

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL**

**MONDAY 18 OCTOBER 2021 AT 10.30AM**

**VIA WEBEX**

**MINUTES**

**Members Present:** Lord President (Chair)

Brandon Malone  
Catherine Smith  
Colin Lancaster (SLAB)  
Denise Swanson (Scottish Government)  
Employment Judge D'Inverno  
Eric McQueen (SCTS)  
Joel Conn  
Lady Carmichael  
Lord Boyd of Duncansby  
Lynda Brabender QC  
Sheriff Hughes  
Sheriff Principal Murray  
Jaqueline Harris  
Sheriff Way  
Thomas Docherty

**In attendance:** Diane Machin (Depute Principal Clerk of Session)

Heather Simpson (SCTS)  
Kay McCorquodale (Judicial Office)  
Cameron Stewart (SCTS)

**Support:**

Graeme Welsh (Secretary, SCJC)  
Craig McCorkindale (Director of Strategy, SCJC)  
Emma Laurie (SCJC)  
Jessica Flynn (SCJC)  
Karen Stewart (SCJC)  
Sinead Campbell (LPPO)

**Item 1: Welcome, apologies and agreement of private paper**

1. The Chair welcomed those present to the forty-third meeting of the Council and introduced Graeme Welsh as the new Secretary to the Scottish Civil Justice Council. There were no apologies tendered.

2. The Chair advised this was Emma Laurie's final meeting with the Council. The Chair and members thanked Emma for her valuable work during her time with the SCJC Secretariat.
3. Members approved the attendance of Kay McCorquodale and Heather Simpson for the duration of the meeting.
4. Members agreed to publish the following papers: Agenda, Paper 2.1, 4.4A

## **Item 2: Previous meeting**

### *Item 2.1 – Items by Correspondence (Paper 2.1)*

5. The Chair introduced Paper 2.1 which provided information on the outcome of three matters that had been considered by correspondence since the last meeting on 19 July 2021. These included:
  - Civil Online Rules Review – Paper 2021/16 invited members to consider and approve a draft instrument containing rules amending the Act of Sederunt (Simple Procedure Amendment) (Civil Online) 2020. The new rules extend the mandatory use of Civil Online for the lodging of simple procedure cases for a period of 6 months. The instrument was approved and thereafter made on 30 August 2021 and laid in the Scottish Parliament along with a policy note on 01 September 2021. The rules expire on 31st March 2022.
  - Administrative matters - Paper 2021/17 invited members to approve draft minutes from 19 July meeting. The minutes were approved and published on the Council's website.
  - Consultation on Mode of Attendance at Hearings - Paper 2021/19 invited members to approve a draft consultation paper and supporting documents. Members approved all papers. The six-week consultation was launched on 06 September to close on 18 October 2021. The closing date was subsequently extended by 4 weeks until 15 November 2021.
6. **Members noted the paper.**

## **Item 3: Proceedings**

### *Item 3.1 – Committee membership – Access to Justice (Paper 3.1)*

7. The Chair introduced **Paper 3.1** which invited members to approve the appointment of Hazel Thoms, Policy and Development Manager at Scottish Legal Aid Board, as Standing Member to the Access to Justice Committee in place of Anne Dickson who has retired.

8. **Members considered Ms Thoms' professional biography provided in paper 3.1 and approved her appointment to the Access to Justice Committee for a period of 3 years.**

#### **Item 4: Work Programme**

##### *Item 4.1 - SCJC Consultation - Mode of Attendance at Hearings (Oral update)*

9. Karen Stewart provided members with a brief overview of consultation feedback from those responses received to date.
10. Emerging themes that:
- There is some support for the general presumption that certain case types are more suitable for an in-person hearing;
  - Substantive business such as debates, proofs, appeals and judicial review, should be heard in person by default;
  - One respondent said that the current draft tips the balance, between efficiency and the benefit of in-person hearings, too far in the wrong direction. Another cautioned that, should in person hearings become the norm, it would be step back in time towards inefficiency. We would lose an opportunity to implement seismic change.
  - The use of electronic hearings for procedural administrative business was to be welcomed:
  - A more flexible approach, rather than a default position, in commercial proofs was proposed. It was suggested that Adoption cases could be carried out by electronic means as a first presumption;
  - Motion procedure should be used, should parties want to change the default presumption; and
  - The court should have the final say with the caveat that there needs to be clear guidance. Some suggested that parties should be able to insist on an in-person hearing.
11. Additional feedback on matters which will impact upon decisions on what will be appropriate in individual cases included::
- access to open justice, IT accessibility and reliability;
  - training of legal practitioners and communication limitations of electronic hearings;

- fatigue and mental health strain of remote users;
- increased use of technology as a positive step particularly in procedural hearings; and
- efficiencies created by remote hearings improved working practices, in particular the use of written submissions and reduced travel/court waiting times.

12. In relation to the drafting of the instrument itself, respondents suggested that:

- the test (as drafted) of whether a case raises a point of law of general public importance/particular difficulty or importance requires clarification on whether it means important to the parties or to the development of the law in a more objective sense; and
- there is a significant difference between video and telephone hearings and this distinction should be recognised in any new rules.

**13. Members noted the update.**

*Item 4.2 – Scottish Government Consultation – Covid Recovery (Paper 4.2)*

14. The Chair introduced **Paper 4.2** which invited members to discuss key topics raised within the Scottish Government's Covid Recovery consultation. The consultation is to help inform future decisions on which matters should/should not be carried forward in permanent legislation once the sunset clauses of existing Coronavirus legislation expire. The consultation closes on 9 November 2021

15. The paper highlighted specific questions from the consultation relating to the civil justice system and invited the Council to consider the relevant issues and to express views on the proposals.

16. The Council discussed and agreed a number of matters which it considered should be included in a formal consultation response and invited the Secretariat to compile a response for members' approval ahead of the closing date.

*Item 4.3 – Civil Online – EQIA from Scottish Courts and Tribunals Service (SCTS) (Papers 4.3, 4.3A, 4.3B, 4.3C)*

17. The Chair invited Heather Simpson to speak to these papers and to recap on matters from the previous meeting in July in relation to an Equality Impact Assessment;

18. Heather advised that operational evidence showed that the exception test was working effectively in practice. User guidance had been amended after EHRC

feedback had been received. SCTS is of the view that the exception test, as drafted, is not unduly burdensome.

19. Heather advised that the SCTS Application Programme Interface, which is used for the bulk of applications will be under continual monitoring and improvement.
20. The final EQIA was provided at **Paper 4.3A**. This provided clarification on matters raised by members. It outlined further steps taken by SCTS to engage with interested parties. The SCTS anticipated that there would be a low impact on court users. Civil Online met accessibility standards. It included, an alternative method (paper application) for those unable to access the online service. Civil Online was recently audited and met the recommended standards.
21. The SCTS will be working in conjunction with Citizens Advice Scotland (CAS) to prepare guidance videos for system users.
22. From the evidence made available to the SCTS, there are no barriers for party litigants using the system.
23. Overall, the SCTS were confident that Civil Online increased access to justice. It provided continual access out-with usual court hours and provided the digital service expected by users in 2021. The SCTS therefore supports making the rules requiring the mandatory use of Civil Online for lodging simple procedure cases, permanent.
24. Members thanked the SCTS for providing this paper and the thorough information provided. Members agreed that the evidence provided was sufficient to make a final decision on whether or not the temporary rules should become permanent. It was agreed there needs to be a further understanding of court users' experience and the demographics of users engaging with Civil Online.
25. **The Council agreed to make the court rules, requiring the mandatory use of Civil Online for lodging simple procedure cases, permanent and invited the Secretariat to issue drafting instructions to that effect.**
26. **Members agreed that a review of the mandatory procedures should be carried out after six months from the date of implementation of the rules.**

*Item 4.4 - Abusive Behaviour and Sexual Harm Act 2016 (Papers 4.4, 4.4A, 4.4B)*

27. The Chair introduced the papers. Paper 4.4 provided an overview of the changes introduced by the 2016 Act. A rules request from Scottish Government was provided for members consideration at Paper 4.4B
28. The Act aims to improve how the justice system responds to abusive behaviour, including domestic abuse and sexual harm, helping to improve public safety by

ensuring that perpetrators are appropriately held to account for their conduct.

29. The Act aims to simplify and rationalise the existing system of civil orders available to protect communities from those who may commit sex offences. This follows concerns raised in relation to the flexibility of orders and their remit.
30. . Members agreed with the proposals identifying particular areas where court rules would be required
31. **The Council instructed the Secretariat to issue drafting instructions for the preparation of a rules instrument for members' consideration in due course.**

## **Item 5: Rules Review**

### *Item 5.1 – Sheriff Appeal Court Rules (Papers 5.1, 5.1A, 5.1B)*

32. The Chair invited Sheriff Principal Murray to speak to these papers and to provide an overview of the rules review;
33. The Sheriff Appeal Court took up its civil jurisdiction on 1 January 2016. To support day-to-day operations, the current Sheriff Appeal Court Rules 2015 (the 2015 rules) came into effect on the same date. The court is now in its sixth year of operation. There have been seven straightforward amendments made to the 2015 rules.
34. At its meeting on 3 October 2016, the Council agreed to a request from the Sheriffs Principal to initiate a rules review exercise. That had been prioritised within the Council's Annual Programme from 2017-18 onwards.
35. As there are existing rules in place, the policy objectives for the review were to deliver an improved appeals process whereby:
  - Appeals can be progressed more timeously;
  - The court can operate more efficiently and with greater flexibility;
  - The updated court procedure better supports appeals being heard by a bench size proportionate to the appeal points raised; and
  - The updated court procedure narrates the rules in a manner that all participants will find easier to use and understand.
36. A key conclusion of the review was a clear need to rename and rearrange chapters and to move certain individual rules between chapters. This requirement drove a tactical decision to revoke the 2015 rules and issue

procedural rules of new as the Sheriff Appeal Court Rules 2021.

37. The Council considered the draft rules instrument in Paper 5.1 A and the related drafting note at Paper 5.1B.

38. **The Council approved:**

- **the rules instrument in Paper 5.1A providing new Sheriff Appeal Court Rules and the onward submission of that instrument to the Court of Session for consideration and approval, subject to any stylistic or typographical amendments; and the preparation of a Policy Note to accompany the rules instrument when it is laid in the Scottish Parliament.**

#### **Item 6: Proposals for new rules**

##### *Item 6.1 - Scottish Biometrics Commissioner Act 2020 (Papers 6.1, 6.1A)*

39. The Chair invited members to consider a Scottish Government rules request at Annex A of **Paper 6.1** seeking court rules to implement the Scottish Biometrics Commissioner Act 2020.

40. The draft rules at **Paper 6.1A** provide a mechanism for the Scottish Biometrics Commissioner to apply to the Court of Session in order to enforce an information order or compliance order.

41. **The Council:**

- **approved the draft rules instrument and agreed that it be submitted to the Court of Session for consideration and approval, subject to any stylistic or typographical amendments; and agreed that no policy note is required to accompany the rules when laid in the Scottish Parliament.**

#### **Item 7: AOB**

42. Craig McCorkindale provided an update on the Rules Rewrite Project. Work is underway with collation of the procedural narrative by the newly appointed Rules Rewrite Drafting Team. It is anticipated that a written update will be available for the next Council meeting in January.

**Item 8: Dates of future meetings**

- Monday 31<sup>st</sup> January 2022
- Monday 25<sup>th</sup> April 2022
- Monday 18<sup>th</sup> July 2022
- Monday 24<sup>th</sup> October 2022

**Scottish Civil Justice Council Secretariat  
October 2021**