

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

MONDAY 28 AUGUST 2017 AT 2.30PM

**CONFERENCE ROOM, EDINBURGH SHERIFF COURT, CHAMBERS STREET,
EDINBURGH**

MINUTES

- Members present:** Lady Wise (Chair)
- Denise Swanson (Scottish Government)
- Lord Arthurson
- Employment Judge Joseph d’Inverno (SCJC member)
- Dean Purdie (Solicitor)
- Ian Maxwell (Families Need Fathers, SCJC member)
- Rachel Smith (Gordon Rural Action)
- Jane Williams (Queen Margaret University, SCJC member)
- In attendance:** Mark Kubeczka (Legislation Implementation Team, SCTS)
- Yvonne Anderson (Offices of Court of Session)
- Support:** Julie Davidson (Deputy Legal Secretary, LPPO)
- Andrew Campbell (Deputy Legal Secretary, LPPO)
- Lauren Gibb (SCJC Secretariat)
- Apologies:** Sheriff Principal Turnbull
- Anne Dickson (Scottish Legal Aid Board)
- Ruth Crawford QC

Paul Reid

Professor Frances Wasoff

Item 1 - Welcome, apologies and agreement of private papers

1. The Chair welcomed those present and congratulated Lord Arthurson on behalf of the Committee on his recent installation as a Senator of the College of Justice.
2. Apologies were noted from Sheriff Principal Turnbull, Anne Dickson, Ruth Crawford QC, Paul Reid and Professor Frances Wasoff.
3. **The Committee agreed not to publish the following papers: 2.2, 4.1 4.1A, 4.1D, 4.2, 4.2A, 4.2C, 4.2D, 4.3, 4.3A, 4.3C.**

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 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)

6. 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) Bill was introduced on 1 June 2017 and the Justice Committee have called for evidence on the Bill. She advised that the Justice Committee is expected to start hearing oral evidence in September.
7. Denise also advised that the independent Regulation of Legal Services Review has now been established and that the Chair is currently meeting with relevant stakeholders. She advised that the review has also commissioned a study of unregulated legal services which is due to report to the review later this year and that the Chair's report is due in July 2018.
8. Denise also provided an update on the independent Review of Legal Aid, being led by Martyn Evans, CEO of Carnegie Trust UK. She advised that the review

has issued a call for evidence and that the Chair has also had meetings with key stakeholders such as Lord President, SCTS and COPFS. She advised that the Chair's report is due in February 2018

9. The Committee noted this update.

Item 3.2 - Update from the Rules Rewrite Drafting Team (Oral)

10. Julie Davidson provided an update on the work of the Rules Rewrite Drafting Team ('RRDT'). She advised that during July and August, members of the Council and the RRDT visited sheriff courts across Scotland in a series of summer tour events.
11. Julie advised that the aims of the events were: to inform practitioners, court staff and the public about the changes to civil court procedure being taken forward under the Rules Rewrite Project ('RRP'); to explain why the reforms are happening and to encourage people to get involved.
12. Julie advised that the work under phase two of the RRP has been divided into six workstreams and that a committee or working group will be allocated to take forward each workstream. She advised that it is likely that the Access to Justice Committee will be invited to consider *workstream 5 - Access to Justice* and that this work will begin in 2018.

13. The Committee noted this update.

Item 3.3 - Update from the Rules Rewrite Drafting Team (Oral)

14. Lauren Gibb provided an update on Simple Procedure and commencement of the Simple Procedure (Special Claims) rules. She reminded members that the core Simple Procedure Rules came into force in November 2016 with Special Claims Rules being scheduled for implementation in April, 2018.
15. Lauren advised that the operation of the core Simple Procedure Rules is currently being reviewed by the SCTS following feedback to identify areas where improvements can be made. Lauren advised that SCTS are holding workshops with court staff and the judiciary to identify areas in need of improvement and it is anticipated that the SCTS will present a paper to the Committee giving further detail about this review and any potential rule changes that might be required as a result at a future meeting.
16. As the Special Claims Rules are modelled on the core Simple Procedure Rules, Lauren advised that the Making Justice Work Programme Board, who are co-ordinating the implementation of civil court reform, has agreed that the

introduction of the Special Claims Rules should be delayed by no less than six months.

17. Lauren also advised that in light of SCTS's operational review, the MJW Board are of the view that it would seem sensible that the post implementation review of Simple Procedure is brought forward. The review had originally been planned for approximately May 2018. She advised that it is anticipated that the Committee will lead on the review of the core rules and that a paper would be presented to Committee in this regard at a future meeting.
18. Lauren advised that when the special claims rules were signed off in principle by Council in May the Council had noted that the Secretariat may wish to use time to consult on the draft rules. Accordingly the Secretariat organised a further informal and targeted consultation with stakeholders in the fields of housing and personal injury. She advised that the responses to this targeted consultation are still being analysed and it was likely that the Committee will be further updated in this regard at the next meeting.
19. **The Committee noted this update and agreed that it would welcome the opportunity to consider the review proposals at a future meeting when they have been fully developed.**

Item 4 - Research and Consultations

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

20. The Committee continued its consideration of lay representation and lay support and considered various options set out **Papers 4.1 and 4.1A** that it could take forward as part of its review.
21. The Committee noted that it considered some of the options set out in **Paper 4.1** at its meeting in June. At that time, the Committee agreed some recommendations it would make to Council. The Committee agreed to consider additional matters from the paper at this meeting.
22. **The Committee considered Papers 4.1 and 4.1A-D and agreed to make the following recommendations to Council:**
 - **Court rules should provide that if a party is represented, that party must only be present at substantive hearings even when he or she is being represented by a lay representative.**
 - **Where not already provided, the forms of application for a lay representative should require the prospective lay representative to**

declare whether or not he/she;

- a) Has a financial interest in the case;**
- b) Has been declared a vexatious litigant;**
- c) Has any criminal convictions;**
- d) Is aware of any conflict of interest in becoming a lay representative for that party.**

The Committee agreed that it was important for a judge to have this information to assist with consideration of whether or not the person is a suitable lay representative. Since the information can be provided in the application forms, the Committee agreed that there is no requirement for court rules to also be amended in these terms.

- Court rules should expressly provide that a lay representative is entitled to see the same documentation and information that the party litigant whom he or she is representing is entitled to see.**
- Court rules should be amended to refer throughout to ‘courtroom supporter’ rather than ‘lay supporter’.**

23. The Committee had an in depth discussion about the term ‘*conflict of interest*’ and whether this wording in the rules requires to be amended in order to help lay representatives understand it. The Committee agreed that rules changes are not necessary because the term is widely understood. It noted that the main purpose of the declaration is to assist the judge with consideration about whether or not the person is a suitable lay representative.

Item 4.2 - Improving Scotland’s Attractiveness for Commercial Dispute Resolution (Papers 4.2 - 4.2A-E)

24. **Papers 4.2 and 4.2A-E** invited the Committee to 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. The subject matter relates to alternative dispute resolution and the Council remitted the matter to this Committee to consider.

25. The Committee noted that Mr Malone’s paper explores the ways in which the attractiveness of Scotland as a forum for commercial dispute resolution for domestic and international parties could be improved. He observes that Scotland attracts very little international dispute resolution business and that a good deal of the legal work generated as a consequence of Scottish business activity is dealt

with elsewhere. Accordingly, Mr Malone makes eight proposals to improve Scotland's attractiveness as a forum for commercial dispute resolution.

26. The Committee noted that the RRDT has considered Mr Malone's proposals and has prepared a summary of the proposals and the ways in which they could be taken forward, subject to the availability of resources.

27. The Committee discussed Mr Malone's paper and noted that whilst it found the paper interesting and thought provoking, it did not see the issues raised by the paper as those which the Committee could offer a great deal of advice or input on. This was because although the paper raised issues of alternative dispute resolution, the paper focused on ADR from a commercial perspective.

28. The Committee considered Papers 4.2 and 4.2A-E 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.**

29. **The Committee agreed that it was unable to offer a view on the remaining proposals.**

30. **The Committee agreed that a paper detailing its recommendations to Council would be prepared by the Secretariat and brought back before the Committee for approval at a future meeting.**

Item 4.3 - Public Interest Interventions (Papers 4.3 – 4.3A-D)

31. **Papers 4.3 and 4.3 A-D** invited members to consider the subject of Public Interest Interventions. The Committee noted that it first considered this subject on 17 October 2016 as a result of correspondence which had been received by the Secretariat from Anna Poole QC. As this matter concerns the ability of parties to

access cases that have been raised in the Scottish courts, members noted that it falls to the Committee to consider.

32. The Committee noted that Anna Poole QC wrote to the Scottish Civil Justice Council on 8 October 2014 asking it to consider a review of the rules provisions for Public Interest Interventions (PIIs). In her paper, she made proposals for potential changes to the rules of court to enable them to work more effectively in the Court of Session. Members noted that when the Committee first considered this matter in October 2016 it agreed that PIIs are important in ensuring access to justice and that the procedure for them should not be unnecessarily complex or difficult. The Committee also agreed that many of the suggestions in Anna Poole QC's paper were worthy of further consideration and the Secretariat was therefore instructed to prepare a paper on some of the issues for consideration.
33. Members noted that a comprehensive paper has been prepared by LPPO on the issue of PIIs along with draft rules. The Committee noted that these draft rules have simply been prepared by LPPO as a useful starting point for discussion in this regard.
34. The Committee discussed Anna Poole QC's proposals and, in particular, the proposal to widen PIIs to cases other than judicial review. The Committee noted that it would be helpful to have input on this item from Committee member Ruth Crawford QC, who has significant experience in public law.
35. **The Committee agreed to postpone further discussion of this matter until a future meeting to allow Ruth Crawford QC to contribute to the discussion.**
36. **The Committee also agreed that the Chair should ask Ruth if she would kindly deliver a short presentation on PIIs in the Scottish courts at the next meeting to help inform member's consideration of this matter.**

Item 5 - A.O.C.B

37. There was no other business raised.

Item 6 - Date of next meeting

38. The Committee noted the next scheduled meeting date:

- Monday 9 October 2017 at 3pm in Parliament House, Edinburgh

**Scottish Civil Justice Council Secretariat
August 2017**