RULES REVIEW: JUDICAL REVIEW RULES IN THE COURT OF SESSION (INCORPORATING PROVISION FOR WITHDRAWL OF AGENTS FROM ACTING)

Policy Proposal

1. To invite members to consider and approve a draft Act of Sederunt **(Paper 5.3A)** containing amendments to Chapter 58 (Judicial Review) of the Rules of the Court of Session ("RCS"). The draft instrument also incorporates proposals for amendments to Chapter 30 of the RCS (Withdrawal of Agents).

2. The judicial review rules, which introduced a permission stage, were developed by the Rules Rewrite Committee ("the Committee") as part of the implementation of the Courts Reform (Scotland) Act 2014 and commenced in September 2015. The Council committed to a review of the rules within 12 months of introduction and allocated this work to Committee the Committee" to take forward. The proposals for amendment of Chapter 30 of the RCS, have arisen during consideration of the substantive review of judicial review proceedings.

Timing

3. These rules are not time critical and so there is no specified implementation date. However, in order to secure the operational benefits anticipated as a result of the changes, it will assist the public and practitioners if the rules are commenced as soon as possible.

4. It is intended that implementation will be coordinated to coincide with proposed changes to the related Practice Note made by the Writing Time Committee led by Lord Bannatyne.

Rationale

5. During the review process, the Committee obtained a range of feedback about the operation of the judicial review procedure from:

    - senators;
    - the Asylum and Immigration Users Group;
    - Lord Boyd in his capacity as the Outer House Administrative Judge; and
    - Officers of the Court of Session including: Deputy Principal Clerk of Session, the Keeper of the Rolls, Officer in charge of Court of Session General Department and the Court of Session Petition Department manager.

6. Statistical information on judicial review cases was also obtained from the Offices of the Court of Session. During the Committee's review of Chapter 58, some additional issues were identified regarding how the procedure for withdrawal of agents operates in the context of judicial review proceedings.

7. The matters arising from the feedback along with the statistical data were considered by the Committee on 25 October 2016, 6 December 2016, 21 February 2017 and 7 April 2017. Prior to being considered by the Committee, the Rules Rewrite Drafting Team shared the rules proposals with Lord Boyd, in his capacity as the Outer House Administrative Judge, who confirmed that he is content with the changes. The proposals were also discussed at the Asylum and Immigration User's Group (chaired by Lord Boyd) on 24th January 2017.

8. The draft rules contained in **Paper 5.3A** amending Chapter 58 have been approved by the Committee and are now submitted to Council for consideration along with recommendations for amendments to Chapter 30 relating to the procedures which apply when agents withdraw from acting.

9. It is anticipated that the rules amendments will create operational efficiencies and improve the judicial review process for the benefit of court users.

Issues raised during policy development stages

10. The Rules Rewrite Drafting Team has provided a Drafting Note at **Annex A** which sets out detailed background to the matters of policy considered by the Committee during the course of the rules review. The main issues are summarised hereafter:

    (i) the Committee identified difficulties that have arisen in judicial review proceedings where an agent withdraws from acting - the relevant rules in Chapter 30 of the RCS have been amended with new provisions that require a withdrawing agent to intimate their withdrawal by letter to the Court and to other parties; the withdrawing agent must confirm they have taken all reasonable steps to notify the party of any future hearing date and the potential consequences to that party of failing to appear or be represented. The rules also make provision that a future diet already fixed in a case need not automatically be discharged;

    (ii)the Committee heard a number of concerns about lack of involvement of a respondent at the stage when 'time-bar' was considered in an application - the revised rules now provide for a respondent to have an opportunity to attend a hearing on 'time-bar' in a judicial review application; consequential changes to the Form of Petition have also been made;

    (iii) the Keeper's Office in the Court of Session raised concerns that the prescribed timescale in Rule 58.7(1)(b) was too restrictive. The Committee

considered the issues raised and the timescale has been extended to 14 days; it is anticipated that this change will facilitate more effective court programming; and

(iv) a number of changes have been incorporated into the rules relating to the 'permission stage' with a view to creating operational efficiencies. For example, general concerns were noted about the quantity of documents lodged with a petition. New provisions requiring a party making an application to consider what documents the Court requires to consider whilst determining the application have been incorporated and it is anticipated that this change will facilitate effective use of judicial preparation time.

Compatibility with SCJC guiding principles

11.

Principle	**Compatibility**
The civil justice system should be fair, accessible and efficient	The rules amend the current procedures for Judicial Review in the Court of Session as a result of feedback obtained during a formal review. The rules are designed to create operational efficiencies to the judicial review proceedings for the benefit of court users and the Court.
Rules relating to practice and procedure should be as clear and easy to understand as possible	These rules have been drafted using the rules rewrite style guide and are short, streamlined and easy to understand.
Practice and procedure should, where appropriate, be similar in all civil courts	The rules apply to proceedings which can be raised in the Court of Session only.
Methods of resolving disputes which do not involve the courts should, where appropriate, be promoted	There is no scope to consider alternative methods of resolving disputes in the context of these rules.

Links to other initiatives

12. There are no links to other initiatives.

Implementation

13. The Secretariat is liaising with the Offices of the Court of Session and the Judicial Institute with regard to the impact of these rules upon staff or judicial training. A copy of the rules, once made, will be shared prior to commencement. The SCTS is also arranging to set up an email address for the purpose of parties making intimations to the Court under the provisions of Rule 58.11(1A). Relevant information for court users will be published on the SCTS website.

Consultation

14. During the course of the review of the rules, the Committee has consulted with those individuals and organisations previously mentioned in paragraph 5 of this paper.

Legal advice

15. Legal Advice is provided in the drafting Note at **Annex A**.

Recommendation

16. **The Council is invited to consider and approve the draft instrument at Paper 5.3A and agree that it be submitted to the Court of Session for consideration and approval, subject to any typographical or stylistic amendment.**

Scottish Civil Justice Council Secretariat

May 2017

Annex A

REVIEW OF JUDICIAL REVIEW

Drafting Note to accompany the draft Act of Sederunt (**Paper 5.3A**), proposing changes to the Rules of the Court of Session.

Proposed Changes

(i) Chapter 30 and the withdrawal of agents

1. The Rules Rewrite Committee ("RRC") propose changes to Chapter 30 (Withdrawal of Agents) of the Rules of the Court of Session:

   - Lord Boyd identified that there have been problems arising with the judicial review procedure where agents for the Petitioner withdraw from acting after intimation and service but before the permission stage. A difficulty arises because at this stage of proceedings there is no respondent/interested party in the case.

   - The Lord President had also expressed some concerns about Chapter 30 and the fact that pre-fixed hearings often have to go off when a solicitor withdraws from acting.

2. The RRC recommends that, where there is a diet fixed within 14 days, the obligation should be on the agent to advise their client of the prearranged diet and that their client should attend. Where there is no other party, the Court should be able to instigate the procedure.

3. The draft Act of Sederunt therefore incorporates changes to Chapter 30:

"Intimation of withdrawal of agent

30.1.—(1) This rule applies where an agent withdraws from acting on behalf of a party.

(2) The agent must intimate withdrawal by letter to the Deputy Principal Clerk and every other party.

(3) That letter must specify the last known address of the party.

(4) Where any previously fixed hearing is to take place within 14 days from the date of the withdrawal, the agent must confirm in the letter that they have taken all reasonable steps to—

(a) notify the party of the hearing date;

(b) advise the party that they must attend the hearing or arrange representation at the hearing to state whether or not they intend to proceed; and

(c) advise the party that a failure to attend or be represented at the hearing may result in the court granting decree or making another finding or order.

(5) The Deputy Principal Clerk must lodge the letter in process.".

4. The RRC does not, at this stage, recommend any changes to the equivalent rule in the sheriff court. The sheriff court rules already have a mechanism for preserving a fixed

hearing on the withdrawal of an agent albeit the onus for intimation of the diet lies with court rather than the withdrawing agent.

(ii) There was a general concern about the quantity of documents lodged with a petition despite the fact that only relevant documents are necessary in terms of the rules

5. The RRC looked to amend Rules 58.3 (4) detailing what should be required to be lodged with the Petition. To achieve this, the Committee explored having the Petitioner only lodge those documents necessary for the determination of the decision whether to grant permission. With these documents the Petitioner can lodge a numbered list of all relevant documents and, if permission is granted, the court can identify what other documents need be lodged for the substantive hearing.

6. However, the Asylum and Immigration Users Group ("AIUG") considered that this process would be too onerous for practitioners and could lead to some confusion for court staff and agents. Rather, it suggested that the documents relevant to the question of permission be identified within the Petition. This would therefore still enable agents to lodge one bundle of documents with the Petition.

7. In light of the comments received, the draft instrument amends the Form of Petition within the "Permission to Proceed" section –

   "8B. That the following documents are necessary for the determination of permission [and extension to the time limit]:

   (*set out, in a numbered list, the documents required to be identified by rule 58.3(4)(d)*)]."

8. The RRC considers that this still achieves the aim of enabling the Court to quickly identify the relevant documents necessary to determine permission. Court of Session Officials confirm that court clerks should be able to identify the appropriate documents from the Petition and put them before the Lord Ordinary.

(iii) a respondent should have an opportunity to attend a hearing about the question of 'time-bar' in a judicial review application

9. There were concerns raised by members of the judiciary about judicial review applications being raised out-with the prescribed time bar of 3 months and, the lack of involvement of a respondent at the stage when the court considers whether or not to allow the petition to be received late. This is because a motion for an extension to the statutory time limit is not intimated to a respondent and does not trigger any caveat which may be lodged with the court.

10. It is clear from operational feedback, that the Court would value the input of potential respondents to allow it to consider the matter with the fullest information. Lord Boyd advised that he finds the views of the respondent helpful at this stage and

has therefore developed a practice of reserving the issue of whether the petition should be received until the permission hearing. This is in order to obtain the views of the respondent.

11. The draft instrument therefore deletes the relevant provision in Rule 58.4 (5) (d) which requires an extension to the time period to be made my motion and inserts a provision into Rule 58.7 (the permission stage) requiring the Lord Ordinary to consider any extension application at this stage. Consequential changes have also been made to the Form of Petition.

(iv) The timescale in Rule 58.7(1) (b) should be extended to 14 days

12. The Keeper's Office advised that the time period prescribed in Rule 58.7(1)(b) (for an oral hearing to take place within 7 days), was too restrictive. They requested that the RRC consider increasing the time limit from 7 to 14 days in order to facilitate more effective court programming.

13. Practice Note No.5 of 2015 requires the Lord Ordinary, when fixing an oral hearing, to produce a brief note setting out the matters which are to be addressed by parties at the hearing. The RRC considered that a 7 day timescale to produce a note and intimate it to parties was overly restrictive and agreed that a timescale of 14 days might facilitate more effective court programming.

14. The draft instrument therefore amends Rule 58.7 (1) (b). This gives the court more time to assign an oral hearing and allows more time for the Lord Ordinary to prepare a brief Note (as per the Practice Note) as to matters on which they wish to be addressed.

15. Lord Boyd also noted an anomaly within the rules. If a petitioner seeks a review under Rule 58.8 of a decision to refuse permission and that is granted, the oral hearing must take place within 7 days but the parties must be given 2 days' notice (58.8(3)). By contrast, if a Lord Ordinary orders an oral hearing under 58.7(1) (b) there is no right requirement for 2 days' notice.

16. The draft instrument amends the rules to stipulate a minimum period of 2 days' notice before any oral hearing.

(v) The procedural hearing

17. There were concerns expressed about the necessity of having a procedural hearing in every case. The existing rules provide that the Lord Ordinary can dispense with this requirement however the RRC explored making a change in emphasis to allow parties to simply write to confirm that they are ready to proceed.

18. Court of Session officials saw merit in keeping the procedural hearing date as this is used administratively for keeping an eye on a case and is easier to manage. They wondered whether Rule 58.11 (1) might be revised to provide that where a procedural hearing has been fixed, parties could write to the court no later than 72 hours prior to the procedural hearing, indicating that they were ready to proceed to the substantive hearing. This could then be shown to the Lord Ordinary and the Lord Ordinary could decide to dispense with the hearing.

19. The draft instrument incorporates this change and the AIUG were content with it. They asked whether an email to the relevant clerk would suffice (which was their preference) and a generic email address has been be set up and will be detailed within the relevant Practice Note.

(vi) Written authorities

20. The RRC recommends that authorities should not be lodged until before the substantive hearing. At present, parties require to lodge their marked up authorities at the same time as the Note of Argument, and before the procedural hearing.

21. Such a change will hopefully save unnecessary expense and avoid the court being inundated with papers. The AIUG supported this change.

22. The proposal will be recorded in the relevant Practice Note: authorities will require to lodged at least 10 days before the substantive hearing i.e. prior to when papers go out to the judges.

23. Another topic the RRC discussed was whether bundles of authorities could be limited. It was mooted whether, for example, a bench book could be prepared in immigration cases. This would save time administratively and parties could simply refer to the relevant paragraphs of court held authorities.

24. This will be a longer term project but the Rules Rewrite Drafting Team has contacted the judicial library staff and they are happy to provide support. The bench book could be either hard copy or electronic and the AIUG confirmed that it is something that might be developed further in an immigration context.

Rules Rewrite Drafting Team, May 2017