

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
MONDAY 11 JULY 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 Boyd

Sheriff Principal Abercrombie

Sheriff Hughes

Sheriff Murphy

Paul Reid (Solicitor)

Joel Conn (Solicitor)

Ian Maxwell (Consumer representative)

Employment Judge d'Inverno (LP member)

In attendance: Craig McCorkindale (Making Justice Work 1 Programme Manager)

Jane MacDonald (SCTS Legislation and Implementation Team)

Gillian Prentice (Deputy Principal Clerk of Session)

Support: John Thomson (Deputy Legal Secretary, Lord President's Private Office)

Caroline Mair (Deputy Legal Secretary, Rules Rewrite Drafting Team)

Stephen Feltham (Deputy Legal Secretary, Rules Rewrite Drafting Team) (For Item 5.2)

Neil Deacon (Deputy Legal Secretary, Lord President's Private Office) (For Item 5.4)

Mandy Williams (Deputy Secretary to the Scottish Civil Justice Council)

Anne Hampson (Policy Officer, Scottish Civil Justice Council)

Apologies:

Lord Menzies

Lord Tyre

Ken Forrest (Advocate)

Jacqueline Harris (Solicitor)

Jane Williams (Consumer representative)

Brandon Malone (LP Member)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present, in particular, Lord Boyd and Joel Conn, who were attending their first meeting, and noted apologies from Lord Menzies, Lord Tyre, Ken Forrest, Jacqueline Harris, Jane Williams and Brandon Malone. He advised members that John Thomson was attending on behalf of Roddy Flinn (Secretary to the Council), who is on leave, and Caroline Mair was attending for Kenny Htet-Khin (Head of the Rules Rewrite Team), who is also on leave.

2. The Council agreed not to publish the following papers: 2.2, 2.3, 3.1, 3.1A, 3.2, 4.3, 5.2, 5.2A-B, 5.3, 5.3A-B, 5.4, 5.4A-C, 6.1 6.1A, 7.1, 7.1A-B, 7.2, 7.2A, 7.3, 7.4, 7.4A-B.

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

3. **Members agreed the minutes from the previous meeting.**

Item 2.2 – Activity since last meeting (Paper 2.2)

4. **Members noted the progress that had been made on actions since the last meeting.**

Item 2.3 – Items by correspondence (Paper 2.3)

5. **Members noted Paper 2.3** which provided a summary of the outcome of consideration given to the following matters raised by correspondence since the last meeting:

A. Sheriff Appeal Court Rules – Minor Amendment

Papers were circulated to members on 20 May 2016 presenting draft rules which proposed amendments to the Act of Sederunt (Sheriff Appeal Court Rules) 2015 to address a number of issues identified during the first three months of the Court's operation.

The instrument was made on 7 June 2016 and came into force on 7 July 2016.

B. Report on the Consultation on the draft Simple Procedure Rules

Papers were circulated to members on 30 May 2016, asking members to approve the draft consultation report for publication.

The Report was published on 06 June 2016.

C. Committee membership

A paper was circulated to members on 30 May 2016, asking members to approve the following changes to membership at committee level to take effect from 03 June 2016, unless otherwise stated:

- Jane Williams and Dean Purdie to the Access to Justice Committee;
- Brandon Malone to the Costs and Funding Committee;
- Sheriff Principal Marysia Lewis, Professor Fran Wasoff and Rachael Kelsey to the Family Law Committee;
- Stephen Brand to the Family Law Committee for a further three year period from the expiry of his tenure on 10 June 2016;
- Lord Woolman to the Information and Communications Technology Committee;

- Sheriff Mackie, Gordon Keyden, Ronald Conway, Fraser Simpson and Alan Rogerson to the Personal Injury Committee for a further three years period from the expiry of their tenure on 10 June 2016;
- Maria Maguire and Amber Galbraith to the Personal Injury Committee for a further three years period from the expiry of their tenure on 26 June 2016;
- Joel Conn to the Rules Rewrite Committee.

The changes to membership were approved.

D. Annual Programme 2016/17

Papers were circulated to members on 17 June 2016, asking members to approve the draft Annual Programme for 2016/17.

The Programme was published on 30 June 2016.

Item 3: Proceedings

Item 3.1 – Committee Remits (Papers 3.1 and 3.1A)

6. At the previous meeting, the Council considered a discussion paper proposing revision to the remits of its established Committees. It was agreed that the secretariat liaise with the committee chairs and prepare proposals for consideration at its next meeting. **Paper 3.1** invited the Council to consider and approve changes to the remits.

7. **The Council approved the revised remits at Paper 3.1A and agreed that they be published on the Council’s website.**

Item 3.2 - Membership (Paper 3.2)

8. At its last meeting the Council considered correspondence from Sheriff Principal Murray stating that it would be helpful for Sheriffs Principal to be represented on the Council’s Committees. The Council agreed to consult the Chairs of the Committees, who do not already have a Sheriff Principal member, to consider if their Committee’s membership would benefit from the appointment of a Sheriff Principal.

9. **The Council approved the appointment of Sheriff Principal Scott to the Access to Justice Committee and Sheriff Principal Murray to the Information and Communications Technology Committee from 11 July 2016. It also noted that the Costs and Funding Committee proposed that, rather than appoint a**

Sheriff Principal as a member, a Sheriff Principal could attend, either at the invitation of the Committee or at their request, to discuss any matters of interest as they arise.

Item 4: Work Programme

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

10. Jan Marshall provided members with an update on legislative developments in the Scottish Government. Jan advised that, as the Parliament is now in recess, there was not much to report on legislative developments beyond the update provided at the last meeting. 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. There was nothing to report in relation to closed consultations as responses had yet to be published.

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

11. Craig McCorkindale informed the Council that the Making Justice Work programme has delivered the majority of the structural changes expected from civil courts reform. The remaining SCCR recommendations are being progressed largely through the rules rewrite project. The focus for the remainder of this year is on the implementation of Simple Procedure and the launch of the Integrated Case Management System (ICMS). Positive feedback had been received on the first round of ICMS business practice testing within Livingston and Hamilton sheriff courts and the Court of Session. User feedback will shape the product for the future. The second round of business practice testing will take place in September 2016.

Item 4.3 - Business Tracker (Paper 4.3)

12. The Council was advised that the tracker had been revised since the last meeting to remove matters which were being considered as part of Rules Rewrite implementation as these already feature on the Rules Rewrite Tacker. No separate Rules Rewrite Tracker was produced for the meeting as work is ongoing to update the tracker to include all courts reform matters. This involves adding all the remaining recommendations from the Scottish Civil Courts Review that can be taken forward by the Council without the need for primary legislation.

13. **The Council noted the amended Business Tracker and the update in relation to the Rules Rewrite Tracker.**

Item 5: Justice system reform: Rules rewrite

Item 5.1 - Update from the Rules Rewrite Drafting Team (Oral)

14. Caroline Mair provided an update on the Rules Rewrite Project, informing the Council that discussion papers had been prepared on Case Management, Style and Language and a Statement of Principle. Caroline advised that the working group, which had been set up to take forward legislative changes to inquiries into fatal accidents and sudden deaths, had held its first meeting in May 2016. Work was ongoing in relation to developing the rules.

15. **The Council noted the oral update**

Item 5.2 - Pre-action Protocols (Papers 5.2 and 5.2A-B)

16. The Council considered draft rules at **Paper 5.2B** prepared by the Personal Injury Committee. These provided for the procedure and practice to be followed under a new compulsory Personal Injury Pre-Action Protocol (PI Protocol). **Paper 5.2** set out the general drafting approach adopted in the rules and the PI Protocol and summarised the main issues considered by the Committee. **Paper 5.2A** provided further background and explained the policy decisions taken by the Committee. The Chair extended the thanks of the Council to the Committee for all the hard work that had gone into developing the rules and the PI Protocol.

17. The policy intention underlying the rules and the PI Protocol is to encourage the settlement of disputes prior to the commencement of proceedings and to narrow the issues to be determined through litigation in cases which do not settle under the PI Protocol

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

Item 5.3 - Court Reform (Scotland) Act 2014 – Rules proposals under Sections 87, 100 and 101 (Papers 5.3 and 5.3A-B)

19. The draft rules at **Paper 5.3B** were proposed by the Rules Rewrite Committee. They relate to the implementation of section 87 of the 2014 Act (power of the sheriff to order the sheriff clerk to execute a deed relating to heritage) and

section 100 and 101 (vexatious litigation orders). These rules implement the remaining provisions of the 2014 Act and also make a minor miscellaneous amendment to the Ordinary Cause Rules to address incorrect references.

20. The Council considered the draft rules and was content that these be submitted to the Court of Session for consideration, subject to any stylistic or typographical amendment.

Item 5.4 - Court Reform (Scotland) Act 2014 – Lay representation for non-natural persons (Papers 5.4 and 5.4A-C)

21. The Council considered a draft instrument making provision for lay representation for non-natural persons at **Paper 5.4A** alongside the legal advice provided at **Paper 54C**.

22. The policy intention underlying sections 95-98 of the 2014 Act is to provide for non-natural persons to have lay representation, which is not currently permitted. This was to avoid the situation where small businesses might struggle to take part in legal proceedings where they could not afford legal representation.

23. The Council was content with the broad policy approach taken in relation to the rules and agreed the rules should not require to prescribe the circumstances in which the provisions should be applied.

24. The Council considered the draft rules and was content that these be submitted to the Court of Session for consideration, amended as required to reflect a broad policy approach, and subject to any stylistic or typographical amendment. It also agreed that this matter should be considered further in two years to see if any further rules are necessary.

Item 6: Justice system reform: Review of Expenses and Funding of Civil Litigation In Scotland (Taylor Review)

Item 6.1- Policy Discussion Paper – Taylor Review (Papers 6.1 and 6.1A)

25. Sheriff Hughes spoke to these papers on behalf of the Costs and Funding Committee. The Council discussed the detailed proposals prepared by the Committee in relation to the implementation of the recommendations in Chapters 2-4 of the Taylor Review.

26. The Council noted that, following detailed consideration of those recommendations, the Committee was not presently proposing the implementation of-

- the recommendation that, at the stage of sanctioning the employment of counsel, the sheriff should cap the counsel's fees that would be recoverable under an award of expenses;
- the recommendation that, at the stage of certifying an expert witness, the court should cap the expert's fees that would be recoverable under an award of expenses;
- the recommendation that, in the Court of Session, the instructing solicitor should be required to inform the opposing party when senior counsel was being instructed;
- the recommendations relating to additional fees; and
- the recommendations relating to the piloting of a fixed expenses scheme, a scheme for the summary assessment of expenses, and an expenses management scheme

27. The Council also noted that implementation of the recommendation relating to cancellation fees for counsel was dependent on the Court of Session being given the power to regulate the fees of counsel, and that the recommendation relating to the review of the tables of inclusive fees was one that should logically be addressed in conjunction with the rules rewrite project. The detailed proposals for the implementation of the other recommendations were noted, and the Chair extended thanks on behalf of the Council for the work the Committee had put into this.

28. The Council approved the draft policy proposals at Paper 6.1A, referred the matter back to the Committee for implementation, and agreed that the recommendations being taken forward should be implemented in advance of the Rules Rewrite Project.

Item 7: Proposals for rules

Item 7.1 – Case management in family actions – research specification (Papers 7.1 and 7.1A-B)

29. The Council considered a draft research specification agreed by the Family Law Committee at **Paper 7.1A** as a proposed phase of research into case management in family actions.

30. The aim of the research is to ascertain the reasons for the apparent variations in the use made of the judicial case management tools available for hearings in certain family actions (Child Welfare Hearing, Options Hearing and Chapter 33AA Case Management Hearing). It is intended that the outcomes from the research will provide the Committee with a broader understanding of what is required for judicial case management to work well.

31. The Council agreed that a legal research consultant be appointed to carry out the work outlined in the specification and the maximum level of funding that should be allocated to this project.

Item 7.2 - Hearing the voice of the child – Intimation of initial writ (Papers 7.2 and 7.2A)

32. The Council considered draft rules at **Paper 7.2A** which amend the Ordinary Cause Rules (OCR) in relation to intimation of an initial writ to a child in family actions which include a crave for a section 11 order under the Children (Scotland) Act 1995. Unlike the Rules of the Court of Session, which already expressly prohibit the intimation of pleadings to a child, the OCR are silent on whether or not a copy of the initial writ should be attached to the form intimating a family action to a child. The draft rules adopt the same approach as the Court of Session, prohibiting the intimation of pleadings to a child.

33. The rule change will reduce the number of occasions where intimation is dispensed with in full on the basis that the child should not see the pleadings. In turn, it is hoped that this will lead to a greater number of children receiving intimation, at an appropriate level, of family and civil partnership actions, and possibly also increase the number of children who can therefore give their views.

34. The Council agreed that the draft rules should be submitted to the Court of Session for consideration, subject to any stylistic or typographical amendment.

Item 7.3 - Rule Clarification – Article 39 EU Regulation 2201/2003 (Papers 7.3 and 7.2A)

35. The Council considered draft rules at **Paper 7.2A** which amend both the Court of Session Rules and the sheriff court equivalent, the Act of Sederunt (Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility Rules) 2006. These rules set out the process to be followed when a person wishes to have a judgment that was issued in Scotland recognised or enforced in another EU Member State. The Scottish Government

suggested this rule change, which simply clarifies that the requirement to produce evidence of execution of service only applies where the applicant wishes to apply for enforcement of a judgment. This is not required where an applicant is simply seeking recognition of a judgment.

36. The Council indicated that it was content that the draft rules be submitted to the Court of Session for consideration, subject to any stylistic or typographical amendment.

Item 7.4 - Child Support Rules - Signature of Application for Liability Orders (Papers 7.4 and 7.4A-B)

37. The Council considered draft rules at **Paper 7.4A** amending the Child Support Rules 1993 to make provision for officials in the Department of Work and Pensions (DWP) to sign applications for liability orders on behalf of the Secretary of State. This change follows recent changes to the form of application which assumed that applications were to be signed by solicitors on behalf of the Secretary of State. In line with previous practice, it ensures that it is competent, for officials in the DWP to sign the applications for liability orders on behalf of the Secretary of State.

38. The Council was content that the draft rules be submitted to the Court of Session for consideration, subject to any stylistic or typographical amendment.

Item 8: A.O.C.B.

39. There was no further business.

Item 9: Dates of future meetings

40. Members noted the dates of future meetings:

- Monday 03rd October 2016 at 10 am
- Monday 21st November 2016 at 10 am
- Monday 23rd January 2017 at 10am
- Monday 20th March 2017 at 10am
- Monday 29th May 2017 at 10am
- Monday 10th July 2017 at 10am

- Monday 02nd October 2017 at 10am
- Monday 20th November 2017 at 10am

Scottish Civil Justice Council Secretariat

July 2016