. The Committee noted that the Research Advisory Group will continue to monitor the progress of the research.

Item 6: A.O.C.B.

20. Ian Maxwell asked if feedback was available from the Sheriffs Principal on the approach to evidential child welfare hearings in the sheriffdoms. Lynda Brabender intimated that in a particular court, parties involved in child welfare hearings are experiencing an ongoing issue with obtaining authorisation from the court to attend personally at such hearings.

21. Inez Manson noted that Sheriff Principal Lewis has previously agreed to provide feedback on this matter. Karen Stewart intimated that Sheriff Principal Lewis anticipates that she will be able to attend the next Committee meeting in February 2017.

22. The Committee requested the LPPO to contact Sheriff Principal Lewis, providing a summary of the issues for consideration at the next meeting.

23. The Chair drew members' attention to a letter from Calm Scotland about a proposed Family Dispute Resolution Pilot scheme which is due commence in Hamilton, Paisley, Dumbarton and Aberdeen sheriff courts. The Chair advised that a consultation meeting has been arranged at the offices of Relationships Scotland, Edinburgh on 14 December 2016 to allow stakeholders to provide their views in connection with the Pilot. The Chair advised that Inez Manson intends to attend the meeting, in order to hear about the proposals. Ian Maxwell and Catriona Whyte advised that they have received invitations and will also attend.

24. The Committee noted that Inez Manson will provide feedback to members at the next Committee meeting.

Item 7: Dates of future meetings

25. Members noted the dates and times of the next meetings

- Monday 13 February 2017 at 10am
- Monday 08 May 2017 at 10am

Scottish Civil Justice Council Secretariat

December 2016