

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
MONDAY 16 MAY 2016 AT 10 AM
JUDGES CONFERENCE ROOM, LEVEL +2 PARLIAMENT HOUSE

MINUTES

Members Present: Lord President (Chair)

Eric McQueen (Chief Executive, SCTS)

Colin Lancaster (Chief Executive, SLAB)

Jan Marshall (Scottish Ministers' representative)

Lord Tyre

Sheriff Principal Abercrombie

Sheriff Hughes

Sheriff Murphy

Eric Baijal (Solicitor)

Jacqueline Harris (Solicitor)

Paul Reid (Solicitor)

Ian Maxwell (Consumer representative)

Prof. Fran Wasoff (LP member)

Employment Judge d'Inverno (LP member)

In attendance: Lord Malcolm [For Item 7.1]

Craig McCorkindale (Making Justice Work 1 Programme Manager)

Jane MacDonald (Policy and Legislation Branch, SCTS) [Until Item 7.1]

Gillian Prentice (Deputy Principal Clerk of Session)

Support: Roddy Flinn (Secretary to the Scottish Civil Justice Council)

Kenny Htet-Khin (Head of Rules Rewrite Drafting Team) [Until Item 7.1]

Luke McBratney (Deputy Legal Secretary, Rules Rewrite Drafting Team) [Until Item 5.3]

Stephen Feltham (Deputy Legal Secretary, Rules Rewrite Drafting Team) [For Item 5.3]

John Thomson (Deputy Legal Secretary, Lord President's Private Office) [For Item 7.1]

Mandy Williams (SCJC, Deputy Secretary)

Susan Brodie (Policy Officer, SCJC)

Apologies: Lord Menzies

Lord Boyd

Andrew Stewart QC (Advocate)

Ken Forrest (Advocate)

Lauren Bruce (Consumer representative)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present and also welcomed Lord Boyd and Sheriff Murphy as new judicial Council members and noted all other apologies.
2. Members agreed not to publish the following papers: 2.2, 3.1, 3.2, 3.2A, 3.3, 3.3A, 4.3, 4.3A, 4.4, 4.5, 5.1, 5.2A-D, 5.3, 5.3A, 6.1, 6.1A, 6.2, 6.2A-B, 7.1, 7.1A

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

3. **Members agreed the minutes from the previous meeting, as amended within paragraph 25, to show the following:**

“In particular, the Council was advised that a number of consultation responses requested consultation on the special claims rules. The Council discussed the implications of this. The Rules Rewrite Drafting team advised they were discussing the matter with the Scottish Government officials.”

Item 2.2 – Progress of actions from previous meetings (Paper 2.2)

4. Members provided feedback regarding the new portal on the Council website. **Secretariat agreed to investigate the issue of user friendly passwords.**
5. **Members noted the progress that had been made on actions since the last meeting.**

Item 3: Proceedings

Item 3.1 – Membership (Paper 3.1)

6. The Chair thanked Eric Bajjal, Professor Fran Wasoff and Lauren Bruce, Council members whose tenure is due to expire on 27 May 2016, for all their assistance they have provided to the Council and its Committees over the last three years.
7. Although Professor Wasoff will no longer be a member of the Council, Lady Wise, Chair of the Access to Justice Committee, seeks the approval of the Council for Professor Wasoff to continue as a member of the Committee.
8. **The Council approved the appointment of Professor Wasoff to the Access to Justice Committee from the expiry of her tenure period on 28 May 2016.**
9. Members considered correspondence from Sheriff Principal Murray indicating that it would be helpful for them to be represented on the Council’s Committees. Members noted that the Sheriffs Principal are currently represented on the Personal Injury Committee and Rules Rewrite Committee and that a nomination is to be made in relation to the Family Law Committee. Members agreed that it was not appropriate for standing appointments for Sheriffs Principal to be made to all established committees and that it would be for the Committee Chairs to consider in light of the remit and work of that Committee.
10. **The Council agreed to consult Committee Chairs to consider if their Committee’s membership would benefit from the appointment of a Sheriff Principal.**

11. **Lord Tyre advised that he would be content for a Sheriff Principal to be appointed to the Information and Communications Technology Committee.**

Item 3.2 – Committee remits (Paper 3.2 & 3.2A)

12. The Council considered a paper proposing revision to the remits of its established committees. The paper proposed a number of changes in order to standardise the layout of the remits and to bring them up-to-date. Members noted that the Family Law Committee had itself considered and proposed its own revised remit.

13. While the Council saw the benefit of a consistent style and layout of all the Committee remits, it noted that each remit may need to be framed to take account of the particular interests of that Committee. The Council agreed that the remits should be broadly framed to encompass the wider function of the Council to keep the justice system under review. It was also agreed that it would be useful to include some of the wider justice system reforms within the remits, for example, digital reform, and alternative dispute resolution.

14. **The Council agreed that the Secretariat liaise with the Committee Chairs and prepare proposals for the Council to consider at its next meeting.**

Item 3.3 – Strategy meeting – Procedural matters (Papers 3.3 & 3.3A)

15. At the Council's Strategy meeting held on the 14 March 2016, a number of proposals were discussed in relation to the Council's own internal procedures. The Council considered and agreed the following proposals:

- **For matters of substantial policy, committees should submit detailed policy proposals to the Council for views; seeking direction or advice where appropriate, before rules are drafted. It was agreed that implementation timescales may make this impracticable in every case.**
- Ms Marshall raised particular concerns as to the impact this new procedure may have on the timetable for the new Fatal Accident Inquiry (FAI) Rules, noting that commitments had been given from the Scottish Government to the UK Government in relation to implementation. Sheriff Principal Abercrombie, chair of the FAI Working Group, noted that the implementation timetable was tight. He advised that, while extra meetings were being scheduled in order to prepare draft rules for consideration by the Council as soon as possible, he considered it would be unwise to compromise on the quality of the new rules for a earlier implementation date.

- **Consideration of matters by correspondence should be used for more routine matters that required approval by the Council, for example, general care and maintenance matters.**
- **Re-introduction of the Update report to provide more detailed information of the work of the Council's committees. It was agreed that, if appropriate, committee chairs or substitutes should be invited to speak to the work of a particular committee.**
- **Communications – When input from other committees is sought, the lead committee should prepare an initial discussion paper, inviting comment from the relevant committees.**
- **Review - It is the responsibility for the lead committee who developed the rules to determine how the rules should be reviewed. It was agreed that proposals for review should be submitted to the Council along with the draft rules.**

Item 4: Work Programme

Item 4.1 – Update from the Scottish Government on legislative developments (Oral)

16. Jan Marshall provided members with an update on legislative developments in the Scottish Government. In particular, the Government is continuing with implementation of the Courts Reform (Scotland) Act 2014, the Succession (Scotland) Act 2016 and the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. It has consulted on a draft Order in Council that makes provision for the transfer of specified functions of the Employment Tribunals to the First-tier Tribunal for Scotland, opposite sex civil partnerships as well as reform of the law on succession and will report in due course. Prior to the pre-election period it published a draft Limitation and (Childhood Abuse) Scotland Bill to remove the time bar for survivors of historical child abuse.

17. Looking forward, there are a number of commitments in the manifesto in the area of civil law which would require legislation in the new Parliamentary term. These include reform of gender recognition law, review of regulation of the legal profession, reform of succession law, removal of the time bar for survivors of historical child abuse, implementation of Sheriff Principal Taylor's review of the costs and funding of civil litigation, reform of legal aid and a review of aspects of family law.

Item 4.2 – Update from SCTS on Making Justice Work programme of reform and Shaping Scotland’s Courts (Oral)

18. Craig McCorkindale informed the Council that the Making Justice Work programme was now focussed on the ICMS live testing which will take place at the end of the month within Livingston and Hamilton sheriff courts and the Court of Session. Other matters under consideration are dealt with elsewhere in the agenda.

Item 4.3 – Annual Report (Papers 4.3 and 4.3A)

19. The Council considered a draft of its Annual Report for 2015/16 and noted that certain matters were still to be updated.

20. **The Council approved its Annual Report for 2015/16, subject to any minor typographical or stylistic amendment.**

Item 4.4 – Priorities for 2016/17 (Paper 4.4)

21. Following on from initial discussions at the strategy meeting, members considered a paper outlining proposed work priorities for 2016/17.

22. **The Council approved the work priorities for 2016/17 and agreed that it would be beneficial to include the more strategic matters to be included within the committee remits.**

Item 4.5 – Business Tracker (Paper 4.5)

23. **Members noted the progress and workload as outlined on the Business Tracker.**

Item 5: Rules Rewrite

Item 5.1 – Update from the Rules Rewrite Drafting Team (Paper 5.1)

24. Kenny Htet-Khin provided an update on the Rules Rewrite Project, informing the Council that the Personal Injury Committee and Costs and Funding Committee are together considering Pre-Action Protocols and a paper will be with the Council for consideration at its next meeting.

25. **Members noted the oral update and that provided in the activity tracker Paper 5.1.**

Item 5.2 – Rules for a new Simple Procedure (Papers 5.2 and 5.2A – D)

26. Luke McBratney spoke to the draft new Simple Procedure rules and accompanying forms contained in Papers 5.2A-D. In particular, he updated the Council on the consultation process for the rules, noting that the consultation responses had been broadly positive with a high quality of responses.
27. At the last meeting, members had been advised that a number of responses sought consultation on the “specialist” procedure rules still to be drafted, for example, in relation to housing and personal injury cases. There were strong views from the consultation and focus group participants that the second set of rules should be consulted upon. It has since been agreed that only the Simple Procedure Rules, which were consulted upon, will commence in November 2016 and that the Simple Procedure (Special Claim) Rules will be commenced later, at a time to be agreed.
28. He advised that the new procedure has been designed for party litigants to be able to represent themselves more effectively. The innovative style of the new rules should allow the rules to be more understandable to the lay person, with guidance incorporated directly into the forms.
29. The Council noted that the Simple Procedure rules supported on-line processing through the new ICMS system, which will enable cases to be lodged on-line with the court. Members discussed the aspiration of only being able to lodge claims on-line. Eric McQueen advised that this was not being made mandatory at this time in order to maintain access to justice for those without internet access. The design of ICMS is anticipated to support a natural shift to online through ease of use and cost effectiveness. Members were also advised that plans were on track for cases to be managed electronically within ICMS by SCTS staff and the judiciary from its introduction.
30. Luke advised that a final cross check was still to be completed and that some referencing may require to be updated.
- 31. The Council approved the draft instrument in Papers 5.2A-D and agreed that the draft instrument and forms be submitted to the Court of Session for consideration, subject to any stylistic or typographical amendments.**
- 32. The Council expressed its thanks to the Access to Justice Committee for all the work involved in producing this large set of new rules and forms. It also noted thanks to both Kenny Htet-Khin and Luke McBratney and the Rules Rewrite Drafting Team as a whole, for the work carried out in preparing the draft instrument.**
- 33. The Council agreed that these rules should be reviewed by the Council two years from implementation. It was noted that the Access to Justice**

Committee anticipated starting to review the rules 18 months from implementation.

Item 5.3 – Discussion Paper: A Statement of Principle for civil procedure (Papers 5.3 and 5.3A)

34. Stephen Feltham spoke to Paper 5.3A, a discussion paper relating to the development of a statement of principle for civil procedure. This discussion paper is due to be considered by the Rules Rewrite Committee at its meeting on 31 May. Given the importance of the statement of principle, the Committee has sought the early views of the Council in order to help develop proposals. **After consideration, the Council agreed that there would be benefit in developing a statement of principle/objective in similar terms to the objective set out in the Supreme Court Civil Rules of British Columbia, which sets out the object of the rules and the principle of proportionality. The Council indicated that it favoured a short consultation on the proposed content of the statement of principle.**

Item 6: Proposals for rules

Item 6.1 – Amendment of Form of Charge for Payment (Papers 6.1 and 6.1A)

35. The Council considered the draft rules at **Paper 6.1A** which make provision to amend the forms of charge for payment prescribed in the Rules of the Court of Session 1994 (Form 16.15-G) and sheriff court rules the Act of Sederunt (Form of charge for payment) 1988. The amendments make it clear that the debtor will only be liable to be sequestrated if his or her total debts amount to £3,000 or more and replace dated terminology.

36. **The Council agreed that the draft instrument be submitted to the Court of Session for consideration, subject to any stylistic or typographical amendment.**

Item 6.2 – Fees of solicitors in the Sheriff Courts (Papers 6.2, 6.2A and 6.2B)

37. The Council considered the draft rules at **Paper 6.2A** which make provision to enable a sheriff court auditor taxing a judicial account of expenses to increase or reduce an inclusive fee in appropriate circumstances, in line with the position held by the Auditor of the Court of Session.

38. **The Council agreed that the draft instrument be submitted to the Court of Session for consideration, subject to any stylistic or typographical amendment.**

Item 7: A.O.C.B.

Item 7.1 – Protective Expenses Orders (Papers 7.1, 7.1A and 7.1B)

39. The Council considered Paper 7.1A, produced by Lord Malcolm in relation to the prescribed test and procedure regulating applications under Chapter 58A of the Court of Session Rules for Protective Expenses Order. Lord Malcolm spoke to this paper.

40. **Following discussion, the Council agreed that draft rules be prepared for consideration at a future Council meeting along with appropriate legal advice. The Council also agreed that there was a need to consult on the draft rules, once available.**

Item 8: Dates of future meetings

41. Members noted the dates of future meetings:
- Monday 11 July 2016 at 10 am
 - Monday 3 October 2016 at 10 am
 - Monday 28 November 2016 at 10 am

Scottish Civil Justice Council Secretariat

May 2016