

ITEM 7.2:**SUBORDINATE LEGISLATION: ACCOMPANYING DOCUMENTS
THE ROLE OF EXPLANATORY NOTES AND POLICY NOTES****Purpose**

1. To provide an explanation to the Council of the documents which may accompany subordinate legislation and their respective purposes.
2. To invite the Council to consider whether policy notes should be provided to accompany draft civil procedure rules, where appropriate.

Background

3. The Council has the function of submitting draft civil procedure rules to the Court of Session, and the Court must consider any draft civil procedure rules which are submitted in this way. The Court may approve them, approve them with such modifications as it considers appropriate, or reject them. Where the Court approves draft civil procedure rules, with or without modification, it must embody them in an act of sederunt.
4. The Interpretation and Legislative Reform (Scotland) Act 2010 provides that when the Court of Session makes an act of sederunt under an enactment the resulting document is a Scottish statutory instrument, and so the provisions of that Act apply as regards its publication and Parliamentary scrutiny. However, the vast majority of Scottish statutory instruments are orders, regulations or rules made by the Scottish Ministers under a wide range of statutory powers.
5. Scottish statutory instruments are separate, but closely related to, statutory instruments which are now made principally by the UK Government. However, they are very similar in form, and the form of statutory instruments has not altered greatly since the coming into force of the Statutory Instruments Act 1946.

Explanatory notes

6. Since at least the 1940s, every statutory instrument has been accompanied by an explanatory note. On devolution, this practice continued for Scottish statutory instruments, including acts of sederunt and acts of adjournal. As the Council will have seen, we prepare explanatory notes to accompany the draft civil procedure rules considered by the Council, unless it is not

possible to do so for reasons of urgency. The explanatory note must be ready by the time the Court is invited to embody the draft civil procedure rules in an act of sederunt.

7. An explanatory note does not form part of the act of sederunt (or other subordinate legislation) which it accompanies. Nor may it be used as an aid to interpretation by the courts. Instead, it is intended to give the lay reader a short, clear statement of the substance and purpose of the instrument. This is the common intention of drafters regardless of which rule-making authority (the Court, the Scottish Ministers or the UK Government) they serve. The explanatory note is supposed to be neutral in tone and it should not seek to explain or justify policy: in short, it should say what the change to the law is, rather than why it is being changed.
8. This does not mean, however, that an explanatory note gives a detailed explanation as to how the instrument will apply in practice. This issue is particularly acute with draft civil procedure rules because, in the vast majority of cases, they amend existing provisions of the Rules of the Court of Session or sheriff court rules. In those cases, the draft civil procedure rules effect the relatively technical process of making detailed amendments to the rules of court, rather than setting out a self-contained set of rules. Accordingly, it is proper for the explanatory note to indicate that, say, the Ordinary Cause Rules have been modified in a particular way.
9. At devolution, the Scottish Ministers recognised that an explanatory note formulated in these terms was unlikely to be sufficient for Committees of the Parliament to form a view on Scottish statutory instruments when scrutinising them. As a result, they introduced a further accompanying document which was originally called an Executive Note. When the Scotland Act 2012 changed the name “Scottish Executive” to “Scottish Government”, Executive Notes were renamed policy notes.

Policy notes

10. The function of a policy note is rather different to that of an explanatory note. As the name suggests, a policy note explains the reasons for making changes to the law. It is also possible to explain the intended effect. It is, by its nature, a more discursive document which means that it is possible to give more information about the background. At Westminster, the equivalent document is now called an “Explanatory Memorandum” (although this is clearly a very similar title to the explanatory note itself).

11. It should be noted that the provision of policy notes by the Scottish Ministers is not required by statute: however, it appears that the view was taken that they should be provided in order that the Scottish Parliament might properly discharge its scrutiny function. Traditionally, neither the former Rules Councils nor the Lord President's Private Office prepared policy notes to accompany acts of sederunt or acts of adjournal.

Discussion

12. We are aware that members of the Council have expressed concerns as to the utility of explanatory notes. In preparing draft civil procedure rules, we strive to ensure that the explanatory note is as helpful to the reader of the instrument as it can be, while recognising the constraints imposed by the nature of explanatory notes.
13. We think it is worth noting that the Scottish Parliament's Delegated Powers and Law Reform Committee ("DPLRC") scrutinises the accompanying documents to each Scottish statutory instrument, as well as the instrument itself. If the DPLRC considers that an explanatory note contains an error, then it may choose to draw that matter to the attention of the Parliament. Similarly, if an explanatory note were to depart from normal drafting or legislative practice (for example by purporting to explain the underlying policy) then the DPLRC might well report such instances to the Parliament. The Court, as rule-making authority, would be exposed to the risk of Parliamentary criticism as a result.
14. Accordingly, while we recognise members' concerns as to explanatory notes, we do not consider that it would be open to the Court to take a significantly different approach to their contents. The Court makes a relatively small amount of subordinate legislation as compared to the Scottish Ministers or the UK Government: it is unlikely that a departure from a longstanding practice as to the neutrality of explanatory notes which is common to all subordinate legislation would escape criticism.
15. We suggest, however, that there is an alternative approach open to the Council. It could adopt the model favoured by the Scottish Ministers and the UK Government of providing policy notes to accompany subordinate legislation. As explained in paragraph 10, the content can be rather wider and we consider that this would assist a) the lay reader in understanding what an instrument is supposed to achieve and b) the Parliamentary authorities and the Committees of the Parliament in discharging their scrutiny functions.

16. If the Council is minded to adopt this approach, we would propose to provide policy notes for draft civil procedure rules where it is appropriate to do so. We note that the Scottish Ministers do not produce them in all cases. The principal exception applied by the Ministers which would also be applicable to the Court is where the changes are so minor that there is nothing which cannot be said in the explanatory note. An example might be draft civil procedure rules which are designed purely to correct technical errors in an earlier act of sederunt: there would be no new policy, simply a technical exercise to ensure that the original policy was correctly achieved. The other (rare) exception which might also be applicable to the Court is cases of extreme urgency, in which there would simply be no time to produce a policy note.
17. Accordingly, we would suggest that draft civil procedure rules brought to the Council would either be accompanied by a policy note for the Council's consideration, or an explanation as to why one was considered not to be necessary. The Council could then consider that explanation and instruct the preparation of a policy note if it took a different view.
18. As far as the preparation of policy notes is concerned, we consider that it would be appropriate to adopt a similar approach to the Scottish Ministers. On that basis, the SCJC Secretariat would prepare a first draft of the policy note, and it would be revised by the drafter. As at present, the drafter would take responsibility for putting the draft civil procedure rules and its accompanying documents to the Council, as it is the drafter who lays the resulting act of sederunt before the Scottish Parliament and must answer for it there.
19. There is a note of caution to be sounded, however. As with explanatory notes, policy notes are not aids to interpretation in the strict sense: the courts cannot look to them to ascertain the intentions of the Court in making an act of sederunt. It follows that as a matter of drafting practice, and in the interests of legal certainty, it would not be appropriate for policy notes to contain definitions of terms of art, or to explain how parties should utilise a particular court procedure. We understand that there is a role for guidance of this nature, but consider that it is properly for the Scottish Court Service to produce it. We note in particular the work of the Policy and Legislation branch in relation to producing a range of guidance on sheriff court procedure which is available from the SCS website.

Recommendation

- 20. The Council is invited to note the respective purposes of explanatory notes and policy notes, in particular the limits on the content of explanatory notes which are imposed as a matter of practice across all rule-making authorities such as the Court, the Scottish Ministers and the UK Government.**
- 21. The Council is invited to indicate whether it wishes to adopt a practice of preparing policy notes to accompany draft civil procedure rules in appropriate cases.**
- 22. If the Council is minded to do so, it is invited to agree that this new practice will apply in respect of any draft civil procedure rules considered by the Council after 17 January 2014.**

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