

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL ACCESS TO JUSTICE  
COMMITTEE**

**MONDAY 05 FEBRUARY 2018 AT 3PM**

**JUDGES CONFERENCE ROOM, PARLIAMENT HOUSE, EDINBURGH**

**MINUTES**

- Members present:** Lady Wise (Chair)
- Anne Dickson (Scottish Legal Aid Board)
- Denise Swanson (Scottish Government)
- Summary Sheriff Jillian Martin-Brown
- Employment Judge Joseph d'Inverno (SCJC member)
- Ruth Crawford QC
- Dean Purdie (Solicitor)
- Ian Maxwell (Families Need Fathers, SCJC member)
- Professor Frances Wasoff (from item 4.1)
- Rachel Smith (Gordon Rural Action)
- In attendance:** Mark Kubeczka (Legislation Implementation Team, SCTS)
- Christina Bardlsey (Offices of Court of Session)
- Support:** Andrew Campbell (Deputy Legal Secretary, LPPO)
- Lauren Gibb (SCJC Secretariat)
- Apologies:** Lord Arthurson
- Sheriff Principal Turnbull

**Not present:** Jane Williams (Queen Margaret University, SCJC member)

### **Item 1 - Welcome, apologies and agreement of private papers**

1. The Chair welcomed those present and welcomed Summary Sheriff Jillian Martin-Brown and Christina Bardsley to their first meetings. Summary Sheriff Martin-Brown has recently been appointed to the Committee by the Council and Christina has recently replaced Yvonne Anderson as the Court of Session representative on the Committee.
2. Apologies were noted from Lord Arthurson and Sheriff Principal Turnbull.
3. The Chair advised members that Paul Reid's tenure had recently come to an end and that the Lord President had written to him thanking him for his valuable contribution to the Council and the Committee since his appointment.
4. **The Committee agreed not to publish the following papers: 2.1, 2.2, 2.3, 4.2, 4.2A, 4.3, 4.3C.**

### **Item 2 - Previous meeting**

#### *Item 2.1 – Minutes of previous meeting (Paper 2.1)*

5. **Given that the October 2017 meeting was inquorate under the Scottish Civil Justice Council Standing Orders, the Committee approved the minutes of the meeting in August 2017.**

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

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

#### *Item 2.3 – Items by Correspondence (Paper 2.3)*

7. The Committee noted **Paper 2.3**, which advised members of the outcome of consideration given to matters by correspondence since the last meeting.
8. Members noted that three items have been considered by correspondence since the last meeting:

#### **A. Meeting of 09 October – Note of Discussions**

- **Paper 2017/20** was issued to members on 20 October 2017, inviting members to consider and, if content, formally approve the decisions contained within a note of discussions on meeting papers. This is because the Committee meeting dated 09 October 2017 was inquorate under the Scottish Civil Justice Council's Standing Orders.

- In order to ensure that the decisions contained within the note of discussions accurately reflect the views of the Committee, all members were invited to respond to this item by correspondence rather than the normal procedure in which a nil response is treated as approval.
- **Responses were invited by close of business on Wednesday 01 November 2017. Four responses were received and whilst these were broadly supportive of the decisions contained within the note of discussions, there were not enough responses to be considered quorate.**
- **Accordingly, the decisions contained within the note of discussions were not formally approved by the Committee.**

#### ***B. Rules Rewrite Project – Work Stream 5: Access to Justice***

- **Paper 2018/01** was issued to members on Friday 12 January 2018 and invited the Committee to consider and, if content, approve:
  - A proposed outline remit of work stream 5 of the Rules Rewrite Project (Access to Justice);
  - proposals for the establishment of a working group drawn solely from Committee members to take forward work stream 5;
  - membership proposals for the proposed working group; and
  - proposed reporting arrangements for this work stream.
- **Responses were invited by close of business on Friday 19 January 2018 with a nil response to be treated as approval. Nine responses were received and the proposals were formally approved by the Committee. Members noted that the proposals will be issued to Council for approval in due course.**

#### ***C. Review of the Simple Procedure Rules - Methodology***

- **Paper 2018/02** was issued to members on Friday 19 of January 2018 and invited the Committee to consider and, if content, approve:
  - a draft consultation paper;
  - a draft research specification commissioning of research into the experiences of party litigants who have used Simple Procedure; and
  - proposals for focus groups to be carried out with stakeholders with experience of using Simple Procedure.

- **Responses were invited by close of business on Friday 26 January 2018 with a nil response to be treated as approval. Four responses were received and the proposals were formally approved by the Committee.**
- **Members noted that the Secretariat is currently considering the comments put forward by members and the proposals will be issued to Council for approval in due course.**

### **Item 3 - Work Programme**

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

9. Denise Swanson provided an update from the Scottish Government on legislative developments since the last meeting. She advised the Committee that the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill is due to progress to stage two at the end of February 2018.

10. Denise also advised that the Independent Review of Legal Aid is expected to report at the end of February and that the Justice Committee intends to take evidence on Alternative Dispute Resolution in early February. Members noted that those invited to give evidence so far are the Scottish Mediation Network, Scottish Arbitration Centre, Edinburgh Sheriff Court Mediation Service, Faculty of Advocates, the Scottish Legal Aid Board and some practitioners.

**11. The Committee noted this update.**

### **Item 4 - Research and Consultations**

#### *Item 4.1 – UK Courts and Mediation Conference - May 2018 (Oral)*

12. The Chair advised the Committee that she has been invited to speak on the topic of mediation in Scotland at a conference in Edinburgh in May 2018. She advised that this conference was being organised by the International Academy of Mediators.

13. The Chair advised that any member of the Committee who wishes to attend the conference, given its focus on Alternative Dispute Resolution, should make themselves known to the Secretariat who will liaise with the conference organisers.

**14. The Committee noted this update.**

#### *Item 4.2 – Review of Lay Representation and Lay Support (Papers 4.1 - 4.1A-D)*

15. The Committee considered **Papers 4.1 and 4.1A-D** in relation to its ongoing review of lay representation and lay support in the Scottish courts. Members noted that an initial draft of the report shown at **Paper 4.2A** was considered by the members present at the meeting on 09 October 2017. However, this meeting was inquorate under the Scottish Civil Justice Council's Standing Orders and, accordingly, the Committee was asked to consider some of these matters again.
16. **The Committee considered Papers 4.1 and 4.1A-D and agreed to make the following recommendations to Council:**
- **That a unitary definition of lay representation in the rules of court should broadly follow the current definition in the Simple Procedure Rules and;**
  - **That, as far as is practicable, there should be a unitary form of application to act as a lay representative.**
17. The Committee also further considered the issue of the recoverability of reasonable outlays by lay representatives. The Committee noted that it had previously agreed to recommend to Council that an exemption be inserted into the current rules so as to make clear that payment of a lay representative's travel and subsistence expenditure would not amount to a breach. However, the Committee had not reach a settled view on the separate issue of whether or not any travel and subsistence paid should be a recoverable expense in the action.
18. **The Committee discussed the issue of the potential recoverability of reasonable outlays as recoverable expenses in an action and agreed to the recommend to the Council that an amendment should be inserted into the rules of court to make it clear outlays paid to a lay representative by a party are not recoverable in an action.**
19. The Committee noted that the Secretariat intends to circulate a completed draft report for consideration before the recommendations are made to Council.

*Item 4.3 - Improving Scotland's Attractiveness for Commercial Dispute Resolution (Papers 4.3 - 4.3A-E)*

20. The Committee considered **Papers 4.2 and 4.2A-E**, which invited the Committee to further consider a discussion paper entitled '*Improving Scotland's Attractiveness as a Forum for Commercial Dispute Resolution*'. Members noted that this paper was initially presented to the Council by Council member Brandon Malone. As the subject matter relates to alternative dispute resolution, the Council remitted the matter to the Committee to consider.

21. The Committee noted that it had first considered the paper at its August 2017 meeting and had agreed to make the following recommendations to Council:

- **That the following proposals could be incorporated into the Rules Rewrite Project and could be considered not only in relation to commercial actions:**
  - **Proposal 1: Introducing a Scottish equivalent to the Part 8 proceedings available under the English civil procedure rules/overhauling the current 'Special Case' procedure;**
  - **Proposal 2: Limiting rights of appeal without leave;**
  - **Proposal 3: Making parties aware of alternatives to litigation in a formal and standardised way at the outset of a case/Introducing an ACAS style service for civil cases;**
  - **Proposal 5: Introducing a system of Parallel Online Blind Bidding (POBB), where both parties submit sealed bids to a third party with the proviso that if the bids come within an agreed percentage of each other, a settlement is deemed to have been agreed.**

22. The Committee had reconsidered these recommendations at its inquorate meeting in October 2017. Members present at the October 2017 meeting reiterated their views that, given the heavily specialist and commercial nature of the issues raised in the paper, the Committee did not feel it can offer a great deal of advice or input on the issues raised. Whilst this meeting was inquorate, the members present discussed whether making the recommendations set out at paragraph 21 may imply that the Committee felt as though it could offer meaningful input on the issues raised by Mr Malone's paper. Members present in October also noted their concern that by making the recommendations set out in paragraph 21, the Committee may implicitly imply that it supported these recommendations above others, when the Committee did not feel that it was in a position to do so.

23. At the October 2017 meeting the members present had noted that the questions posed in Mr Malone's paper were significant and were of the view that, whilst the Committee is generally supportive on Alternative Dispute Resolution, the Committee should not offer any views on the proposals.

24. **The Committee discussed the paper and agreed that whilst it remained supportive of Alternative Dispute Resolution, it did not feel that it could offer meaningful comment on Mr Malone's proposals.**

**25. The Committee also agreed that it would welcome the opportunity to comment on some of the proposals once they had been more fully developed.**

26. The Committee noted that some of Mr Malone's proposals would be considered in any event as part of work stream 5 of the Rules Rewrite Project (Access to Justice). Members observed that Proposal 1 in particular was broadly similar to the work streams planned review of Chapter 78 of the Rules of the Court of Session (special cases under section 27 of Court of Session Act 1988) for Inner House rulings on points of law.

#### **Item 5 - A.O.C.B**

27. The Committee discussed the progress of the Civil Online portal and noted its ongoing interest in the project. The Committee were mindful that the Simple Procedure Rules and Forms had been designed with an online case submission facility in mind and were interested an update on the development of the portal.

**28. The Committee agreed that the Secretariat should write to Craig McCorkindale, Director of Civil Court Reform at the Scottish Courts and Tribunals Service, seeking a formal update on the project.**

#### **Item 6 - Date of next meeting**

29. The Committee noted the next scheduled meeting date:

- Monday 23 April 2018, 3pm, Parliament House, Edinburgh

**Scottish Civil Justice Council Secretariat  
February 2018**