

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

MONDAY 17 October 2022 AT 10.30AM

APEX HOTEL, WATERLOO PLACE, EDINBURGH

MINUTES

Present: Lord President (Chair)
Lynda Brabender KC
Lady Carmichael
Sheriff Principal Ross
Joel Conn
Employment Judge d'Inverno
Trish Fiddes (Keeper of the Rolls - in place of Chris Fyffe)
Colin Lancaster (SLAB)
Kay McCorquodale (Scottish Courts and Tribunals Service - in place of Eric McQueen)
Ryan McRobert (Scottish Government - in place of Denise Swanson)
David Smith (Legislation and Implementation team - in place of Nicola Anderson)
Sheriff Way
Jaqueline Harris

In attendance: Laura Bremner (Judicial Institute)
Andrew Campbell (LPPO)
Carolyn Magill (LPPO)
Ysabeau Middleton (Lord President's Law Clerk)

Support: Jessica Flynn (SCJC)
Craig McCorkindale (SCJC)
Paula Preston (SCJC)
Graeme Welsh (SCJC)

Apologies: Nicola Anderson
Craig Anderson
Lord Ericht
Chris Fyffe
Sheriff Hughes

Brandon Malone
 Thomas Docherty
 Eric McQueen (SCTS)
 Catherine Smith KC
 Denise Swanson (Scottish Government)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed members and attendees to the forty-ninth meeting of the Council. There were ten apologies recorded.
2. The Council agreed not to publish papers 3.1, 4.1, 4.1A, 4.1B, 4.2, 5.3, 5.3A-C.

Item 2: Previous meeting

Item 2.1 - Items by correspondence (Paper 2.1)

3. The Chair introduced paper 2.1. This provided information on seven matters which had been considered by correspondence since the last meeting:
 - Paper 2022/18 was issued on 25 July 2022 and invited members to consider and approve draft minutes of the meeting held on 18/07/22. Responses were invited by close of business on 01 August 2022. One response was received noting minor typographical errors. The revised draft minutes were thereafter published on the SCJC website.
 - Paper 2022/19 was issued on 29 July 2022 and invited members to approve membership appointments to the Family Law and Personal Injury Committees. Responses were invited by close of business on 05 August 2022. No responses were received. The following members were appointed for three years and the Council website was updated accordingly.
 - Family Law Committee: Rachael Kelsey, Solicitor.
 - Personal Injury Committee: Ronnie Conway, Solicitor; Amber Galbraith, KC; Maria Maguire, KC; Fraser Simpson, Solicitor.
 - Paper 2022/20 was issued on 17 August 2022. It invited members to consider a rules request from the UK Government seeking court rules to implement the Telecommunication Infrastructure (Leasehold Property) Act 2021. Responses

were invited by close of business 31 August 2022. One response was received approving the recommendations for draft rules. Members approved the issue of drafting instructions for court rules by the Secretariat to the Lord President's Private Office.

- Paper 2022/21 was issued on 24 August 2022. It invited members to consider proposals for the preparation of court rules to implement the Civil Protection Measures, European Protection Order and Victims' Rights (EU Exit) (Scotland) (Amendment Etc.) Regulations 2022; i.e. civil protection orders. The policy intent of the Regulations is that civil protection orders from EU member states should continue to be recognised but outgoing orders should cease to be issued. This aligns with the approach taken in England, Wales and Northern Ireland following 'Brexit'. Responses were invited by close of business on 07 September 2022. No responses were received. Members approved the issue of drafting instructions for court rules by the Secretariat to the Lord President's Private Office.
- Paper 2022/22 was issued on 30 August 2022 inviting members to approve an amendment to the draft Rules instrument on Case management of family and civil partnership actions in the sheriff court. Responses were invited by close of business on 09 September 2022. Two responses were received approving the amendment. Drafting instructions were issued by the Secretariat to the Lord President's Private Office.
- Paper 2022/23 invited the Council to consider a rules request from Registers of Scotland seeking to make permanent certain measures contained within the Coronavirus (No.2) (Scotland) Act 2020, once the temporary provisions ceased to have effect on 30 September 2022. The amendment to Chapter 62 of the Rules of the Court of Session would permit documents to be signed and transmitted electronically for registration in the Register of Judgements. The paper was issued to Lady Carmichael and Lord Ericht on 08 September 2022 under the Council's urgent clearance procedures and was approved on this date. The draft instrument was then submitted to the Court of Session for consideration and approval.
- Paper 2022/24 – was issued on 29 September 2022. It invited members to consider draft rules implementing a request from Scottish Courts and Tribunals Service for a change to the commencement date of the Act of Sederunt (Simple Procedure Amendment) (Miscellaneous) 2022/211. The new commencement

date will be 31 May 2023. Responses were invited by close of business on 6 October 2022 with a nil response indicating consent. One response was received approving the draft instrument. The draft rules were approved for submission to the Court of Session.

4. Members specifically discussed the amendment to the Act of Sederunt (Simple Procedure Amendment) (Miscellaneous) 2022/211. SCTS provided a summary on why the change to the commencement date was required. Members agreed that early engagement with the Civil Lab (within SCTS) was essential to agree achievable commencement dates for new Rules.
5. **The Council noted the paper.**

Item 2.2 - Age of Criminal Responsibility (Oral Update)

6. An oral update was provided. No applications have been lodged since the commencement of the Act on 17 December 2021.
7. The Family Law Committee will meet on 31 October 2022 and consider different options on progressing child friendly forms.
8. **The Council noted the update.**

Item 3: Committee Memberships

9. Members noted paper 3.1 and were asked to approve the reappointments of members to Council, Access to Justice Committee, Rules Rewrite Committee and the Family Law Committee.
10. The Chair recorded his appreciation to Council members, Joel Conn, Lynda Brabender KC, Joe d'Inverno and Brandon Malone, who were standing down.
11. **The Council approved the reappointments.**

Item 4: Work Programme

Item 4.1 – Modes of Attendance

12. The Chair introduced Papers 4.1 to 4.1B and invited members' views on the latest version of the Rules, which generally aligned with current practice in the

Court of Session and sheriff courts. The Council discussed the matter at length and agreed that:

- A split between procedural business being heard virtually and substantive business being heard in-person strikes a better balance (than the previous draft Rules) and provides more certainty for court users;
- An accompanying practice note should define what procedural business means in the context of the new rules, and what is meant by the term 'electronic means';
- The Rules are sufficiently flexible for switching the mode of attendance between in-person and virtual hearings if a motion is made to the court;
- Exemption for family procedural business should only apply when a child welfare hearing is required; and
- The Council will consult with specific justice partners prior to commencement.

13. The Council instructed revisions to the draft Rules.

Item 4.2 – Judicial Rate of Interest

14. The Council considered paper 4.2 and discussed the options in light of recent increases to the Bank of England base rate. Members agreed that a responsive mechanism was required and noted the recommendations of the Scottish Law Commission Report. Members discussed the challenges faced by the Council when attempting to align a rate change with other jurisdictions. The Council's powers allowed for the substitution of one rate for another but not to set a formula which would track the Bank of England base rate.

15. Members agreed that the Council should:

- Write to the Scottish Government requesting that a power to set a fluctuating mechanism is legislated for at the earliest opportunity; and
- Maintain the ability to alter the rate, should interest rates continue to climb and the Judicial Rate of Interest becomes problematically too low.

16. The Council instructed the secretariat to progress correspondence to the Scottish Government

Item 4.3 – United Nations Convention on the Rights of a child

17. The Chair introduced papers 5.3 to 5.3C and invited views on the requirement to develop bespoke rules, given the extent of the Council's priorities.

18. Members noted the following points:

- The amended Bill has not yet been through Parliament and further challenge at the UK Supreme Court cannot be ruled out;
- The Scottish Government had said that commencement is anticipated to be around September 2023;
- The orders are similar to other Rules. A generic form such as an adapted Form 9 could work; and
- Demand for this type action is likely to be low. Prescriptive court rules may not be necessary.

19. The Council postponed a decision until the Bill is reconsidered. The Rules Rewrite Committee may wish to consider the best approach.

Item 5: AOB

20. Those members standing down from the Council recorded their gratitude for their time on the Council and expressed their best wishes for the Council's future work.

Item 5: Dates of Future Meetings

- 20 February 2023
- 22 May 2023 (TBC)
- 28 August 2023
- 20 November 2023

**Scottish Civil Justice Council Secretariat
October 2022**