

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

WORKING GROUP

TUESDAY 28 FEBRUARY 2017 AT 11 AM

PARLIAMENT HOUSE, EDINBURGH

MINUTES

Members Present: Sheriff Principal Abercrombie (SCJC member, Chair)

Sheriff Liddle

Sheriff Hughes

Jane MacDonald (SCTS, Legislation Implementation Team)

Marie-Louise Fox (SLAB representative)

Hamish Goodall (Scottish Government representative)

Elizabeth Ross (COPFS representative)

Rona Jamieson (Solicitor)

Alan McCloskey (Victim Support Scotland)

Jackie Powell, (SCTS, ICMS Project Lead)

Support: Caroline Mair (Deputy Legal Secretary, Rules Rewrite Drafting Team)

Kenneth Htet-Khin (Head of Rules Rewrite Drafting Team)

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

Apologies: Jillian Martin-Brown (Advocate)

Item 1: Welcome, apologies and agreement of private papers

1. The Chairman welcomed those present and noted apologies from Jillian Martin-Brown.
2. The working group agreed not to publish the following papers: **2.2, 3.1, 3.1A, 4.1.**

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

3. **Members approved the minutes from the previous meeting.** There were no matters arising.

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

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

Item 3: Proposals for rules

Item 3.1 Draft FAI Rules (Paper 3.1. 3.1A)

5. Caroline Mair introduced the draft rules for members' consideration. The Working Group also considered **Paper 4.1** which contained a detailed analysis of the consultation responses. The Working Group considered and discussed the rules and prescribed forms, taking account of matters raised by respondents to the consultation. The Working Group discussed and approved some substantive amendments to the rules in light of consultation responses. The key changes concerned: - (i) the shift from "evidence" to "information", (ii) witness statements, (iii) adjustments to the timeframes, and (iv) financial sanctions for non-compliance.

A shift in focus from 'evidence' to 'information'

6. Caroline Mair explained that the Legal Secretary to the Lord President had offered some general observations on the laws of evidence applicable at an inquiry. He had expressed the view that the rules were too restrictive in confining themselves to the manner in which "evidence" is presented and suggested that what the rules ought to be aiming for is a more fluid system whereby the sheriff can determine the form in which "information" generally, or on a particular topic, is to be presented.
7. The Rules Rewrite Drafting Team had considered those comments carefully and concluded that this suggested approach would be more in-keeping with the inquisitorial nature of an inquiry and would chime with some of the themes which

emerged in the Scottish Courts and Tribunals Service Evidence and Procedure Review.

8. Caroline Mair explained that this had been given effect to in the draft in two key ways: -
 - (i) the normal rules of evidence have been disapplied (see Rule 4.1);
 - (ii) the sheriff has been given “information” management powers. Rule 4.2 provides that the sheriff may make orders about the manner in which information is presented to the inquiry or about how the sheriff will “reach conclusions” (as opposed to findings-in-fact) based on that information.
9. Caroline explained that some of the other provisions have fallen away because of the disapplication of the normal rules of evidence or have been adapted to refer to “information” rather than evidence (see for example rules 4.10 (joint minutes of agreement, 4.11 (the duty to agree information) and 4.12 (notices to admit information)).
10. The Working Group discussed and endorsed the approach. It agreed that making this change has the benefit of making the rules more inquisitorial in nature as any/all information in whatever form could be put before the sheriff who will draw his or her own conclusions from it.
11. The Working Group agreed that this should be one of the matters considered when the rules come to be reviewed.

Witness statements will not be the default

12. Caroline Mair explained that there was very strong opposition to the proposed requirements that a witness statement be lodged for every witness. Concerns were raised about the resource implications and other practical problems which would arise if witness statements were the default. Given these concerns, the rules have been amended so that a sheriff has the option of ordering a witness’ statement to be lodged but witness statements were not to be the default position.
13. Going forward, witness statements will be part of the sheriff’s “toolkit”; one of a number of powers and options open to the sheriff should the circumstances require it.
14. The Working Group agreed this change.
15. The Working Group noted that the use of witness statements and video recordings (under rule 4.14) should be reconsidered when the rules are reviewed.

Adjustment of the timeframes

16. Caroline Mair explained that the majority of respondents to the consultation had raised concerns that the timeframes provided for in the rules might prove too challenging to meet in practice. As a result, various adjustments have been made to the timescales. In particular, the Rules now provide that if a preliminary hearing is to be held, this must take place within 56 days of the first order. If no preliminary hearing is to be held, the inquiry must be assigned to start within 56 days. The rules also provide that notice of the inquiry must be given at least 42 days before the preliminary hearing or, if there is no preliminary hearing, the inquiry.
17. The Working Group was supportive of these changes and was of the view that they should be sufficient to address the concerns raised by respondents. It was agreed that that this particular matter should be reconsidered when the rules come to be reviewed.

Inquiry Management Powers - power to impose a financial sanction

18. Caroline Mair explained that there had been very strong opposition to this provision. Respondents had raised practical issues and others were of the view that it was too close in nature to an award of expenses, which the court is prohibited from awarding under the Act. The Working Group agreed that this rule provision will be omitted.
19. The Working Group agreed a number of more minor technical drafting revisions and requested an amendment to the rules on the use of experts in order to align the procedure with that of other witnesses. It was also agreed that the provision regarding expert witnesses led by the procurator fiscal should be applicable to expert witnesses led by any participant and that the minute of questions should not be limited to matters of clarification.
20. **Subject to the agreed revisions, the Working Group approved the draft rules and agreed that these be submitted to Council for consideration and approval.**

Item 4: Research and consultations

4.1 Analysis of Consultation Responses (Paper 4.1)

21. The Working Group considered **Paper 4.1** which provides a detailed analysis of all consultation responses received. The Working group noted that non-confidential responses have been published on the SCJC website.

4.2 Next Steps (Oral)

22. The Working Group discussed a number of matters which will require to be finalised before its business is concluded. Members discussed how the rules will be maintained going forward, and agreed that as the COPFS is not represented on the Council it will be important for the Council to consult the COPFS prior to making any rules changes. The Working Group also discussed and agreed that it would recommend to Council that a review of the rules be scheduled for approximately 18-24 months after commencement. The Secretariat noted a number of specific matters for inclusion in the review. Members also discussed procedures for approving the minutes of today's meeting and the consultation report which is being drafted.
23. **The Working group agreed:**
- **A draft consultation report will be issued to members for approval by correspondence and thereafter submitted to Council seeking approval to publish.**
 - **The draft minutes of today's meeting will be issued to members for approval by email correspondence.**
 - **The following recommendation will be submitted to the Council for approval; a review of how the rules are working in practice should be scheduled for approximately 18-24 months after they come into force, and the COPFS should be consulted in relation to any proposed amendments.**

Item 5: AOCB

24. The Working Group noted the procedures which SCTS has set out for publication of responses to the sheriff's determination by relevant parties. In particular it was noted that SCTS has no discretion under the 2016 Act to publish late responses.
25. **The Chairman thanked the members of the Working Group for their considerable input in developing the draft rules.**

Scottish Civil Justice Council Secretariat

February 2017