

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
ACCESS TO JUSTICE COMMITTEE
MONDAY 11 FEBRUARY 2019 AT 3PM
JUDGES CONFERENCE ROOM, PARLIAMENT HOUSE, EDINBURGH

MINUTES

Members present: Lady Wise (Chair)

Anne Dickson (Scottish Legal Aid Board)

Denise Swanson (Scottish Government)

Sheriff Principal Turnbull

Summary Sheriff Jillian Martin-Brown

Employment Judge Joseph d’Inverno (SCJC member)

Ruth Crawford QC

Joel Conn (Solicitor, SCJC member)

Dean Purdie (Solicitor)

Ian Maxwell (Families Need Fathers, SCJC member)

Support: Andrea Campbell (Policy Officer, SCJC)

Kelly Jack (Policy Officer, SCJC)

Lauren Keillor (Policy Officer, SCJC)

Katherine Marshall (Deputy Legal Secretary, Lord President’s Private Office)

Apologies:

Lord Arthurson

Christina Bardsley (Offices of Court of Session, SCTS)

Mark Kubeczka (Legislation Implementation Team, SCTS)

Rachel Smith (Gordon Rural Action)

Jane Williams (Queen Margaret University, SCJC member)

Item 1 - Welcome, apologies and agreement of private papers

1. The Chair welcomed those present and in particular welcomed Joel Conn, who was attending his first meeting. The Chair informed the Committee that the Council had approved the appointment of council member Joel to the Committee on 21 January 2019.
2. The Chair informed the Committee that Professor Frances Wasoff had recently resigned from the Committee and has been thanked for her valuable contribution.
3. The Chair informed members that this would be Lauren Keillor's last meeting as secretariat support. Lauren would be moving to a post in Scottish Government shortly. Support going forward would be provided by the secretariat team. Andrea Campbell and Kelly Jack of this team attended this meeting and were welcomed by the Chair.
4. Apologies were noted from Lord Arthurson, Mark Kubeczka, Christina Bardsley, Rachel Smith and Jane Williams.
5. **The Committee agreed not to publish the following papers: 2.1, 4.1, 4.1A, 4.1C, 4.1D.**

Item 2 - Previous meeting

Item 2.1 – Progress of actions from previous meetings (Paper 2.1-2.1A)

6. **The Committee noted the progress that has been made on actions since the last meeting.**

Item 3 - Work Programme

Item 3.1 - Update from the Scottish Government on legislative developments (Oral)

7. Denise Swanson provided an update from the Scottish Government on legislative developments since the last meeting. She advised the Committee that the Scottish Government was continuing to prepare for Brexit.
8. Denise also advised that a new Sheriff Court (Limits on Awards of Expenses) Order was progressing through Parliament and that a consultation was currently ongoing in relation to defamation in Scotland. Denise advised that a consultation in relation to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 had closed.
9. **The Committee noted this update.**

Item 4 – Justice System Reform

Item 4.1 - Review of Simple Procedure Rules – Options Paper (Paper 4.1 - 4.1A-D)

10. The Committee considered **Papers 4.1 and 4.1A-D**, which invited members to consider and provide views on an options paper (**Paper 4.1A**) in relation to the Committee's ongoing review of the Act of Sederunt (Simple Procedure) 2016 ('the simple procedure rules').
11. Members noted that the options paper at **Paper 4.1A** had been prepared by the Lord President's Private Office ('LPPO') to provide advice to and assist the Committee in its consideration of possible amendments arising from the review.
12. To form the Committee's review, members noted that a public consultation ran from 27 February to 31 May 2018. It received 25 responses, mainly from law firms and representative bodies. In addition, research was commissioned from the University of Glasgow led by Tom Mullen and Halle Turner into the experiences of party litigants using simple procedure. Alongside these strands, the Scottish Courts and Tribunals Service ('SCTS') Director of Operations has carried out a review into simple procedure from the court's perspective and had provided the Committee with a paper in this regard.
13. **The Committee considered the options paper at Paper 4.1A alongside the reports stemming from the individual strands of the review at Papers 4.1B-D and agreed:**

- That the Claim Form should be replaced with a streamlined version that contains the details of the parties and orders sought in a summary front page. The Committee also agreed that the guidance should be retained for the benefit of party litigants;
- That the Further Claimant and Further Respondent Forms should be omitted so that all parties are contained within a single document;
- That the requirement to lodge two copies of the Claim Form (except in cases where the sheriff clerk is asked to serve the Claim Form) should be omitted;
- That the requirement to list the evidence, documents and witnesses the claimant may bring to a hearing when initiating the claim should be omitted. However, the Committee discussed this matter in detail and agreed that a step in the process, direction from the judge or signposting which would encourage party litigants to think about the evidence that they may lead would be helpful. The Committee agreed that this matter should be revisited during any further engagement and by the Committee at a future meeting.
- That rule 1.8 should be amended so that the sheriff may make a decision where he or she considers that the response ‘obviously has no real prospect of success’;
- That the Response Form should be replaced with a streamlined version. with guidance being retained for the benefit of party litigants;
- That, for the purposes of consistency with provision made for the claimant, the rules should be amended to provide that the sheriff clerk may formally serve documents where required on behalf of a party litigant individual respondent,
- That the Time to Pay Notice should be amended so that the claimant is required to explain the reason why they object to a Time to Pay Application, and to give an opportunity to specify any outlays incurred in making the claim;
- That rule 5.6(2) should be amended so that the sheriff ‘may’ (rather than ‘must’) arrange a time to pay hearing, keeping the parties out of court unless necessary;
- That the first attempt at formal service should be by recorded delivery post or, with the agreement of the person on whom the document is to be formally served, by email;

- That all references to postal service should refer to ‘a postal service which records delivery’;
- That the Confirmation of Formal Service should be accompanied by evidence of ‘sending’ (rather than, as is the case at present, evidence of ‘delivery), except in the case of email service, where acknowledgement of receipt of the email would be required
- That a process flow diagram should be included in most forms depicting what the parties must do next;
- That rule 7.6(1) should be amended to provide that the options available to the sheriff are not exhaustive in line with the sheriff’s power to do anything considered necessary to facilitate negotiation or decide the case;
- That rule 7.6(1)(d) should be amended to clarify that the first written order may indicate that the sheriff is considering making a decision without a hearing and give the parties an opportunity to object to that proposed course of action;
- That standard orders 3 and 4 should be merged to streamline the process of making the decision without a hearing in appropriate cases;
- That rule 8.4(2) should be amended so that, where a party does not take a step ordered in an ‘unless order’, the sheriff ‘must other than in exceptional circumstances’ make a decision;
- That a new standard order for cases with additional respondents should be included (to require: (a) the respondent to serve the Claim Form and the Response Form on the additional respondent within three weeks; (b) the additional respondent to respond within a further three weeks; and (c) explain that the sheriff will issue a case management order within a further two weeks);
- That the application forms should be significantly streamlined as far as possible by consolidating the following application forms into an ‘Orders Application’ by which the parties can ask the sheriff to make any orders:
 - Change of Timetable Application
 - Service by Advertisement Application
 - Application to Pause
 - Application to Restart
 - Additional Respondent Application
 - Application to Amend
 - Abandonment Notice
 - Application to Represent

- **Incidental Orders Application**
 - **Recovery of Documents Application**
 - **Application to Open Confidential Document**
 - **Special Recovery of Documents Application**
 - **Application to Recall**
 - **Alternative Decision Application**
 - **Application to Change a Damages Management Order**
 - **Application for Instructions about a Damages Management Order**
 - **Application for a Children’s Property Administration Order**
- **That the Application for a Decision should be amended to include a section in which the claimant can ask for any outlays (or other appropriate orders) and to require the claimant to set out when the application was sent to the court (to make calculating two weeks after the last date for a response easier),**
 - **That the process of responding to an application should be amended so that the applicant is given sight of any objection made by the other party,**
 - **That the rules should be amended to clarify that the court does not need to delay determining an application until the objection period has expired where the application was not sent to the other party (e.g. because that party’s whereabouts are unknown) and that the application forms should include a question relating to whether a copy has been sent to the other party so that the court is aware when an application was not intimated.**
 - **That the List of Evidence and List of Witnesses Forms should be amended so that they include a space for a description of the document (for example, a ‘Second List of Witnesses for the Respondent’),**
 - **That rule 10.2 should be amended to clarify that all evidence must be lodged together with a List of Evidence Form and both should be sent to the other party.**
 - **That rule 13.5(1) should be amended so that a decision of the sheriff may be recalled in any circumstances where a decision was made in the absence of the party seeking to recall the decision;**
 - **That rule 13.3(4) should be amended so that the sheriff may correct any minor or typographical errors in the Decision Form at any stage;**
 - **That the Decision Form and rules 15.2(1) and 16.2(1) should be amended to provide that the time limits linked to appealing or enforcing a decision start from the date of the decision (rather than when the Decision Form is sent);**

- **That rule 14.4 should be amended so that the written orders given by the sheriff in relation to expenses must require a party to send an account of expenses to the other party for negotiation before any expenses hearing is fixed;**
- **That the rules should be amended to provide that the Sheriff Appeal Court ('SAC') must issue its decision within four weeks, with the possibility of an extension, after an appeal hearing in rule 16.4(4). The Committee agreed that the wording for this amendment should mirror that which is currently under consideration by the Council in its review of the SAC rules.**

14. The Committee discussed whether the Time to Pay Application should be amended so that the order sought in the application is specified more clearly by giving the respondent an option to admit the claim and offer to pay any arrears and future payments by instalments. The Committee noted that the Time to Pay Application had been recently amended and considered that the difference between time to pay under the Debtors (Scotland) Act 1987 and Consumer Credit Act 1974 was clear enough in the current form. **The Committee agreed that it did not wish to take this amendment forward at this time.**

15. The Committee also discussed whether the period in which a party receiving an application can object to that application should be reduced from 10 days to 7 days. The Committee agreed that this may have implications for access to justice and may put unnecessary pressure on advice organisations relied on by party litigants. **The Committee agreed that it did not wish to take this amendment forward at this time.**

16. Due to the lateness of the hour, the Committee were unable to consider a number of proposals in **Paper 4.1A** which LPPO and the secretariat had recommended not be taken forward. **However, the Committee agreed that it wished to consider these matters at a future meeting.**

Item 5 - A.O.C.B

17. Lauren Keillor of the Secretariat explained to the Committee that Neil Christie, ICMS Business Change Manager, had recently contacted the secretariat in relation to possible discrete amendments to the simple procedure response and time to pay application forms, and possibly others, in light of the upcoming commencement of SCTS's online case submission facility.

18. Lauren explained that whilst LPPO and the secretariat were still considering which particular forms should be amended, and the exact wording which would be appropriate, the policy intention of these amendments would be to

highlight to a respondent that he or she can respond to a claim online once the go live date for civil online had passed. Lauren explained that SCTS were concerned that a respondent who received a bundle of papers may not be aware that the facility to respond to the claim online exists and that this amendment was intended to make this new functionality clear to respondents.

19. The Committee agreed:

- **That these amendments should be taken forward by LPPO and the secretariat in conjunction with the ICMS team; and**
- **That, given the time sensitive and minor nature of these amendments, the draft instrument should go straight to Council for consideration and, if content, approval.**

Item 6 - Date of next meeting

20. The Committee agreed that the contingency meeting scheduled for 25 February 2019 would not be necessary, given that the agenda items tabled for this meeting had been largely discussed.

21. The Committee noted that the next meeting date will be fixed shortly and communicated to members via email.

**Scottish Civil Justice Council Secretariat
February 2019**