

SCOTTISH CIVIL JUSTICE COUNCIL – RULES REWRITE COMMITTEE

19 JANUARY 2016 AT 4.15 PM

JUDGES' CONFERENCE ROOM, PARLIAMENT HOUSE

APPROVED MINUTES

Members present: Lord Menzies (Chair)
Lady Wolffe
Sheriff Principal CAL Scott (Sheriff Principal of
Glasgow & Strathkelvin
Ian Dickson (SLAB)
Kay McCorquodale (Courts Policy Team, Scottish
Government)
Professor Fran Wasoff (SCJC member)
Jacqueline Harris (SCJC member)
Jonathan Brown (OSPC, Scottish Government)
Kenneth Forrest (SCJC member)
Andrew Stewart QC

In attendance: Gillian Prentice (Deputy Principal Clerk of Session)
Jane MacDonald (SCTS Policy & Legislation Branch)
Kenneth Htet-Khin (Head of the Rules Rewrite Drafting
Team)
Luke McBratney (Rules Rewrite Drafting Team)
Caroline Mair (Rules Rewrite Drafting Team)
Karen Stewart (SCJC Secretariat)
Susan Brodie (SCJC Secretariat)

Apologies: Sheriff Thornton

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present. The Chair introduced Karen Stewart, SCJC Secretariat, who will be supporting the Committee going forward. Sheriff Thornton tendered apologies.

2. **The Committee agreed that the following papers be marked private: Papers 2.2, 3.1, 3.1A, 4.1, 4.2, 4.2A, Annex to 4.2A, 5.1, 5.1A, 5.3 & 5.3A**

Item 2: Previous meeting

Item 2.1 Minutes of previous meeting [Paper 2.1]

3. **The Committee approved the minutes of the previous meeting subject to agreed amendments at paragraphs 11, 12 & 14.**

Item 2.2 Progress of actions from previous meeting [Paper 2.2]

4. **Members noted Paper 2.2. There were no matters arising.**

Item 3: Proceedings

Item 3.1 Membership [Papers 3.1 & 3.1A]

5. **Members noted Papers 3.1 & 3.1A.**

Item 4: Rules Rewrite

Item 4.1 Update from Rules Rewrite Drafting Team [Oral]

6. Kenny Htet-Khin provided an oral update on feedback which has been received regarding the impact upon practice and procedure of rules provision to date. An update was provided on the progress made regarding the *simple procedure* rules and the *personal injury pre-action protocol*. He intimated that a readability exercise and focus group was planned to consider the draft *simple procedure* rules. A draft protocol has been prepared and is to be considered by the PI Committee. An update was provided on the priorities of the Rules Rewrite Drafting Team which will include drafting rules to support the Bankruptcy Consolidation Bill and the recently enacted Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act.
7. **Members noted the update.**

4.2 Draft Scoping Paper [Papers 4.2, 4.2A]

8. Luke McBratney spoke to these papers. He explained the proposed approach (set out in paper 4.2A) to the process of managing the programme of work necessary to take forward a comprehensive rewrite of the civil procedure rules. Each stage of the proposed approach was discussed fully by members and agreement was reached on the proposals for managing the programme of work. Members noted that it was the intention of the drafting team to commence work on the project immediately with a view to having many of the substantive background aspects of the project completed during the course of 2016.

9. **The Committee agreed:**

9.1 **The scope of the rewrite is to encompass: the Rules of the Court of Session, the Ordinary Cause Rules, the Summary Application Rules, the Child Care and Maintenance Rules, the Adoption Rules, and every other set of civil procedural rules relating to the sheriff court. In addition it was agreed that the Sheriff Appeal Court rules are within the scope of the rewrite.**

9.2 **The following matters fall out with the scope of the rewrite: the Simple Procedure Rules (when enacted), the Registration Appeal Court, the Election Court, strictly administrative matters relating to the organisation of the courts and their offices (e.g. chapter 3 of the Rules of the Court of Session) and proceedings relating to Fatal Accident Inquiries.**

9.3 **Whilst it was acknowledged that close liaison with the SCJC Costs and Funding Committee will be vital during the rewrite project in relation to rules regulating the recoverable expenses of solicitors, it was agreed that the work itself will be out with the scope of the rewrite project.**

9.4 **Going forward, both fees-related and purely administrative rules provision will be separated from 'procedural' rules of court.**

9.5 **It was agreed that the programme of work be separated into 5 phases:**

1. **preparing discussion papers**

2. preparing procedural narratives
3. agreeing a draft structure
4. preparing policy instructions on particular matters, and
5. agreeing draft rules.

9.6 The question of whether or not the rewrite project should develop a single procedural code covering both of Scotland's principal civil courts is to be considered further at stage 3 of the agreed phased work programme. The committee were of the view that members would be in a position at this point in the programme to make a suitably informed decision on the issue. It was agreed that this issue will not be revisited until that time.

9.7 At the conclusion of each phase of the project, the Committee will report to the SCJC with its conclusions and recommendations. The Committee will liaise with other SCJC Committees on the handling of specific work areas once decisions on principle have been taken (e.g. family cases in the FLC, lay representation in the ATJC).

9.8 During the course of the work programme, the Committee will prepare appropriate updates on ongoing work to share with the public and the professions in order to raise awareness of emerging proposals. The Committee will also consider other methods of spreading knowledge to ensure that broader perspectives are taken into account. This may include formal consultation on specific areas should this be deemed necessary and proportionate.

9.9 Phase one discussion papers will be prepared on the following subjects with papers a to c being presented first:

- a. A statement of principle for civil procedure
- b. The form, style and language of rules of court
- c. Case management and sanction for failure to comply
- d. The implementation of transition to the new rules of court
- e. Petition and summons procedure
- f. The use of ICT in the courts

g. Unnecessary, redundant or otiose provisions

10. **The Committee agreed that paper 4.2A be revised to take account of its views and thereafter that it be placed before the SCJC for consideration at the meeting scheduled for 14 March 2016.**

4.3: Reflective Meeting on the rules to date [Oral]

11. Kenny Htet-Khin advised that a meeting will take place on Monday 8 February to consider feedback on the drafting process for the rules to date. Jacqueline Harris, Jonathan Brown, Sheriff Principal Abercrombie, Q.C. and Fran Wasoff are due to attend. The drafting team are preparing questions for consideration and will feedback to members in due course.

12. **The Committee noted the position.**

Item 5: Proposals for Rules

5.1: Discussion Paper on reform of the permission to appeal procedure [Papers 5.1, 5.1A]

13. Caroline Mair spoke to these papers and outlined the background and issues for consideration.

14. **Members noted the conclusions of the further research on the issue and agreed that the current rules on *permission to appeal* will not be amended and that the committee will consider the wholesale reform of the *permission to appeal* process under the new powers conferred by section 115 of the 2014 Act.**

15. **The Committee requested that a paper be provided for consideration at the next or following meeting.**

5.2: Required draft rules for the remaining implementation of the Courts Reform Act [Oral]

16. Caroline Mair provided an update on progress regarding the preparation of draft rules for implementation of Section 87 – execution of deeds relating to heritage and Sections 100 and 101 regarding vexatious litigants, of the 2014 Act. She advised that papers will be prepared for members' consideration at the next meeting.

17. **Members noted the position.**

5.3 Correspondence seeking changes to Court Rules [Papers 5.3, 5.3A]

18. **Members agreed that this item and associated papers be 'rolled-over' to the next meeting.**

Item 6: AOCB

19. The Chair drew the following matters to members' attention:

Signing of applications for leave to appeal to the Supreme Court and from the Sheriff Appeal Court to the Inner House

19.1 At a recent Training Session for judges (including the LP) an issue was discussed relating to the signing of applications for leave to appeal to the Supreme Court. Specifically the requirement for signatures on the relevant form which requires a docquet to be signed "*by Counsel or other person having a right of audience*".

19.2 The view expressed by several judges was that there should be no requirement for Counsel to sign (and that this could equally apply in all leave to appeal cases) although the Chair acknowledged that there are arguments for and against this requirement.

19.3 The Committee agreed that a paper be prepared on the matter which will then be consideration by correspondence.

Procedure required to claim expenses from the Scottish Legal Aid Fund

19.4 The procedure required to claim expenses from the Scottish Legal Aid Fund was discussed in the reclaiming motion of Asif Ashiq (2016 CSIH 1). In this (and other similar cases), the Office of the Advocate General is seeking expenses from SLAB following success in the case. It was noted that the rules requirement for handling of such motions is a two stage process and that the rules provision appears to be unnecessary and costly.

19.5 Having considered the matters raised, the Committee requested that a paper be prepared for consideration by members at the next meeting.

Item 7: Date of Next Meeting

20. The next meetings of the Committee are scheduled for:

- Tuesday 29 March 2016
 - Tuesday 31 May 2016
 - Tuesday 12 July 2016
 - Tuesday 25 October 2016
- All at 4.15pm in Parliament House

APPROVED