

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
MONDAY 14 MAY 2018 AT 10.30 AM
JUDGES CONFERENCE ROOM, LEVEL +2 PARLIAMENT HOUSE
MINUTES

Members Present: Lord President (Chair)
Sheriff Principal Abercrombie QC
Lynda Brabender QC
Kenneth Campbell QC
Joel Conn (Solicitor)
Employment Judge Joseph d’Inverno (LP member)
Elena Fry (Solicitor)
Jacqueline Harris (Solicitor)
Gavin Henderson, Scottish Government
Colin Lancaster, Scottish Legal Aid Board
Brandon Malone (LP member)
Ian Maxwell (Consumer representative)
Eric McQueen (Chief Executive, SCTS)
Lord Menzies
Sheriff Murphy QC
Jane Williams (Consumer representative)

In attendance: Nicola Anderson (Legislation Implementation Team, SCTS)
Craig McCorkindale (Director for Civil Courts Reform, SCTS)
Diane Machin (Deputy Principal Clerk of Session, SCTS)

Support: Roddy Flinn (Secretary to the Scottish Civil Justice Council)
Lauren Keillor (Policy Officer, Scottish Civil Justice Council)
Mandy Williams (Deputy Secretary to the Scottish Civil Justice Council)

Apologies: Lord Boyd of Duncansby
Sheriff Hughes
Lord Tyre

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present and noted apologies from Lord Boyd of Duncansby, Lord Tyre and Sheriff Hughes.
2. The Chair welcomed Gavin Henderson and Nicola Anderson to their first meetings. Gavin has recently replaced Jan Marshall as the Scottish Government

representative on Council and Nicola has recently replaced Jane McDonald as head of the Legislation Implementation Team of SCTS.

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

3. The minutes were approved.

Item 2.2 – Activity since last update (Paper 2.2)

4. The progress that had been made on actions since the last meeting and the activity report on the work of the Council’s Committees were noted.

Item 2.3 – Items by correspondence (Paper 2.3)

5. Paper 2.3, which advised of the outcome of consideration of matters by correspondence since the last meeting, was noted.

6. Two matters have been considered by correspondence since the last meeting:

A. Simple Procedure Fixes Instrument

Paper 2018/10 was issued to members on 22 March 2018, inviting members to consider and approve draft rules (at **Paper 2018/10A**) making amendments to the core Simple Procedure Rules in light of the discussions at the Council meeting.

Responses were invited by close of business on Thursday 29 March 2018. Two responses were received, one proposing a slight amendment to the draft rules. This was considered by the secretariat and Rules Rewrite Drafting Team and the guidance in C6 of Form 5A (Time to Pay Form) was amended to include the wording “in relation to a consumer credit agreement”.

As the policy on this matter remained broadly the same, members agreed that the instrument would not be further circulated for comment and would be treated as approved.

B. Brexit forward planning

Paper 2018/11 was issued to members on 30 April 2018, providing members with an update of the work being undertaken by the Lord President's Private Office (LPPO) in relation to Brexit.

At its January meeting, the Council received an update about LPPO/SCTS's Brexit response planning. The Council noted that a scoping exercise was being undertaken by LPPO to assess the implications on rules of court. It was agreed that the report on that exercise would be circulated to members in due course.

That scoping exercise was now complete and **Paper 2018/11** was the scoping report presenting the findings of the exercise. The following papers accompanied the report:

- Scoping exercise: full analysis (**Paper 2018/11A**)
- Project Initiation Document: Rules of Court – effect on Brexit (**Paper 2018/11B**).

Members noted the papers at this stage.

Item 3: Proceedings

Item 3.1 (Committee membership) (Paper 3.1)

7. The following changes to Committee membership were approved:

- **the re-appointment for Yvonne MacDermid to the Costs and Funding Committee for a further period of three years from 6 July 2018;**
- **the appointment of Ms Fiona Campbell to the Family Law Committee with effect from 31 May 2018; and**
- **the appointment of Nicola Anderson to be the SCTS LIT representative on the Costs and Funding Committee; the Information and Communications Technology Committee and the Rules Rewrite Committee with immediate effect.**

Item 4: Work Programme

Item 4.1 – Update from the Scottish Government on legislative developments (Oral)

8. Gavin Henderson provided the Council with an update from the Scottish Government on legislative developments. He advised that the Civil Litigation

(Expenses and Group Proceedings) (Scotland) Bill has recently been passed by the Scottish Parliament.

9. The Prescription (Scotland) Bill has been introduced and stage 1 was almost complete. The Damages (Scotland) Bill and the Children (Equal Protection from Assault) (Scotland) Bill are expected to be introduced in June 2018.

10. **This update was noted.**

Item 4.2 – SCTS Update (Oral)

11. Craig McCorkindale updated the Council on developments within SCTS and in particular the ICMS online case management system. Phase 1 development of Civil Online, in relation to case tracking, was now live and development of the second phase was ongoing.

12. Work was ongoing to prepare for the implementation of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. Finally, the new Fees Orders came into force from 25 April 2018, applying a 2.3% increase.

13. **This update was noted.**

Item 4.3 – Business Tracker (Paper 4.3)

14. **Paper 4.3, which provided an update of the Council’s work, was noted.**

15. In relation to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill, the Council agreed that close coordination would be needed between the development of rules on group proceedings and associated legal aid arrangements.

Item 5: Justice system reform: Courts Reform

Item 5.1 – Rules Rewrite tracker (Paper 5.1)

16. **Paper 5.1, which provides an update on the work being progressed by the Council under the Courts Reform agenda, was noted.**

Item 5.2 - Rules Rewrite Project: Update (Paper 5.2)

17. **Paper 5.2, which provides a written update on the progress of the Rules Rewrite Project (RRP) working groups, was noted.**

18. The approximate timescales for the stages of the RRP and likely implementation dates for new rules were discussed.

Item 6: Proposals for rules: policy development

Item 6.1 – Draft consultation: case management in family actions (Papers 6.1 and 6.1A)

19. **Paper 6.1**, which invited the Council to consider and approve a draft consultation document on the case management of family and civil partnership actions in the sheriff court, was considered.

20. At its November meeting, the Council approved the Family Law Committee's proposal to carry out a public consultation on the recommendations contained in a report of its sub-committee on case management in family actions.

21. **The consultation document at Paper 6.1A was approved.**

22. **The list of proposed consultees was approved, with the addition of the Royal Faculty of Procurators in Glasgow and the Senators of the Court of Session.**

23. **The proposed timescale for the consultation was approved.**

Item 6.2 – Commercial Dispute Resolution (Papers 6.2 and 6.2A)

24. **Paper 6.2**, which invited the Council to consider further the policy proposal paper entitled '*Improving Scotland's Attractiveness as a Forum for Commercial Dispute Resolution: A discussion paper for the Scottish Civil Justice Council*', was considered.

25. The paper was submitted to the Council by Brandon Malone and has been considered by the Access to Justice Committee on a number of occasions. The Committee had agreed that, whilst it remains supportive of Alternative Dispute Resolution, it does not feel that it could offer meaningful comment on Mr Malone's proposals. It would welcome the opportunity to comment on some of the proposals once they had been more fully developed.

26. Mr Malone's paper contains eight proposals to improve Scotland's attractiveness as a forum for commercial dispute resolution.

27. **The proposals were considered and the following was agreed:**

- ***Proposal 1: Introducing a Scottish equivalent to the Part 8 Proceedings available under the English Civil Procedure Rules/overhauling the***

current 'Special Case' procedure - as well as considering Chapter 78 of the Rules of the Court of Session, work stream 5 of the RRP would be asked to consider Chapter 77 as part of its work;

- ***Proposal 2: Limiting rights of appeal without leave*** - the Deputy Principal Clerk of Session will provide statistics in relation to the number of appeals in commercial actions for consideration at a future meeting with a view to exploring whether appeal as of right acts as a disincentive;
- ***Proposal 3: Making parties aware of alternatives to litigation in a formal and standardised way at the outset of a case or introducing an ACAS style service for civil cases*** - the first element of this proposal would be taken forward as part of work stream 5 of the RRP's planned consideration of pre-action protocols, the types of action suitable for ADR, and ways that the court can encourage ADR at various stages of a case (including at the outset); it was agreed that the second element to this proposal should not be considered further by the Council at this time given the financial implications;
- ***Proposal 4: Clarifying the circumstances in which commercial proceedings might be anonymised*** - this proposal should not be taken forward by the Council having regard to the principle of open justice;
- ***Proposal 5: Parallel Online Blind Bidding*** - this proposal would be taken forward as part of work stream 6 of the RRP;
- ***Proposal 6: Allowing English law to be the subject of submission, rather than evidence, in the Scottish Courts*** - this proposal should not be taken forward by the Council having regard to the potential adverse consequences of such a change;
- ***Proposal 7: Establishing an English/Common law court or an international court*** - the commercial judges should be asked to consider this matter and provide their views for further consideration by the Council at a future meeting;
- ***Proposal 8: Establishing an international dispute resolution forum*** - the commercial judges should also be asked to consider this matter and provide their views for further consideration by the Council at a future meeting.

Item 6.3 – Judicial rate of interest (Paper 6.3)

28. **Paper 6.3**, which presented members with a summary of the current policy position in relation to the judicial rate of interest, was considered.

29. The paper had been prepared following discussion at the Council's last meeting when members indicated that the judicial rate of interest should remain a Council priority and be included in its Annual Programme for 2018/19. In particular, the Council had sought clarification on whether amendments to the rate of interest fell within the powers of the Council to regulate.

30. **Paper 6.3** confirmed that it would be within the functions of the Council to make recommendations to the Court regarding the amendment of the judicial rate of interest in both the Court of Session and sheriff court. It also set out the wider effects in terms of the impact of the rate on the quantification of damages.

31. **Given that the Ministry of Justice and Scottish Government are considering whether to launch a joint consultation concerning the factors that should be taken into account in setting the default rate of interest on decrees, the Council agreed that it should write to the Scottish Government seeking the Government's views on how best to progress matters.**

Item 7: A.O.C.B.

Agreement of private papers

32. The Council agreed to publish **Papers 2.3 and 3.1.**

Item 8: Dates of future meetings

33. The dates of future meetings were noted:

- Monday 9 July 2018 at 10:30 am
- Monday 10 September 2018 at 10:30 am
- Monday 19 November 2018 at 10:30 am

**Scottish Civil Justice Council Secretariat
May 2018**