

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

MONDAY 19 JULY 2021 AT 10.30AM

VIA WEBEX

MINUTES

Members Present: Lord President (Chair)
Brandon Malone
Catherine Smith
Colin Lancaster (SLAB)
Denise Swanson (Scottish Government)
Employment Judge D'Inverno
Eric McQueen (SCTS)
Joel Conn
Lady Carmichael
Lord Boyd of Duncansby
Lynda Brabender QC
Sheriff Hughes
Sheriff Principal Murray
Sheriff Way
Thomas Docherty

In attendance: Diane Machin (DPCS)
Heather Simpson (SCTS)
Kay McCorquodale (Judicial Office)
Nicola Anderson (SCTS Legislation Implementation Team)

Support: Craig McCorkindale (Director of Strategy, SCJC)
Emma Laurie (SCJC)
Jessica Flynn (SCJC)
Karen Stewart (SCJC)
Kelly Jack (SCJC)
Edward McHugh (LPPO)

Item 1: Welcome, apologies and agreement of private paper

1. The Chair welcomed those present to the forty-second meeting of the Council.
2. Apologies were noted from Jacqueline Harris.
3. Members agreed the attendance of Kay McCorquodale and Heather Simpson for the duration of the meeting.
4. Members agreed to publish the following papers: Agenda, Paper 2.1

Item 2: Previous meeting

Item 2.1 – Items by Correspondence (Paper 2.1)

5. The Chair introduced Paper 2.1 which provided information on the outcome of two matters that had been considered by correspondence since the last meeting on 24 May 2021.
6. **Members noted the paper.**

Item 3: Work Programme

Item 3.1 – Annual report 2020/21 and Annual programme 2021/22 (Paper 3.1 and 3.1A)

7. The Chair introduced **Papers 3.1 and 3.1A** – the Council’s Draft Annual Report and Annual Programme. Members noted that the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 requires that the Council’s Annual Report and Annual Programme must be prepared and laid before the Scottish Parliament as soon as reasonably practicable at the end of the annual period ending on 31 March. The Act permits the Council to combine both documents.
8. **Members approved the laying of the SCJC Annual Report 2020-21 and Annual Programme 2021-22 in the Scottish Parliament (subject to any typographical or stylistic amendments).**

Item 4: Rules Review

Item 4.1 - Rules Review - Mandatory Use of Civil Online in Simple Procedure Cases (Papers 4.1, 4.1A-D)

9. The Chair introduced the papers and invited members to consider whether the rules instrument for the mandatory use of civil online in simple procedure cases should be retained, abandoned or changed in advance of its 30th of September expiry date.
10. Lady Carmichael, Chair of Access to Justice Committee, was invited to set out members’ views on the subject, after the last Committee meeting on 14 June. The Council were provided with copies of the minutes of that meeting and the Committee’s questionnaire report on the rules.
11. Lady Carmichael provided an overview of the Committee’s views in particular regarding the exception test, Application Programming Interface (API) and the Equality Impact Assessment (EQIA). Some members of the Committee had

concerns that the policy may change after a full EQIA had been completed. There remained concerns about the impact of the rules on party litigants.

12. Lady Carmichael drew the Council's attention to the Equality and Human Rights Commission (EHRC) response to the Access to Justice Civil Online questionnaire. Their view was that the application process for the exception test could be seen as unduly burdensome.
13. Some Council members agreed with the concerns that a full EQIA had yet to be completed. Members agreed that, whilst the interim EQIA had been helpful for discussion, there remained concerns about approving a policy proposal for rules without a full EQIA. Other members queried how to engage with parties who chose not to lodge a claim via civil online.
14. SCTS explained that the EQIA was a substantial piece of work and a thorough approach was being taken. SCTS clarified that there was still some information to be gathered but they anticipated that it would be available by the end of August.
15. One member advised that he had discussed appeal routes with the EHRC in relation to a request for an exception. There was no right of appeal.
16. SCTS noted that whilst the exception test was designed to ensure access to justice, they wished to engage with groups that represented and supported users with protected characteristics. ICMS had also been audited for accessibility and there will be ongoing systems testing with users who have disabilities. There is also a feedback function integrated with the system. SCTS advised it was engaging with Citizens Advice Scotland on creating explanatory videos and guidance for its public website. SCTS noted that the EQIA aimed to enhance service delivery rather than lead to changes. SCTS's preference was for the temporary rules be made permanent now, with a review programmed in the future.
17. Taking account of views it was proposed that the sunset period be extended, to allow for further clarification of impact and completion of the EQIA.
18. Members were invited to vote on the following policy options:
 - 1) Approve a policy that would make the temporary rules on the use of civil online in simple procedure cases mandatory; stipulating that the rules will be reviewed again in one year; or
 - 2) Delay agreement of a policy position and retain the temporary rules with the sunset clause extended by a further 6 months until 31 March.
19. **Members voted by a majority in favour of option 2. Therefore, the provisions of the temporary rules requiring the mandatory use of civil**

online for the lodging of simple procedure cases will be extended for 6 months and will now expire on 31 March 2022

Item 5: Proposals for new rules

5.1 - Age of Criminal Responsibility (Scotland) Act 2019 (Papers 5.1, 5.1A-D)

20. The Chair introduced Paper 5.1 which invited members to consider and discuss proposals for the development of court rules to support the implementation of the Age of Criminal Responsibility (S) Act 2019. The Act introduced three new civil court orders, including police powers covering:

- the search of a child, vehicle or premises
- child interview orders; and
- the taking of intimate samples

21. The papers outlined potential operational issues with implementation such as the expeditious consideration of applications. The Council noted that the Scottish Government policy on out of hours applications was unclear. Denise Swanson advised that the Scottish Government is to consider its policy.

22. Members agreed that as a generality court rules should be as straightforward as possible with no bespoke provisions unless essential. Nevertheless, members agreed that relevant application forms, as requested by Police Scotland, and bespoke rules should be developed separately from the generic Summary Application Rules.

23. The Council instructed the draft rules be prepared making provisions for:

- ***the use of templates for applications by Police Scotland***
- ***regulating intimation, hearings and related timescales and any related new forms***
- ***the confidentiality of hearings***
- ***the procedures for permission to appeal***
- ***amending SAC rules to include appeals brought under the Act within the scope of existing rules relating to urgent appeals***
- ***new SAC rules regulating procedures for timescales, appeal avenues and form requirements***

24. The Council invited the Family Law committee to oversee the development of draft forms and noted that Scottish Government will be providing funding for the development of child friendly forms where required.

25. Members noted that the Act received Royal Assent in June 2019 and provisions relating to the disclosure of convictions came into force in November 2020. The Scottish Government anticipates that the Act will be commenced in October 2021.

5.2 - Rules of Court of Session - Consultation on Remote Hearings (Papers 5.1, 5.2)

26. The Lord President introduced **Paper 5.2** which provided an update on the progress with this work since the last Council meeting in on 24 May 2021.

27. At that time, the Council had discussed the outputs from the Judicial Institute's Civil Law Conference. Members expressed views to the Secretariat about the continued use of remote hearings when the current emergency legislation ends. Members' views were collated and noted in **Paper 5.2A**

28. The Lord President noted that, with the pending relaxation of the COVID rules including, as of next month, physical distancing, there is likely to be increasing pressure to return to in-person hearing in civil cases. The SCTS did not intend to change current operational provisions and did not propose that the courts return immediately to a general public open state. Post August, the public counters in courts will stay closed and there will continue to be limited access to the courts with masks and 1m physically distancing remaining.

29. Civil business would continue to be conducted virtually. A gradual change programme will have to be developed over time. New rules governing virtual and in-person hearings must be devised by the Council. The Lord President expressed the view that this matter was likely to be the most important decision that the Council would take in the past 5 years.

30. In order to assist members' discussion, the LPPO provided members with a draft rules instrument setting out draft Court of Session rules. Members discussed and agreed a number of key principles on the use of virtual hearings which would underpin the development of new court rules and which would form part of a public consultation on the use of virtual hearings in the civil courts.

31. The key principles are:

- Procedural business should continue to be dealt with virtually.
- Any business which did not involve the appearance of witnesses should continue to be dealt with virtually (e.g. legal debates).
- Categories of case (regardless of whether there are to be witnesses) which can most expeditiously be carried out remotely should continue to be dealt with virtually (e.g. commercial cases).

- Exceptions to these generalities must apply. Parties must have the option to request an in-person hearing on cause shown.
- There will be categories of case where an in-person hearing should be the default e.g. proofs where there is a significant issue of credibility requiring an analysis of demeanor.
- There will be exceptions required for legal debates and appeals where there is a point of law of general public importance or particular difficulty and the in-person appearance of advocates may help the resolution of the issues.
- There will be cases within the 'in-person' by default category where it would still be best to have a hearing in virtual/partly virtual format. This would be permitted on cause shown (e.g. due to travel distances).

32. In relation to family actions, some members were of the view that it was unnecessary for all hearings in these cases to be 'in-person' by default and that there were certain types of hearing which would benefit from being held remotely; in particular those involving child or vulnerable witnesses. The Council invited Lynda Brabender to provide the Secretariat with a note of proposals for those hearings in family actions which would be best held remotely.

33. Some members were strongly of the view that there should be no default requirement for hearings involving evidence of witnesses to be held in person. Some members noted that evidence in criminal proceedings was regularly and successfully given by remote means. Building rapport with witnesses was more of a problem than the testing of witnesses' credibility.

34. Mr Docherty noted that digital connectivity across the country will be crucial to the success of a virtual system. During the pandemic, many families had struggled with access to digital services. Mr Docherty queried how law centres and support services would be financed to enable them to provide support to court users who required to access the courts remotely.

35. Members agreed that the consultation should clearly set out a vision for the future of civil hearings. Members agreed that it would be important to obtain effective engagement from consultees who primarily used the sheriff courts. In order to do so, the Secretariat will liaise with LPPO and provide drafting instructions with a view to including draft sheriff court rules in the consultation document.

36. The Lord President noted that a practice note would be needed to narrow the discretionary windows in order that the key principles were seen as robust. It was noted by members that, in order to ensure a hearing can be conducted justly, where there was more than one option for the mode of hearing, other factors should be considered (e.g. parties' views, equality considerations, proportionality and expedition).

37. Members agreed that open justice was a matter which requires further consideration. It was noted that there was no public access to telephone hearings and that standard public access to WebEx events was by telephone on a national rate tariff.
38. Members agreed that rules/guidance for the electronic submission of documents and on procedures regulating the use of electronic bundles will be key to ensuring operational efficiency in virtual hearings. The rules would have to provide specific and consistent procedures to avoid local practices developing. These had the potential to create uncertainty and unpredictability and to prevent access to justice. Mr Conn proposed that the rules ought to provide for simple document formats and default provisions for document handling during hearings.
39. Mr Conn expressed the view that current systems and technology were not entirely fit for purpose. Significant change and resources would be required to allow virtual hearings to be undertaken in such a way as would equal an in person hearing. Appropriate resourcing, to enable SCTS to provide support for court users on the use of technology and to develop best practice on the use of Webex for electronic document handling during hearings, was required.
40. Members agreed that any rules which were developed will require monitoring and may change over time in light of experience.
41. Mr Docherty queried whether the Council was adequately resourced to undertake an Equality Impact Assessment for this project. It was noted that the Secretariat would lead on this work.
42. The timetable of work anticipated that a draft rules instrument and related consultation document would be issued by correspondence to members for consideration and approval in August. This was with a view to a public consultation running for 12 weeks. The Scottish Government would provide the Secretariat with information to assist the compilation of a prospective list of consultees.
43. Timescales for the remainder of the work were under consideration by the Secretariat.
44. The Scottish Parliament had passed a Bill on 24 June extending Part 1 of both Coronavirus Acts until 31 March 2022. The Bill made provision for further extension until 30 September 2022 under any future regulations made by Scottish Ministers.

45. In due course the consultation paper would be available to all the Council's committees in order that they could respond directly for their respective interests.

Item 6: AOB

46. Mr McCorkindale advised members that a new secretary had been appointed and would take up post on 07 September 2021. The LPPO has arranged for the secondment of 2 lawyers from the Parliamentary Counsel Office to support the work of the Council's Rules Rewrite Project for a period of 2 years. Start dates are to be confirmed.

Item 7: Dates of future meetings

- Monday 18 October 2021

**Scottish Civil Justice Council Secretariat
July 2021**