

REFORM OF CHAPTER 10 OF THE RULES OF THE COURT OF SESSION

Purpose

1. To invite the Council to consider policy proposals to amend Chapter 10 of the Rules of the Court of Session (“Chapter 10”) in relation to sittings of the court and, if content, approve draft rules provided at **Paper 6.1A**.
2. This proposal has not previously been considered by any of the Council’s Committees.

Policy Proposal

3. In September 2016, the Lord President made [Direction No 1 of 2016](#) under Chapter 10, which made provision for the sittings of the Court of Session for the Legal Years 2016/17, 2017/18, 2018/19 and 2019/2020. In particular, the Direction abolished the summer vacation and term dates.
4. Since that time, the Lord President’s Private Office (LPPO) has been considering what rule changes to Chapter 10 would be appropriate in consequence of the removal of court terms and the coming abolition of the summer vacation in 2018.
5. Moving away from a Direction setting out court sitting dates to including those dates in the body of the Rules themselves (beside the other rules about court sittings) has the benefit that court users can find at a glance when the Court is sitting. This would be of particular benefit to court users who are not lawyers and who would not otherwise think to look beyond the Rules for a Direction located elsewhere.
6. In the process of doing that work, the opportunity has also been taken to review the content of the entire Chapter with a view to modernising the drafting and stripping out spent provisions.
7. As a result, the proposed new Chapter 10 is considerably shorter than the existing one. **Paper 6.1B** has been prepared by LPPO to explain the background to the work and the policy options, together with policy recommendations. As noted, draft rules are provided at **Paper 6.1A**.

Timing

8. If Council agrees, it is intended that the draft rules would be made following the November meeting with a view to coming into force on 01 January 2018. The terms of the draft rules are predicated on those assumptions. If the draft rules are made later then commensurate adjustment to the dates mentioned in rule 10.3 would be required.

Consultation

9. No formal consultation has taken place on the draft rules. LPPO has liaised with the Offices of the Court of Session during the development of the rules as well as with the Office of the Advocate General for Scotland (in relation to Exchequer Causes).

Legal advice

10. Paper 6.1A has been prepared by LPPO and incorporates legal advice, where appropriate.

Recommendation

11. **The Council is invited to consider the draft rules at Paper 6.1 and, if content, to approve these for submission to the Court of Session, subject to any typographical or stylistic amendments.**

SCJC Secretariat

November 2017

SCOTTISH STATUTORY INSTRUMENTS

2017 No.

COURT OF SESSION

**Act of Sederunt (Rules of the Court of Session 1994
Amendment) (Sittings of the Court) 2017**

Made - - - - - *23rd November 2017*

Laid before the Scottish Parliament *24th November 2017*

Coming into force - - - *1st January 2018*

In accordance with section 4 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013(a), the Court of Session has approved draft rules submitted to it by the Scottish Civil Justice Council.

The Court of Session therefore makes this Act of Sederunt under the powers conferred by section 103(1) of the Courts Reform (Scotland) Act 2014(b) and all other powers enabling it to do so.

Citation and commencement, etc.

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Sittings of the Court) 2017.

(2) It comes into force on 1st January 2018.

(3) A certified copy is to be inserted in the Books of Sederunt.

Amendment of the Rules of the Court of Session 1994

2.—(1) The Rules of the Court of Session 1994(c) are amended in accordance with this paragraph and paragraph 3(1) to (6).

(2) For Chapter 10 (sittings of the court) substitute—

(a) 2013 asp 3. Section 4 was amended by the Courts Reform (Scotland) Act 2014 (asp 18), schedule 5, paragraph 31(3) and the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (asp 2), schedule 1, paragraph 1(4).

(b) 2014 asp 18.

(c) The Rules of the Court of Session 1994 are in schedule 2 of the Act of Sederunt (Rules of the Court of Session 1994) 1994 (S.I. 1994/1443), last amended by S.S.I. 2017/242.

“CHAPTER 10 COURT SITTINGS

Session of the court

10.1.—(1) Except in vacation, the court shall be in session throughout the year and, subject to paragraph (2), shall—

- (a) normally sit on Tuesday, Wednesday, Thursday and Friday of each week;
- (b) normally sit between 1000 hours and 1600 hours, with an appropriate adjournment for lunch;
- (c) not sit—
 - (i) on a public holiday; or
 - (ii) on such other days as the Lord President may, in exceptional circumstances, direct.

(2) The court may sit—

- (a) on a Monday where it is considered desirable to do so;
- (b) on a Saturday, Sunday or public holiday where it is desirable to do so to determine a matter of urgency.

(3) For the purposes of these Rules, a “sitting day” is a day on which the court sits under paragraph (1)(a) or a vacation sitting day.

Vacation

10.2.—(1) During vacation, the court—

- (a) shall normally sit on a vacation sitting day;
- (b) may sit, on days other than vacation sitting days, where it is desirable to do so.

(2) The court shall not sit on—

- (a) a public holiday; or
- (b) such other days as the Lord President may, in exceptional circumstances, direct.

(3) During vacation, one or more of the judges of the court shall act from time to time as a vacation judge sitting in court or in chambers.

(4) The vacation judge shall deal with the business of the vacation judge under rule 11.1(1) on such days and at such times as it is desirable to do so.

(5) A Division of the Inner House may sit during vacation, whether or not on a vacation sitting day, to determine urgent business which cannot competently be determined by the vacation judge.

Holiday dates, periods and vacation sitting days

10.3. In these Rules—

“public holiday” means any of the dates or parts of days in the following table—

Table

2018

2019

2020

Monday 1st January 2018	Tuesday 1st January 2019	Wednesday 1st January 2020
Tuesday 2nd January 2018	Wednesday 2nd January 2019	Thursday 2nd January 2020
Friday 30th March 2018	Monday 15th April 2019	Friday 10th April 2020
Monday 2nd April 2018	Friday 19th April 2019	Monday 13th April 2020
Monday 16th April 2018	Monday 22nd April 2019	Monday 20th April 2020
Monday 7th May 2018	Monday 6th May 2019	Monday 4th May 2020
Monday 21st May 2018	Monday 20th May 2019	Monday 18th May 2020
Monday 17th September 2018	Monday 16th September 2019	Monday 14th September 2020
Monday 3rd December 2018	Monday 2nd December 2019	Monday 30th November 2020
The afternoon of Monday 24th December 2018	The afternoon of Tuesday 24th December 2019	The afternoon of Thursday 24th December 2020
Tuesday 25th December 2018	Wednesday 25th December 2019	Friday 25th December 2020
Wednesday 26th December 2018	Thursday 26th December 2019	Monday 28th December 2020;

“vacation” is any of the periods in the following table beginning with the date in the first column and ending with the date in the corresponding second column—

Table*First column**Second column*

Monday 1st January 2018	Friday 5th January 2018
Saturday 24th March 2018	Friday 6th April 2018
Saturday 22nd December 2018	Friday 4th January 2019
Saturday 13th April 2019	Friday 26th April 2019
Saturday 21st December 2019	Friday 3rd January 2020
Saturday 4th April 2020	Friday 17th April 2020
Saturday 19th December 2020	Tuesday 5th January 2021;

“vacation sitting day” means any of the dates in the following table—

Table

2018

2019

2020

Thursday 4th January 2018	Friday 4th January 2019	Wednesday 8th April 2020
Wednesday 28th March 2018	Wednesday 17th April 2019	Wednesday 15th April 2020
Wednesday 4th April 2018	Wednesday 24th April 2019	Wednesday 23rd December 2020
Friday 28th December 2018	Tuesday 31st December 2019	Wednesday 30th December 2020.”

Consequential amendments

- 3.—(1) In the provisions mentioned in paragraph (2), for “sederunt” substitute “sitting”.
- (2) The provisions mentioned are—
- rule 4.7(2) and (3) (lodging of documents in Inner House causes);
 - rule 13.13(3)(a) (calling);
 - rule 23.1G(3) (enrolling opposed motions by email);
 - rule 70.8(4)(c) (transfer of causes); and
 - rule 88.6(b) (application for transfer of case involving parental responsibilities to foreign court).
- (3) In rule 23.6(2) (hearing of motions) omit “in session outwith a term or”.
- (4) In rule 23.7 (motions in session outwith a term or in vacation)—
- (a) in the heading omit “in session outwith a term or”;
 - (b) in paragraph (1) omit “in session outwith a term, or”;
 - (c) in paragraph (4) omit “of the lord Ordinary in session outwith a term or”;
 - (d) in paragraph (5) omit “the Lord Ordinary in session outwith a term or”.
- (5) In rule 23.14 (appearance by solicitor for certain motions) omit paragraph (2).
- (6) In rule 77.4(2) (presentation to Lord Ordinary) for “sederunt day of the following term” substitute “sitting day after that vacation”.
- (7) In section 5 of the Debts Securities (Scotland) Act 1856(a), for “sederunt days” substitute “sitting days within the meaning of the Rules of the Court of Session 1994”.

CJM SUTHERLAND
Lord President
I.P.D.

Edinburgh
Date

(a) 1856 c.91.

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt amends the Rules of the Court of Session 1994 to set out when the Court of Session sits.

It provides for a new Chapter 10 on court sittings. New rule 10.3 lists the public holidays, vacation periods and vacation sitting days of the Court up to the end of 2020. These dates (other than those beyond September 2020) were previously set out in Direction No.1 of 2016 made under Chapter 10. The Court shall sit throughout the year except during two brief vacation periods at Christmas and Easter. During vacation Court business shall be dealt with either by the vacation judge or, where necessary, a Division of the Inner House.

Consequential amendments to the Rules of the Court of Session 1994 are made by paragraph 3.

THIS PAGE IS INTENTIONALLY BLANK

Reform of Chapter 10 RCS

Introduction

1. The Lord President made Direction No.1 of 2016 under Chapter 10 of the Rules of the Court of Session 1994. That Direction effectively abolished terms in the Court of Session and introduced a formal Easter vacation period. As a result of those reforms, work has been done to identify how those changes impact on, and might be more permanently reflected in, the RCS while at the same time making the Chapter more intelligible and reflect the reality of modern court business.

Context

2. The sheriff and sheriff appeal courts do not take vacations or use terms and, conform to orders made by the sheriffs principal, sit Monday to Friday between 10am and 4pm. They take a small number of public holidays during the year¹. The Commercial Court sits all year round and Exchequer Causes are also capable of being heard at any time². While driven by different demands and planning arrangements, criminal business in all courts also takes place throughout the year with a limited number of public holidays³.

3. The Court of Session was historically a court which sat for a particular session to deal with specific business. Over time, due to the steady flow of business, sessions evolved into entrenched periods of the year. The periods when the Court was not in session were historically to allow Senators to return to their estates in order to tend to their farms and ingather harvests.

Policy

(a) Abolition of terms/ all-year round business

4. The historic reasons for the Court of Session's sitting dates no longer apply. Indeed, compared to the rest of the courts and tribunals system, the Court of Session's term-based approach and lengthy summer break can be seen as positively

¹ Orders are made by Sheriffs Principal by virtue of powers in section 28 and 56 of the Courts Reform (Scotland) Act 2014.

² RCS 10.6 and 10.7.

³ Section 8 of the Criminal Procedure (Scotland) Act 1995.

anomalous, inconsistent with modern standards of access to justice and arcane for some court users.

5. Only in areas such as education, where there are logical reasons for dividing the year into parts, do terms - or, their modern counterpart, semesters - continue to the present day. Given that commerce and civic life do not stop for long breaks, it can also be regarded as anomalous that access to court should be restricted for lengthy periods, and inconsistent that that restriction exists in relation to just one court. The retention of those anomalies and inconsistencies is difficult to justify in policy terms as there is no business reason for the Court to restrict access to itself for lengthy periods.

6. In isolation, there is no reason why the Court cannot sit in session all-year round. The judges, staff and estate are all present. It is therefore recommended that the Court be in session all year. If the Court is in session all year then there is no need for the concept of terms and they fall away. The effect on the RCS would be that rules 10.1(2) and (3) and 10.4 would be redundant and rule 10.3 would require amendment to reflect the absence of terms. In doing so the Court declares itself open for business all-year round.

(b) Vacation periods

7. The existence of vacation periods falls to be considered. Prior to Direction No.1 of 2016, there was one vacation period, a fortnight at Christmas. Easter fell between terms and so was, for practical purposes, a quasi-vacation period. Direction No.1 retained the Christmas vacation and formalised the position in relation to Easter by creating an Easter fortnight vacation.

8. During a vacation period the Court is available to dispose of limited business, per the terms of RCS rule 11.1, so is not closed. The Inner House is available during vacation for urgent business that only it can deal with. The Court is therefore vacated rather than on vacation.

9. As noted, vacation periods do not exist as such in the rest of the courts and tribunals system. In practice, both Christmas and Easter are well understood holiday periods reflected in wider society with many businesses running reduced service or closing for the duration. The existence of those vacation periods is, therefore, not inconsistent with commerce and the affairs of court users. While the Court of Session is the only court with expressly stated Christmas and Easter periods of reduced service, in practice business during those periods in other fora is reduced

as court users and staff themselves take those periods as holidays and only restricted volumes of business are dealt with during those periods.

10. Therefore it is submitted that the existence of defined (but limited) vacation periods is consistent with the reality of court business across the justice system and it is recommended that they be retained. The RCS make provision for vacation business in rules 10.1(1), 10.2(2), 10.5 and 11.1 and it is proposed that the effect of those rules be retained.

(c) Exchequer Causes and commercial actions

11. Exchequer Causes and commercial actions may be determined at any point of the year, regardless of sessions or vacations. In practice, it is understood that commercial business is programmed to avoid substantive business during holiday periods. Exchequer Causes are very rare nowadays.

12. There is therefore a question as to whether, if the Court is sitting all year except for 2 fortnight-long vacation periods, there is any need to retain RCS rules 10.6 and 10.7.

13. Historically, the provision about Exchequer Causes being able to be heard at any point in the year was provided for in section 3 of the Exchequer Courts (Scotland) Act 1856. That section also made provision for who could hear such causes. The ability for such causes to be heard at any time was repealed and re-stated in an Act of Sederunt in 1987⁴. The Court of Session Act 1988 then repealed and re-stated the provision about who could hear them and thereby swept away section 3 in its old form entirely. The Act of Sederunt in 1987 was, of course, consolidated into the current RCS rule 10.6.

14. While it remains the case – and would even if rule 10.6 were revoked – that Exchequer Causes have precedence over other court business, there does not appear to be any legal barrier to the removal of RCS rule 10.6⁵.

15. In relation to practical barriers, as the largest user of the jurisdiction, HMRC's legal advisers in the Office of the Advocate General were asked for their view on whether revocation would cause operational difficulties. Their view was that it would not. They advised that the jurisdiction is not commonly exercised; that any

⁴ S.I. 1987/2160.

⁵ Provision in the Treaty of Union about the Exchequer Court was fulfilled by the establishment of the Exchequer Court by Act of the Westminster Parliament in 1707. There is no vires issue with the revocation of the rule.

urgency arising in a case would be for interim orders; and the vacation judge arrangement provides a route to obtain them. They agreed that abolition of rule 10.6 had some merit.

16. In policy terms, if the Court is sitting all-year round except for two fortnight periods during which there is cover for limited aspects of Exchequer Causes, and in practice debates and proofs are not scheduled for those periods anyway, there is much to be said for revoking the rule - and that is the recommendation.

17. That logic applies with stronger force in relation to commercial actions for which there is no historic legislative baggage. In those actions proofs and debates are also as a matter of practice not set during holiday periods. It is recommended that rule 10.7 also be removed.

(d) Nomenclature

18. "Terms" came into being as a label with the last RCS consolidation in 1994. Hitherto, these periods were the traditional "sessions" of the Court of Session. A "term" is therefore not a historic label.

19. The start of the Winter term has traditionally denoted the start of the legal year. But the concept of the legal year itself does not appear to have any legal basis in Scotland. Ceremonial activities mark the start of what would, in days gone by, have been the full return of Senators to active business after the summer harvest. The legal year is not a term of art in the Rules or in the statute book nor does it serve any obvious contemporary purpose as far as the RCS are concerned. If the recommendation in relation to abolition of terms is agreed then retention of the concept of a legal year would involve a somewhat artificial definition of when each year starts and ends, with no other legal consequence flowing from it. It is therefore recommended that "terms" and the legal year are not referred to in a modernised Chapter 10.

20. "Sessions" are, in contrast, an enduring reminder of the Court's origins and history. Reference to them is made throughout the RCS and, while it would be possible to do away with them, additional drafting would be required to adjust those references.

21. "Sederunt days" are simply sitting days. There are some references to sederunt days in the statute book but very few survive. It is possible to substitute the word "sederunt" for "sitting" without any further legal implication and it has

the benefit of being clearer to the modern eye and lay court users. It is therefore recommended that this change in nomenclature be adopted.

22. The use of the word “vacation” and its origins are unclear. One possibility is that it might have been chosen because to use “holiday” or something equivalent would give a misleading impression of how the Court operates during such periods. The Court can and does still sit - just less frequently - and the administration of justice continues. While it would be possible to use a different word to describe vacation periods, e.g. nominal business period or quiescent period, “vacation” is a readily understood term for the two fortnight periods which it is proposed to describe. In the absence of a more apt alternative, it is recommended that “vacation” continue to be used.

Draft Act of Sederunt

23. **Paper 6.1A** is provided to members as a draft act of sederunt that would deliver the recommended policy points and nomenclature changes mentioned above if they were accepted in full.

Drafting commentary

24. New rule 10.1(1) states the general rule: that the Court sits throughout the year and sets out when. New rule 10.1(1)(c)(ii) retains direction-making power in the hands of the Lord President to direct when the Court should shut due to exceptional circumstances, e.g. flood/ fire or to permit investigation after a terror attack. As currently drafted, despite such circumstances or a public holiday, the Court could still choose to sit – that reflects the position in the current rule 10.1.

25. New rule 10.1(2) allows the Court to sit on a Monday if it is desirable to do so and at the weekends or on public holidays where there is urgent business. New rule 10.1 attempts to bring together the remnants of the current rules 10.1 to 10.3⁶.

26. Public holidays occur during vacation periods. The current draft of new rule 10.2 has the effect that the Court should sit on a vacation sitting day but also has the

⁶ Although thought was given to the complete removal from the RCS of provision such as that in new rule 10.1, two considerations weighed against that. First, the other courts all specify their sitting days and times and make provision about public holidays so to remove that would make the RCS inconsistent with how other courts are administered (acknowledging that those other courts provide for this detail in Directions or notices rather than their rules). Second, if there is no general provision about sitting days and times then it is unclear to court users when the court *does* sit.

power to sit whenever it is desirable to do so during vacation. The exception to that is in new rule 10.2(2): that the Court shall not sit on a public holiday or on such days as are directed by the Lord President in exceptional circumstances.

27. The draft contains no equivalent to existing rules 10.6 and 10.7.

28. Some thought has been given to the location and layout of the tables in new rule 10.3, which lists holidays, vacation periods and vacation sitting days.

29. At present many of these dates are set out in a triennial Direction. It has not always been so. Such dates used to be set out in an annual Act of Sederunt. The requirement to make that annual instrument was repealed by the Court of Session Act 1988 and thereafter the practice developed of such dates being set out in a Direction made under the RCS.

30. It is submitted that it is simpler for all court users if such dates are readily accessible and in one place. The question then becomes whether they should be in the RCS or a Direction. If they are in the Rules then court users need only revert to the Rules to find the detail. Court users who are not in the professions will intuitively look to the Rules for such information, not a Direction. It is submitted that the better location for these dates is therefore in the Rules themselves. By including them in the Rules, on a triennial basis, the Council would be able to consider the forward dates when an amending instrument is brought forward.

31. In terms of format, setting dates out in tables seems the simplest and clearest way to see at a glance when the Court is sitting. It also has the benefit that when it comes to updating them, it is a simple matter to substitute new tables in their place. The draft shows the tables inserted in the body of Chapter 10. The only other possible place for them in the RCS would be in a new Appendix 2. The balance of convenience is felt to favour having them in the Chapter itself so they are easily found and read with rules 10.1 and 10.2.

Equality considerations

32. The primary impact identified in relation to equality was around the possible impact on court users with caring responsibilities. Those users include court staff, agents, solicitor advocates, advocates, party litigants and represented parties, judges, witnesses and members of the public who wish to view the Court in action. Caring responsibilities are a constant across all of those who interact with the Court and the majority of users successfully plan their affairs so as to juggle the competing

demands of being in Court with their personal responsibilities. On those occasions where it is not possible then courts and tribunals listen, take account and make such adjustments as are necessary to address that while enabling business to continue.

33. Setting that against the impact of the abolition of terms, it was acknowledged that implementing an abolition in time for the start of the 2016/ 2017 legal year might well impact on court users as they were likely to have made arrangements already in relation to their caring responsibilities, as well as things such as holidays, such that the removal of the summer vacation in 2017 would be an unreasonable burden. Direction No.1 of 2016 therefore abolished the summer vacation with effect from the summer of 2018 to provide over 18 months' notice for court users to adjust their affairs.

34. The current Dean of the Faculty of Advocates wrote to the Lord President enquiring about equality considerations after the Direction came into force. Among others, the then Dean of the Faculty of Advocates was consulted in April 2016 in relation to the changes proposed to be made by what became Direction No.1 of 2016. The then Dean was content with the proposal and noted that a change would involve Faculty considering its own practices and guidance, particularly around its requirement that advocates obtain the Dean's permission to be absent during term time; cab rank and declining instructions on the basis of pre-arranged holiday; and calling days. The Dean noted that, in the absence of terms, the Court would require to bear in mind that advocates could well be on holiday when next diets are fixed.

35. Although it is acknowledged that advocates may have particular concerns about the change, it can be seen that many of them stem directly from the practices and guidance of the Faculty and the way in which its members have chosen to regulate themselves than from the change to the operation of the Court.

LPPO

13 September 2017

THIS PAGE IS INTENTIONALLY BLANK