Introduction

The Family Law Association previously responded to the consultation in respect of the Scottish Civil Court Review. That response was submitted in 2008. That response has been helpful in the formulation of this further response.

It has always been the Family Law Association’s strongly held belief that the formation of a distinct Family Court would be advantageous not only for the Parties in family actions but also to the Courts and the judiciary. Whilst the Association has always been aware that the provision of a state of art Family Court is unlikely to be achievable it should not stop those within the Scottish Courts aiming to achieve that. The present draft Bill goes some way to provide the specialisms which are undoubtedly required in Family Law and other areas. However, the Association retains concerns in connection with the proposals. The writer has found some difficulty in formulating a response as it is difficult to rationalise how the system will work in practice particularly in rural areas.

As was suggested in the 2008 response, the Family Law Association remains concerned about the perception that Family Law is somehow being “dumbed down” by the introduction of Summary Sheriff’s. Whilst that perception may be erroneous it is nevertheless held in the wider population. It is accepted however, that the proposals within the draft Bill provide that Summary Sheriffs are to be appointed on the same conditions as a Sheriff. It is hoped that there will be an opportunity to have Summary Sheriff’s appointed solely on the basis of their specialism in Family Law.

One of the other major concerns highlighted in the 2008 response and which remains a concern today is how the system will work in practice, particularly in rural areas. One of the fundamental principles of the Bill is to allow Parties a choice in who would deal with their case. They could either travel to a specialist sheriff or have it dealt with locally by a Summary sheriff. The Association remains concerned that for some Parties that choice will not be available. For instance if a Party in a rural area on Legal Aid finds themselves 50 or 60 miles from a specialist Sheriff, will they truly be able to avail themselves of the specialist? Will the Legal Aid Board pay to have a solicitor deal with it? Alternatively, the same considerations may apply in those same circumstances to a privately funded party. Purely on financial grounds they may find it extremely difficult to afford the additional cost of travel to the court of their choice. In circumstances such as these would a choice really be available.

This Response now turns to the specific questions posed. The Family Law Association has responded to those Chapters and Questions which affect Family Law.
Chapter 1

*Do you think that the Court of Session should retain concurrent jurisdiction for all family cases regardless of the value of the claim?*

The Association does have anxieties in connection with the definition of the word “value”. We can think of many cases whereby the value of a claim might be relatively small when considering monetary value but have an extremely high value to the Parties involved. What value do you place upon contact with a child?

The Association also has concerns about the difficulties and limitations placed on a Defender by a Pursuer’s ability to raise an action in the Court of Session irrespective of value or complexity. Some cases are raised with little regard to the monetary value of the claim, but based on one party’s ability to pay the costs of such an action. In some circumstances such a practice is used as a weapon to defeat the opponent who is unable to afford representation in that court.

The Court of Session should be used for high value claims or claims which pose complex legal issues. Unless a claim falls into either one of those categories it should be raised in the Sheriff Court.

We do not believe that there should be an automatic bar to raising any action in the Court of Session but there should be a greater degree of judicial scrutiny/case management to ensure that the case is appropriate to merit a hearing before that court.

*What impact do you think these proposals will have on your organisation?*

There are already significant delays in some family cases due to court resources. Some courts are unable to set a proof within the times limits envisaged within the relevant court rules, adoptions being one example. Cases involving children should be prioritised within the court system so that they stand a better chance of being resolved quickly with less strain on the parties and the children involved.

Chapter 2

*Do you agree with the proposed competence of Summary Sheriffs in family cases?*

This is a difficult question to answer given that no-one has been able to explain how the Summary Sheriffs/Sheriffs will be dealt with in any particular area. For instance, how is this to work in rural areas? Is it to be the case for instance that all the specialist Family Sheriffs will remain in Edinburgh whilst the local Courts have Sheriffs and/or Summary Sheriffs? Are the Summary Sheriffs with Family Law expertise or an interest in family law able to deal with purely family law or would they have to deal with the full spectrum of summary crime, small claims and the like as well?

If there is a Summary Sheriff with family expertise in an area then that would probably be preferable to a Sheriff without such expertise.
The Association does have anxieties about the fact that Summary Sheriffs are to hear Summary Crime and Small Claims/Summary Causes as well as family cases. One of the biggest criticisms of the Court system thus far is the fact that civil business plays second fiddle to criminal business. It has always been the case that those involved in civil actions have had to wait whilst criminal business is disposed of. The Association is therefore concerned that having Summary Sheriffs deal with Summary Crime is simply going to mean that exactly the same difficulties are found in the new third tier of jurisdiction.

One of the main themes behind the draft Bill is to ensure that parties have the choice of where they raise an action. If they wish to raise it before a Sheriff who is a specialist in family law matters then that is their choice. However, if it is the case that a party in Hawick simply can’t afford to travel to Edinburgh or the Legal Aid Board will not pay for a solicitor to deal with the matter before the Specialist Sheriff in Edinburgh then the Association wonders how much choice there actually is. The Association is concerned that the choice will not be available for those on reduced incomes and or Legal Aid.

As can be said for all areas of law, no doubt, it would be beneficial for a Sheriff who has an interest or specialism in a particular area of law to deal with that area. That is even more important in the area of family law matters because additional skills and training are essential to help deal with emotional issues quickly to alleviate stress, anxiety and harm to children. The Association endorses and would promote the specialist training of Sheriffs/Summary Sheriffs for family law cases. Other jurisdictions such as Australia have specialist family courts and these jurisdictions have seen benefits in that system. The specialist family court in Glasgow is successful and it would be hoped that the new court structure would allow such specialist courts in all areas of the country.

It should never be forgotten that family law cases are not soft options, the work is demanding because there are many facets to it, knowledge of the law is insufficient; on-going training in a number of other areas is essential. These cases require the very best of judicial thinking and case management to ensure the right result is delivered for each family. That includes ensuring that each case receives the appropriate amount of time to deal with it.

Do you agree that Summary Sheriffs should deal with referrals from Children’s Hearings?

Various members of the Association can see that there may be difficulties in the suggestion that Summary Sheriffs deal with referrals from Children’s Hearings. This stems from the fact that there could be families that are involved in multiple processes. For instance, adoption, which we understand is to be dealt with by a Sheriff; at the same time other members of the family, might be dealt with through the Children’s Hearing System. That could create anomalies whereby the family have to go through different Courts with different members of the judiciary dealing with the different cases which have an impact on the family unit. It would be advantageous in such circumstances to have the same Sheriff/Summary Sheriff deal with that family.
It remains unclear as to why criminal charges being heard by a Sheriff and jury which relate to a member of a family should be categorised differently to other areas of law with equal importance and effect to a family unit. For instance say a father is tried on indictment for abuse, requires to be dealt with by sheriff and jury, why should proceedings relating to the future care arrangements of the child/children who may have been victims of that abuse be dealt with by a Summary sheriff?

Do you agree that the allocation of cases where there is concurrent competence between Sheriffs and Summary Sheriffs should be an administrative matter for the relevant Sheriff Principal?

The Association is concerned that such a practice would lead to disparity as different Sheriff Principals would make different decisions. Such a policy would lack clarity; it seems that it would be desirable and beneficial to have one policy which related to Scotland.

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