

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

ACCESS TO JUSTICE COMMITTEE

MONDAY 12 DECEMBER 2016 AT 3PM

JUDGES DINING ROOM, PARLIAMENT HOUSE, EDINBURGH

MINUTES

- Members present:**
- Lady Wise (Chair)
 - Colin Lancaster (Scottish Legal Aid Board, SCJC member)
 - Denise Swanson (Scottish Government representative)
 - Sheriff Principal Turnbull
 - Sheriff Arthurson QC
 - Ruth Crawford QC (Advocate)
 - Paul Reid (Solicitor, SCJC member)
 - Dean Purdie (Solicitor)
 - Professor Frances Wasoff
 - Ian Maxwell (Families Need Fathers, SCJC member)
 - Jane Williams (Queen Margaret University, SCJC member)
- In attendance:**
- Senga Gracie (SCTS Legislation Implementation Team)
 - Yvonne Anderson (Depute, Offices of Court of Session)
- Support:**
- Andrew Campbell (Deputy Legal Secretary, Lord President's Private Office)
 - Norman Munro (Deputy Legal Secretary, Lord President's Private Office)

Lauren Gibb (Policy Officer, SCJC)

Apologies: Employment Judge Joseph d’Inverno (SCJC member)
Catherine Molloy (Solicitor)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present and welcomed Sheriff Principal Turnbull and Norman Munro to their first meetings.
2. Apologies were noted from Employment Judge d’Inverno and Catherine Molloy.
3. **The Committee agreed not to publish the following papers: Papers 2.2, 4.1, 4.1A-B, 4.2, 4.2D, 5.1, 5.2.**

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

4. **The Committee approved the minutes of 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 last meeting.**

Item 3: Work Programme

Item 3.1 - Update from the Scottish Government on legislative developments

6. Denise Swanson provided an update on legislative developments in the Scottish Government. Denise advised the Committee that the Government is currently considering the ‘Taylor Bill’ and that a Contract (Third Party Rights) Bill is due to be introduced and will be considered by the Delegated Powers and Law Reform Committee. Denise also advised that the Limitation (Childhood Abuse) Bill is due to be considered soon by the Justice Committee. Denise advised the Committee that new regulations to provide for legal aid under the new Simple Procedure Rules and various other Courts Reform commencement orders are now in force.

Item 3.2 - Update from the Rules Rewrite Drafting Team

7. Norman Munro provided an update on the work of the Rules Rewrite Drafting Team (RRDT). Norman advised that the simple procedure rules came into force on 28 November 2016 and that an issues log is being kept to allow the RRDT to identify any urgent issues. Norman also advised that the Rules Rewrite Committee is carrying out a review of the Judicial Review procedure and a paper was considered by that Committee during its meeting on 06 December. Norman advised that the Rules Rewrite Committee will also be conducting a review of the Sheriff Appeal Court Rules.

Item 4: Research and consultations

Item 4.1 - Lay representation and lay support - consideration of core issues (Papers 4.1 – 4.1A-B)

8. Members considered **Papers 4.1 and 4.1A-B** which provide possible options to implement the policy decision taken by the Committee at its October meeting recommending the creation of rules which do not automatically permit lay representatives to cross examine a witness but make provision for a lay representative to make an application to do so.
9. Sheriff Principal Turnbull advised the Committee that he had discussed the possibility of such a rule with the Sheriffs Principal who have indicated support for the drafting of rule to this effect. Sheriff Principal Turnbull noted that some sheriffs currently permit lay representative's to cross examine whilst some do not. He suggested that refusing permission to cross examination was unduly restrictive and did not meet the expectations of parties. Sheriff Principal Turnbull also advised the Committee that the Sheriffs Principal supported a rule as opposed to a practice note.
10. The Committee considered the two possible drafting options set out in **Paper 4.1B** and discussed whether or not the test for such a rule should be 'in the interests of justice' or 'if it would assist the Court'. The Committee noted that the first option allowed a party to make an oral application to allow a named lay representative to represent them and that this rule immediately allowed a lay representative to do everything a party litigant could do. The Committee noted that the second option split lay representation into two stages: the first being an application to allow a lay representative to represent a party and the second being an application to allow a lay representative to lead evidence. The Committee discussed whether or not having two stages would introduce a conceptual difficulty for parties, lay representatives and the judiciary.
11. **The Committee agreed that any rules should broadly follow a one stage process and that the rules must clarify that the withdrawal of permission**

for a lay representative's to represent a party, will not preclude any other lay representative applying for permission to represent that party.

- 12. The Committee agreed that rules allowing lay representatives to cross examine should follow the 'in the interests of justice' test.**
- 13. The Committee instructed the preparation of draft rules for consideration at the next appropriate meeting.**

Item 4.2 - EU Small Claims (Papers 4.2 – 4.2A-D)

- 14. The Committee considered Papers 4.2 and 4.2A-D which invited members to consider a new EU Regulation (Regulation (EU) 2015/2421) due to come into force on 14 July 2017. This regulation relates to European Small Claims Procedure, which is supported in domestic court rules by two Acts of Sederunt: the European Small Claim Procedure Rules (the ESCP Rules) and the European Order for Payment Procedure Rules (the EOPP Rules).**
- 15. The Committee noted the legal advice provided, which advised that amendments to the ESCP and EOPP Rules are necessary as a result of the new EU regulation. The Committee noted that the new EU Regulation is directly applicable and therefore does not require any domestic legislation to enforce it. Members also noted that the ESCP and EOPP rules exist to facilitate the European Small Claims Procedure and fill in any procedural gaps.**
- 16. The Committee considered a number of issues and agreed that rules provision is required to:**
 - provide a form of application where the court wishes to take evidence in another Member State.**
 - amend Form 3 in the ESCP Rules to reflect the wording of Article 18.1 of the new EU Regulation.**
 - amend Form 1 in the EOPP Rules to include reference to European Small Claims Procedure.**
 - amend paragraph 5 of the EOPP Rules to take account of the effect of the new Article 17 of the new EU Regulation.**
- 17. The Committee agreed it did not wish to make references to the EU Regulations in the ESCP and EOPP Rules ambulatory.**
- 18. The Committee instructed the preparation of draft rules for consideration at the next appropriate meeting.**

Item 5: Justice System Reform: Rules Rewrite

Item 5.1 - Item by Correspondence – Miscellaneous Instrument (Papers 5.1-5.1A)

19. **Paper 5.1** provided the Committee with information about rules approved by the Council via correspondence, since the Committee last met. The rules were set out in Paper 5.1A.
20. The Committee noted that the instrument amended the core simple procedure rules following a rules request from the Society of Messengers at Arms and Sheriff Officers. It also included a rule permitting trainee solicitors to appear in simple procedure cases which was approved previously by the Committee. Members noted that due to time pressure, this instrument was issued directly to the Council for approval.

Item 5.2 - ICMS – Launch of Civil Online (Paper 5.2 – 5.2A)

21. **Papers 5.2 and 5.2A** provided information about the launch of SCTS new ICMS system. The paper included legal advice from the Rules Rewrite Drafting Team about the potential impact on the simple procedure rules of any significant delay to the availability of the online system.
22. Members noted that SCTS initially aimed to launch Civil Online to coincide with the introduction of Simple Procedure on 28 November 2016. However, SCTS has delayed the launch.
23. **The Committee considered the legal advice provided within Paper 5.1 and confirmed that no changes to the simple procedure rules require to be made at this stage.**
24. **The Committee agreed that the Chair would write to the head of the ICMS project to request a formal update about the likely launch date of Civil Online.**

Item 6 - A.O.C.B

25. Ian Maxwell advised the Committee that he had read an interesting review of 'Mackenzie Friends' in England. The Chair advised that the Committee would note with interest any literature on lay representation and that this matter would be on the agenda at the next Committee meeting.

Item 7 - Dates of future meetings

26. The Committee noted the date of the next meeting: Tuesday 18 April 2016 at 3pm in Parliament House, Edinburgh and that Sheriff Arthurson QC will chair this meeting.

**Scottish Civil Justice Council Secretariat
December 2016**