

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

MONDAY 09 JULY 2018 AT 10.30 AM

JUDGES' CONFERENCE ROOM, LEVEL +2 PARLIAMENT HOUSE

MINUTES

- Members Present:** Lord President (Chair)
Sheriff Principal Abercrombie QC (until Item 5.2)
Lynda Brabender QC
Kenneth Campbell QC
Joel Conn (Solicitor)
Employment Judge Joseph d'Inverno (LP member)
Jacqueline Harris (Solicitor)
Colin Lancaster (Scottish Legal Aid Board)
Brandon Malone (LP member)
Ian Maxwell (Consumer representative)
Kay McCorquodale (Chief Development and Innovation Officer, SCTS)
Gery McLaughlin (Scottish Government)
Lord Menzies
Lord Tyre (from Item 6.1)
Jane Williams (Consumer representative)
- In attendance:** Nicola Anderson (Legislation Implementation Team, SCTS)
- Support:** Roddy Flinn (Secretary to the Scottish Civil Justice Council)
Mandy Williams (Deputy Secretary to the Scottish Civil Justice Council)
David Ross (Policy Officer, Scottish Civil Justice Council)
- Apologies:** Lord Boyd of Duncansby
Elena Fry
Gavin Henderson
Sheriff Hughes
Diana Machin
Eric McQueen
Sheriff Murphy QC

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present and noted apologies from Lord Boyd, Elena Fry, Gavin Henderson, Sheriff Hughes, Diane Machin, Eric McQueen, and Sheriff Murphy.
2. The Chair welcomed Gery McLaughlin, who attended in place of Gavin Henderson on behalf of the Scottish Government, and Kay McCorquodale, who attended in place of Eric McQueen on behalf of SCTS.

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

3. Colin Lancaster proposed an amendment to paragraph 14 of the minutes of the previous meeting.
4. **The Council agreed the amendment and approved the minutes subject to the agreed amendment**

Item 2.2 – Activity since last update (Paper 2.2)

5. **The Council noted the progress that had been made on actions since the last meeting and the activity report on the work of the Council's Committees.**

Item 2.3 – Items by correspondence (Paper 2.3)

6. **The Council noted Paper 2.3 which provided a summary of the outcome of the following matter raised by correspondence since the last meeting:**

A. Regulation of fees of solicitors

- **Paper 2018/12** was issued to members on 29 May 2018, inviting members to consider and approve draft rules (at **Paper 2018/12A**), developed by the Costs and Funding Committee, proposing an increase in the fees of solicitors by 5%.
- **Responses were invited by close of business on Tuesday 05 June 2018. Three responses were received, all approving the rules. The rules were made on 06 June 2018 and come into force on 24 September 2018.**

Item 3: Work Programme

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

7. Gery McLaughlin provided the Council with an update from the Scottish Government on legislative developments. The Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill was granted Royal Assent on 5 June and is now the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

8. The Damages (Investment Returns and Periodical Payments) (Scotland) Bill was introduced on 14 June. The Prescription (Scotland) Bill had its Stage 1 debate on 27 June. The Scottish Government has undertaken to support John Finnie's Children (Equal Protection from Assault) (Scotland) Bill, which is expected to be introduced in the autumn.

9. Item 3.2 – Update from SCTS (Oral)

10. Kay McCorquodale updated the Council on developments within SCTS. She advised that work on the development of Phase 2 of Civil Online is nearing its end. Phase 2 will allow Simple Procedure documents, including claim and response forms, to be submitted electronically via Civil Online. Additional development time has been required to address changes brought in by the recent Act of Sederunt (Simple Procedure Amendment) (Miscellaneous) 2018. Alongside this, development work is underway on the Integrated Case Management System (ICMS) for the Court of Session. SCTS has published its Digital Strategy, which sets out key digital innovation priorities over the next 5 years.

Item 3.3 – Business Tracker (Paper 3.3)

11. The Council noted Paper 3.3 which provided an update of the Council's work.

Item 4: Justice system reform: Courts Reform

Item 4.1 – Courts Reform Tracker (Paper 4.1)

12. The Council noted Paper 4.1 which provided an update on the work being progressed by the Council in relation to implementing the Courts Reform (Scotland) Act 2014 and the outstanding recommendations of the Scottish Civil Courts Review.

Item 4.2 - Rules Rewrite Project: Update (Paper 4.2)

13. The Council noted Paper 5.2, which provided an update on the progress of the Rules Rewrite Project working groups.

Item 5: Proposals for rules: policy development

Item 5.1 – Commercial dispute resolution (Papers 5.1 and 5.1A)

14. The Chair introduced **Paper 5.1**, which invited members to give further consideration to three of the proposals made by Brandon Malone in his paper '*Improving Scotland's Attractiveness as a Forum for Commercial Dispute Resolution: A discussion paper for the Scottish Civil Justice Council*'.

15. In relation to proposal 2 (limiting rights of appeal without leave in commercial actions), members considered statistics on the numbers of appeals in Court of Session commercial actions. **Members considered whether further information was necessary in order to consider this proposal more fully. It was agreed that no action was required at this time.**

16. In relation to proposal 7 (establishing an English/ Common law court or an international court) and proposal 8 (establishing an international dispute resolution forum), members considered a written response outlining the views of the commercial judges. Guidance aimed at encouraging the prompt disposal of actions for enforcement of an adjudication decision, including timescales for issuing judgments, is expected to be issued in autumn 2018. This might help to address concerns about Scottish courts losing business to England and Wales. It was agreed that it might be helpful to look at the timescales for issuing judgments generally in the commercial court.

17. Members considered that the Council's role was to consider improvements to practice and procedure in commercial actions, rather than to recommend the creation of a new forum.

18. **The Council rejected the proposals to establish an English/Common law court or an international court, or an international dispute resolution forum, on the grounds that it does not have the power to do so. It was open for other bodies to take forward such proposals.**

Item 5.2 – Protective Expenses Orders (Papers 5.2 and 5.2A-D)

19. The Chair introduced **Paper 5.2**, which invited members to consider Lord Malcolm's paper at **Paper 5.2A** and accompanying draft rules at **Paper 5.2C** concerning applications for protective expenses orders ("PEOs") in environmental proceedings. The paper and draft rules were prepared to reflect the considerations of the Protective Expenses Orders Working Group, which was chaired by Lord Malcolm.

20. **The Council, having considered Lord Malcolm’s paper and the draft instrument at Paper 5.2C:-**

- **approved the draft instrument subject to minor amendment and agreed that it be submitted to the Court of Session for consideration and approval, subject to any typographical or stylistic amendment; and**
- **agreed to consider a paper offering views on provisions for protective expenses orders to non-environmental actions at the next appropriate meeting.**

Item 5.3 – Lay representation (Papers 5.3 and 5.3A)

21. The Council considered **Paper 5.3**, which presented members with a report by the Access to Justice Committee setting out recommendations following its review of lay representation and lay support in the Scottish courts.

22. The Council was broadly supportive of the recommendations but raised concern that recommendation 7 may lead to the creation of new rights of audience for lay representatives.

23. Members discussed the role of a lay representative, and how it may differ in a simple procedure claim in the sheriff court, compared to a more complex action in the Court of Session. Draft rules should avoid creating a right of audience for lay representatives. A party should remain under an obligation to attend procedural hearings personally, unless the judge excuses the party’s attendance on cause shown.

24. **Subject to the concern above, the Council approved the recommendations and remitted the matter back to the Access to Justice Committee for the preparation of draft rules.**

Item 6: Proposals for rules: implementation of legislation

Item 6.1 Immigration Act 2016 (Papers 6.1 and 6.1A-B)

25. The Chair introduced **Paper 6.1**, which invited members to consider a policy proposal from the UK Government seeking new rules of court in order to implement the sections of the Immigration Act 2016 (‘the 2016 Act’) relating to Labour Market Enforcement Orders (LMEOs). Draft rules were provided at **Paper 6.1B**.

26. **The Council considered and approved the draft instrument at Paper 6.1B and agreed that it be submitted to the Court of Session for consideration and**

approval, subject to any typographical or stylistic amendment.

Item 7: A.O.C.B.

27. Lord Tyre advised members that he had been attending another meeting concerning the future development of the Civil Online portal by SCTS. Lord Tyre confirmed he advised the meeting that the portal should be developed with the Rules Rewrite Project in mind, rather than the rules as they are now, to ensure that the portal is not out date when it is launched.

Item 8: Dates of future meetings

28. The dates of future meetings were noted:

- Monday 10 September 2018 at 10:30 am
- Monday 19 November 2018 at 10:30 am
- Monday 21 January 2019 at 10.30 am
- Monday 18 March 2019 at 10.30 am
- Monday 13 May 2019 at 10.30 am
- Monday 08 July 2019 at 10.30 am
- Monday 09 September 2019 at 10.30 am
- Monday 18 November 2019 at 10.30 am

**Scottish Civil Justice Council Secretariat
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