



## Scottish Civil Justice Council Update – Issue 5: August 2016

### Council Activity – 11 July 2016 meeting

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#### Committee remits

The Council considered and approved changes to the remits of its established Committees. The revised remits can be seen on the [Committee](#) pages of the Council's website.

#### Committee membership

The Council approved the appointment of Sheriff Principal Scott to the Access to Justice Committee and Sheriff Principal Murray to the Information and Communications Technology Committee with effect from 11 July 2016.

The following appointments were previously approved by the Council by correspondence, taking effect from 03 June 2016, unless otherwise stated:

- Jane Williams and Dean Purdie to the Access to Justice Committee
- Brandon Malone to the Costs and Funding Committee
- Sheriff Principal Marysia Lewis, Professor Fran Wasoff and Rachael Kelsey to the Family Law Committee
- Stephen Brand to the Family Law Committee for a further three year period from the expiry of his tenure on 10 June 2016
- Lord Woolman to the Information and Communications Technology Committee
- Sheriff Mackie, Gordon Keyden, Ronald Conway, Fraser Simpson and Alan Rogerson to the Personal Injury Committee for a further three years period from the expiry of their tenure on 10 June 2016
- Maria Maguire and Amber Galbraith to the Personal Injury Committee for a further three year period from the expiry of their tenure on 26 June 2016
- Joel Conn to the Rules Rewrite Committee



## Ongoing work

- Review of Expenses and Funding of Civil Litigation in Scotland – the Council considered and approved a paper produced by the Costs and Funding Committee detailing proposals in relation to the implementation of the recommendations in Chapter 2-4 of the Taylor Review. The Council referred the matter back to the Committee for implementation (see [Committee Activity](#) below).
- Case management in family actions – the Council considered and approved a draft research specification agreed by the Family Law Committee as a proposed phase of research into case management in family actions. The aim of the research is to ascertain the reasons for the apparent variations in the use made of the judicial case management tools available for hearings in certain family actions (see [Committee Activity](#) below).

## Secondary Legislation

This section provides an update on draft rules of court that have been considered by the Council and have been submitted to the Court of Session for consideration. The [Recent Rules](#) section below details rules that have subsequently been approved by the Court of Session and embodied in an Act of Sederunt:

- Lay representation for non-natural persons – to provide for lay representation for companies, limited liability partnerships, any other partnerships and unincorporated association of persons
- Hearing the voice of the child: intimation of initial writ – to amend the Ordinary Cause Rules to expressly prohibit the intimation of the initial writ to a child in family actions
- Rule Clarification: Article 39 EU Regulation 2201/2003 – to amend the Rules of the Court of Session and sheriff court rules to clarify that the requirement to produce evidence of execution of service only applies where an applicant wishes to have a judgment issued in Scotland enforced in another EU Member State; it does not apply where the applicant is seeking recognition of the judgment.



- Child Support Rules: Signature of Application for Liability Orders – to make provision for officials in the Department for Work and Pensions to sign applications for liability orders on behalf of the Secretary of State.

## Recent Rules

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### [Act of Sederunt \(Rules of the Court of Session 1994 and Sheriff Court Rules Amendment\) \(No. 2\) \(Miscellaneous\) 2016](#)

This instrument was made on 12 August 2016 and comes into force on 28 November 2016. It introduces new rules in relation to implementation of section 87 (power of sheriff to order sheriff clerk to execute deed relating to heritage) and section 100 (vexatious litigation orders) of the Courts Reform (Scotland) Act 2014. It also corrects minor numbering errors in rule 36.L1 of the Ordinary Cause Rules and in the Act of Sederunt (Sheriff Court Rules Amendment) (Personal Injury Pre-Action Protocol) 2016.

### [Act of Sederunt \(Sheriff Court Rules Amendment\) \(Personal Injury Pre-Action Protocol\) 2016](#)

This instrument was made on 20 July 2016 and comes into force on 28 November 2016. It introduces a new chapter into both the Ordinary Cause Rules (Chapter 3A) and the Summary Cause Rules (Chapter 4A) requiring parties to a prospective action of damages for personal injury to comply with a compulsory protocol prior to commencing proceedings.



## Committee Activity

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The [Access to Justice Committee](#) last met on 14 June 2016. The Committee considered its remit and agreed a revision for submission to the Council. This remit was approved by the Council at its meeting on 11 July 2016. The Committee considered draft rules in relation to lay representation for non-natural persons (companies and other organisations) to implement sections 95-98 of the Courts Reform (Scotland) Act 2014. The draft rules were submitted to the Council who considered and approved them on 11 July 2016. At its next meeting in August the Committee will further consider the rules relating to lay representation and lay support and will view a presentation on lay representation in the Scottish courts by a researcher from the University of Glasgow.

The [Costs and Funding Committee](#) submitted detailed policy proposals in relation to the implementation of recommendations made in Chapters 2 to 4 of Sheriff Principal Taylor's Review of Expenses and Funding of Civil Litigation in Scotland, ("Taylor Review"), to the Council at its meeting 11 July for approval. In particular, the Committee proposed the following:

- Additional fees (Taylor Review recommendations 1, 2, 3, 5, 6, 7, 9, 12 and 13): following consultation with the Consultative Committee on Commercial Actions, the Committee proposed that these should not be adopted as a matter of general application, although particular recommendations may be considered suitable for adoption in the context of specialised procedures. Therefore, the Committee proposed it would keep this under review. In the meantime, the Committee proposed that the current rules and procedures relating to additional fee applications continue in the Court of Session and sheriff courts.
- Block table of fees (Taylor Review recommendations 4, 8 and 10): the exercise recommended in the Taylor Review be carried out in conjunction with the rules rewrite project.



- Interest on Judicial Expenses (Taylor Review recommendation 15): the Committee proposed that courts should have the power to award interest on judicial expenses from 28 days after an account of expenses has been lodged however, additionally, this may be on the basis that this provision is permissive rather than mandatory as originally stated within the Taylor Review.
- Account of expenses in sheriff court actions (Taylor Review recommendation 16): to be taken forward.
- Recovery of counsel's fees in the sheriff court and when sanction should be sought (Taylor Review recommendations 19, 20 and 21): to be taken forward by way of court rules.
- Sanction for the employment of counsel in the sheriff court (Taylor Review recommendations 19 – 21) has already been given effect in section 108 of the Courts Reform (Scotland) Act 2014. The Committee has not identified a need for an alternative provision and propose to keep this under review.
- Fees of Advocates and Solicitor Advocates the Court (Taylor Review recommendation 22): The Council does not currently have the power to fulfil these recommendations. The Scottish Government has consulted on a proposal to extend the Court's power to regulate fees and if this power is provided the Committee will reconsider the relevant recommendations of the Taylor Review.
- Notification of instruction of Counsel (Taylor Review recommendation 23): the Committee concluded this would not achieve its intended purpose of contributing to predictability and accordingly agreed this should not be taken forward.
- Expert Witnesses (Taylor Review recommendations 26 - 29): the Committee agreed that the court should have regard to proportionality of instructing an expert witness and proposed the test be amended to effectively reflect such proportionality. However, due to the impracticalities of tables of fees for expert witnesses, the Committee proposed not to take the recommendation relating to tables of fees for expert witnesses forward.



- Pilot schemes (Taylor Review recommendations 33, 34, 35 & 36): after consultation with the Consultative Committee on Commercial Actions and Commercial Judges, it was found that this may jeopardise the current success of the Commercial Court and accordingly the recommendations will not be taken forward by the Committee.

The proposals have been approved by Council and the matter referred back to the Committee to enable draft rules to be prepared.

The Committee also continues to consider detailed proposals in relation to Pursuers' Offers and Pre-Litigation Fees and these areas will be considered further at the Committee's next meeting.

The [Family Law Committee](#) met on 20 June 2016 and considered and approved draft rules amending the Child Support Rules 1993 to ensure it is competent, in line with previous practice, for officials in the Child Maintenance Group, Department for Work and Pensions to sign applications for liability orders under section 33(2) of the Child Support Act 1991 on behalf of the Secretary of State. The Committee considered revised forms to replace the existing Form F9 (the sheriff court form currently used to intimate a family action to a child and seek his/her views) which is considered by stakeholders to be far from child friendly. It agreed that the sub-group who had developed the forms should amend them in line with the discussion at the meeting; views from stakeholder should be sought and arrangements made to consult groups of children on the revised forms over the summer. The Committee also noted that the Scottish Government propose to submit a joint policy proposal with the Mental Welfare Commission for Scotland suggesting a change to court rules relating to curators ad litem to address specific divorce issues which have been raised. In relation to research on case management in family actions, the Council approved the research specification developed by the Committee and agreed that a legal research consultant be appointed to carry out the work. It is anticipated that a consultant will be appointed in September and permission has been requested from the relevant Sheriffs Principal for the consultant to carry out research in one of their courts. It is intended that the outcomes from the research will provide the Committee with a broader understanding of what is required for judicial case management to work well.



The [ICT Committee](#) last met on 13 June 2016. The Committee agreed a revised remit which was then approved by the Council on 11 July 2016. Lord Justice Briggs, Deputy Head of Civil Justice in England and Wales, joined the meeting by video conference and discussed his proposals for an online court in England and Wales. The Committee will consider how these proposals might be relevant in the Scottish civil justice system and anticipate submitting a paper on the subject to Council in due course.

The [Personal Injury Committee](#) met on 6 June 2016. It considered revised rules and a revised compulsory personal injury pre-action protocol. The Committee also considered in detail the recommendations from the Costs and Funding Committee (representatives of which attended the meeting) in relation to protocol expenses for work undertaken during the compulsory pre-action protocol stages. It agreed that the draft Act of Sederunt and Personal Injury Pre-Action Protocol be revised in line with discussion at the meeting and thereafter submitted to the Council for consideration and approval. The Committee is considering, by correspondence, an initial set of draft rules for personal injury cases which are to be included in the proposed Simple Procedure (Special Claims) Rules. At its 17 October 2016 meeting, the Committee will give further consideration to these rules, consider a draft clinical negligence pre-action protocol and set up a working group to develop an industrial disease pre-action protocol for the consideration of the full Committee.

The [Rules Rewrite Committee](#) is continuing with work to implement the remaining areas of the Courts Reform (Scotland) Act 2014 including vexatious proceedings, interdicts, and review of permission to appeal procedures. The first stage of work under the Rules Rewrite Project is ongoing and the Committee will next consider policy discussion papers on otiose provisions and case management powers. The Committee has submitted draft rules to support the Bankruptcy Consolidation Bill to the Council for consideration and approval. The Committee is also soon to consider reviewing the rules for Judicial Review proceedings.



The [SCJC Working Group](#) – Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. The working group met on 20 July 2016. The working group considered the interaction of the sheriff court Ordinary Cause Rules with inquiry proceedings and agreed on the desirability of including a statement of principle in the rules. The working group are next to consider the detail of such a statement and how consultation on the draft rules will be carried out.

## Other developments of interest

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### Membership

A recruitment exercise is ongoing to seek to fill a vacancy for a new advocate member for the Council. The vacancy follows the appointment of former advocate member Andrew Stewart QC as a Senator of the College of Justice. Further information can be found on our [recruitment page](#).

### Doors Open Day

Parliament Hall is currently holding its second historical exhibition during the Edinburgh Festival including Doors Open Day which takes place on Saturday 24 September 2016.

The Scottish Civil Justice Council Secretariat has agreed to take part in Doors Open Day and plans to provide information about the work of the Council and its committees to the public.



## Feedback

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The Council welcomes all feedback in relation to the practical workings of the rules of court. You can contact us as follows:

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This update is produced approximately every two months by the Scottish Civil Justice Council secretariat to provide stakeholders with regular information on the work of the Council and its committees. Meeting dates and latest minutes of the Council and its committees are available on the [Council's website](#).