

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
MONDAY 14 MARCH 2022 AT 9.30AM
RADISSON BLU HOTEL, ROYAL MILE, EDINBURGH
MINUTES

- Members Present:** Lord President (Chair)
Catherine Smith QC
Colin Lancaster (SLAB)
Denise Swanson (Scottish Government)
Eric McQueen (SCTS)
Joel Conn
Lady Carmichael (*Chair of the Access to Justice Committee*)
Lord Boyd
Lynda Brabender QC
Sheriff Way
Thomas Docherty
- In attendance:** Craig Anderson (SCTS)
David Smith (SCTS)
Lord Armstrong (*Chair of the Personal Injury Committee*)
- Support:** Andrew Campbell (LPPO)
Catriona Marshall (LPPO)
Sinead Campbell (LPPO)
Craig McCorkindale (SCJC)
Graeme Welsh (SCJC)
Karen Stewart (SCJC)
Kelly Jack (SCJC)
Paula Preston (SCJC)
- Apologies:** Brandon Malone
Employment Judge D’Inverno (*remote connection unavailable*)
Jaqueline Harris
Lady Wise (*Chair of the Family Law Committee*)
Lord Harrower (*Chair of the Cost and Funding Committee*)
Sheriff Principal Murray
Sheriff Hughes

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed members and attendees to the forty-sixth meeting of the Council, and apologies were noted.
2. **The Council agreed not to publish papers 3.1, 3.1A, 3.2, 3.2A, 3.3, 3.3A and 4.1.**

Item 2: Previous meeting

Item 2.1 - Items by correspondence (Paper 2.1)

3. The Chair introduced Paper 2.1 which provided information on the outcome of two matters considered by correspondence since the last meeting:
 - Paper 2022/02 – had confirmed the minutes of the Council’s meeting of 31 January 2022; and
 - Paper 2022/03 – had confirmed the Council’s agreement to the appointment of five members to the Rules Rewrite Committee:
 - Lord Richardson, Sheriff Kenneth Campbell QC, Summary Sheriff Roddy Flinn, Duncan Hamilton QC and Mark Boni.
4. **The Council noted the items approved by correspondence.**

Item 3: Work programme

Item 3.1 - The new rules for 2021-22 (Paper 3.1 and 3.1A)

5. Craig McCorkindale spoke to the 8 rules instruments which the Council had proposed to the Court of Session for approval during the 2021-22 planning period:

WORKFLOW	POLICY TOPIC	IN FORCE
RULES REVIEW	Civil Online / Mandatory Online Submission – Part 1 (extension) Civil Online / Mandatory Online submission - Part 2 (permanence) Review of - the Sheriff Appeal Court Rules	29 Sep 2021 31 Mar 2022 06 Jan 2022
FEES REVIEW	Society of Messengers at Arms & Sheriff Officers (SMASO)	30 Jun 2021
COMMENCEMENT OF ACTS	CL(E&GP)(S) Act 2018 - s8 - Qualified One Way Cost Shifting (QOCS) Corporate Insolvency and Governance Act 2020 Age of Criminal Responsibility (Scotland) Act 2019 Scottish Biometrics Commissioners Act 2020	30 Jun 2021 29 Sep 2021 17 Dec 2021 01 Jan 2021

Item 3.2 - Environmental scanning (Paper 3.2 and 3.2A)

6. Craig McCorkindale updated the Council on the upcoming Government Bills that may generate a requirement for new rules in due course. He spoke to the various consultation exercises that precede the tabling of Bills:

WORKFLOW	POLICY TOPIC	Timing
Future Bills	Community Wealth Building Bill Human Rights Bill Land Reform Bill Natural Environment Bill Childrens Care and Youth Justice Bill	2023 to 2025 2023 to 2025 2023 to 2025 2023 to 2025 Nov 2022
Bills Expected (during 2022-23)	The Moveable Transactions Bill The National Care Services Bill	Spring 2022 Summer 2022
Bills Tabled (during 2021-22)	The Coronavirus (Recovery and Reform) (Scotland) Bill Fireworks and Pyrotechnic Articles (Scotland) Bill The Gender Recognition Reform (Scotland) Bill	Jan 2022 Feb 2022 Mar 2022

7. The Council noted the consultation on Adults with Incapacity (AWI) that had taken place during 2018. A report from the Mental Health perspective is expected later this year. This will comment on the proposed transfer of some of the AWI caseload from the courts to the Tribunals. It was suggested that consideration of that report may trigger the Scottish Government's thinking around the timing for the pending transfer of tribunal rule making functions to the Council.

Item 3.3 - The priorities for 2022-23 (Paper 3.3 and 3.3A)

8. Craig McCorkindale introduced paper 3.3 which updated the Council on the 14 priority items that will be carried forward from the 2021-22 work programme:

WORKFLOW	POLICY TOPIC
RULES REVIEW	Simple Procedure (core rules) Inner House Rules
MODERNISATION INITIATIVES	Simple Procedure Special Claims (SPSC) The New Civil Procedure Rules/ Digitisation Case Management – Sheriff Court Family Actions Lay representation, lay support and party litigants Pre Action Protocol – Clinical Negligence Pre Action Protocol – Disease
COMMENCEMENT OF ACT's	Civil Litigation (E & GP) (S) Act 2018 – sec 9 - Representation free of charge Civil Litigation (E & GP) (S) Act 2018 – sec 10 - Third party funding Civil Litigation (E & GP) (S) Act 2018 – sec 11 - Awards against legal representatives
OTHER REQUESTS FOR NEW RULES	Judicial Rate of Interest Appointment of assessors (under the Equality Act 2010) Extension of Simplified Divorce

9. The Council noted the two priority items that were on track for approval and commencement in the first quarter of 2022-23; the amended rules for Core Simple Procedure, and the rules for Case Management in Sheriff Court Family Actions.
10. The Extension of Simplified Divorce has been a long standing priority. The Council expressed concern at any suggestion of a further potential delay in the Scottish Government consultation on the prerequisite changes to the law of evidence. Denise Swanson acknowledged the concerns and agreed to ask the Bill team to review the timings for that consultation exercise.
11. The Chair invited Council members to provide their views on the policy items that should be prioritised across the pipeline of 42 existing requests for new rules, along with any new policy topics that may warrant some consideration during this strategy session. The following key points were noted from that discussion:

RESOURCES - Clarification was sought on the resources available to progress the Councils work programme. Officials confirmed that the secretariat is now at full complement, as is the LPPO. As previously advised to the Council, the arrangements made with the Parliamentary Council Office have secured two lawyers with drafting experience for a two year period to specifically support the rules rewrite project. The difficulty in sizing the resource required given the wide variation in the scope of the 42 rules requests outstanding, was raised.

DATA - The Councils increasingly evidence based approach to decision making raised challenges around how best to secure the right data. The extent to which the Council could put the onus to gather good data back onto the organisation requesting new rules, rather than rely on the limited resource available to the secretariat, was queried. The need for good supporting data, through examples such as the level of contested cases under Simple Procedure, was reinforced.

USER EXPERIENCE - To progress access to justice issues, there is a need to explore both how the Council can better understand the user experience, and how an individual case flows through the justice system. Practical examples of how the same need to focus on user experience is reflected across SLAB included increasing requests for ancillary services such as family therapy, or requests for linking eviction clients to assistance services.

DIGITISATION - In terms of the progress made with digitisation during the Covid response, the support from practitioners for locking in the gains made with digitally lodged productions and the use of electronic bundles etc. was noted. The use of telephone hearings in eviction cases had significantly increased the attendance rate for party litigants. There was a concern at any potential drop-off in attendance rates that may come with a switch from telephone hearings to Webex hearings. The potential equality of arms issue that arises with the increased requirement for written submissions in lieu of oral advocacy was mentioned. Those who are skilled in the art

of writing submissions can potentially influence outcomes, whereas a party litigant is unlikely to display similar skills in their written submissions.

RESEARCH - The further research that needs to be undertaken around digital exclusion was raised. The wider research that is currently getting underway with regard to assessing how Covid has impacted on the work of the courts was noted. There was a desire to get the SG Bill teams to interact with the SCJC far earlier in the legislative development process.

RULES - The meeting noted the manner in which practitioners find imaginative ways to work around some rules, such as those for withdrawal of agents. The proposed changes to child welfare reporters, that were still to be finalised in terms of the Childrens (Scotland) Act, was flagged. A greater priority should be given to periodical payments under the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019. Whilst it is not a priority item, revisiting an “opt out” option under group procedure at some point was suggested.

COMMISSARY - The number of practitioners working in commissary was mentioned. Although it is not an immediate priority, the Council should not lose sight of the opportunity to deliver improvement in that area. There is a desire within the SCTS Civil Lab to initiate an “understand” phase of work later this year which will help the SCTS to better understand the opportunities for improvement across its commissary services.

12. The Chair summarised the key themes arising from discussion:

- Before adding too many new policy topics, the Council should focus on driving down the existing 42 outstanding requests. The secretariat should review any ‘low hanging fruit’ that could accelerate that process.
- The Council should look to adapt its ways of working:
 - To reinforce those general rules that can deliver “one size fits all” solutions that are sufficient to meet most policy objectives; and
 - To minimise the unnecessary requests that continue to arise for bespoke court procedure.
- The Simple Procedure Special Claims rules should be issued as soon as practicable after the Council approves the changes to Core Simple Procedure rules, to enable the Summary Cause Rules to be revoked.
- Whilst it is not top of the priority list, there is a need to scope the challenges within tribunal rules so that the Council can understand the potential workload that will arise on transfer, and what it would take to achieve a level of consistency when practitioners move from one tribunal to another.

- 13. The Council agreed the 16 priority items for the 2022-23 work Programme;**
- **The 14 items carried forward from the previous Work Programme;**
 - **The 1 existing policy item for *Modes of Attendance* – to cover the development of new rules which are reflective of the consultation feedback that has been received.**
 - **The 1 new policy item for *Scoping of Tribunal Rules* – to clarify the level of potential change required when this rule making function is transferred to the Council.**

Item 4 – Any Other Business

Item 4.1 – Economic Crime (Transparency and Enforcement Bill) (Paper 4.1)

14. The Council noted that applications to rectify items recorded on the UK Government's new register of overseas entities can be progressed under existing rules of court; by using summary applications procedure within the sheriff courts, or by lodging a petition within the Court of Session. A rule change will be required for any applications from enforcement agencies to extend the time available for investigations under part 2 of the Bill. The most efficient way for those applications to be made within the Court of Session would be by way of lodging a note in process.
15. **The Council instructed the drafting of an instrument to amend RCS 76.37B (2) so that applications under a newly inserted section 396DA of the 2002 Act would be made by lodging a note in process.**
16. **A draft Act of Sederunt will be circulated for approval by correspondence as soon as it becomes available.**

Item 5 – Dates of Future Meetings

17. The Council noted the dates set for future meetings on:
- 25 April 2022;
 - 18 July 2022; and
 - 17 October 2022.

**Secretariat to the Scottish Civil Justice Council
March 2022**