

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
MONDAY 21 NOVEMBER 2016 AT 10 AM
JUDGES CONFERENCE ROOM, LEVEL +2 PARLIAMENT HOUSE**

MINUTES

Members Present: Lord President (Chair)

Lord Menzies
Lord Boyd
Colin Lancaster (Chief Executive, SLAB)
Cameron Stewart (Scottish Ministers' representative)
Sheriff Principal Abercrombie
Lynda Brabender (Advocate)
Paul Reid (Solicitor)
Jacqueline Harris (Solicitor)
Joel Conn (Solicitor)
Ian Maxwell (Consumer representative)
Jane Williams (Consumer Representative)
Employment Judge d'Inverno (LP member)
Brandon Malone (LP member)

In attendance:

Craig McCorkindale (Making Justice Work 1 Programme Manager)
Gillian Prentice (Deputy Principal Clerk of Session)

Support:

Roddy Flinn (Legal Secretary to the Lord President)
Kenneth Htet-Khin (Head of Rules Rewrite Drafting Team)
Norman Munro (Deputy Legal Secretary, Lord President's Private Office)
Edward McHugh (Deputy Legal Secretary, Lord Presidents Private Office)
John Thomson (Deputy Legal Secretary, Lord Presidents Private Office)
Caroline Mair (Deputy Legal Secretary, Lord Presidents Private Office)
Mandy Williams (Deputy Secretary to the Scottish Civil Justice Council)
Karen Stewart (Business & Policy Manager, Scottish Civil Justice Council)

Apologies:

Lord Tyre
Sheriff Hughes
Eric McQueen (Chief Executive, SCTS)
Kenneth Forrest (Advocate)
Jane MacDonald (SCTS Legislation and Implementation Team)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present and noted apologies from Lord Tyre, Sheriff Hughes, Eric McQueen (Chief Executive, SCTS), Kenneth Forrest (Advocate) and Jane MacDonald (SCTS Legislation and Implementation Team).
2. The Council agreed not to publish the following papers: 2.2, 2.3, 3.1, 4.3, 5.1, 5.2, 5.2A-G, 5.3, 5.3A, 5.4, 5.4A-B, 6.1, 6.1A-B, 6.2, 6.2A-B, 6.3, 6.3A, 6.4, 6.4A-B.

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

3. **Members approved 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 and the activity report on the work of the Council's committees.**
5. Lord Menzies provided information about an issue which the Rules Rewrite Committee (RRC) will shortly consider. This relates to the form for applications for leave to appeal to the Court of Session from the Sheriff Appeal Court. It is anticipated that the RRC will remit draft rules to the Council for consideration in the short term.
6. The Lord President advised that the Council has been asked to approve funding of £1,300 for one of the Family Law Committee's ongoing projects. The funding is requested for the purpose of reimbursing the costs of the Children's Parliament, which will carry out consultation with children on proposed new forms that will replace the existing Form F9, Form CP7 and Form 49.8-N. These are the forms prescribed for the purposes of intimating family actions to children, and seeking their views. Lynda Brabender provided information on the work that the FLC is taking forward.
7. **The Council approved the funding of this project in the sum of £1,300.00.**

Item 2.3 Items by Correspondence (Paper 2.3)

8. **Members noted the paper.**

Item 3: Proceedings

Item 3.1 – Committee Membership (Paper 3.1)

9. The Council considered Paper 3.1 and approved the following changes in committee membership:

- The appointment of Senga Gracie as SCTS Legislation and Implementation Team alternate member to Access to Justice Committee;
- The appointment of Sheriff Principal Stephen to replace Sheriff Principal Abercrombie as the Sheriff Principal member of the Personal Injury Committee; and
- The appointment of Lord Boyd as the SCJC member of the Personal Injury Committee.

Item 4: Work Programme

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

10. Cameron Stewart provided an update on legislative developments in the Scottish Government; in particular that a Bill to remove the limitation period for survivors of historical child abuse has been introduced. The Scottish Parliament is considering secondary legislation involving the Simple Procedure and some changes to Legal Aid provisions. Increases to court fees are being considered as well as an increase to judicial numbers.

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

11. Craig McCorkindale provided an update on the Making Justice Work programme of reform. He said that the new Integrated Case Management System (ICMS) was launched in the sheriff courts on 31 October 2016 as scheduled. To date there has been six system fixes rectified by the project team thus far and the system is now stabilising for users. There are some further changes to come, including to the system in relation to court fees and the introduction of Simple Procedure. The launch of ICMS in the Court of Session and the electronic submission of forms has been deferred to a date to be confirmed in 2017.

12. Ian Maxwell inquired why online forms are not yet available. Mr McCorkindale advised that the forms are ready on the SCTS website but that further testing on the public facing website is required before this goes live. Joel Conn enquired about how cases have been transferred to the new system and, in particular,

cases under the Adults with Incapacity Act provisions. Mr McCorkindale advised that all cases up to three years old have been transferred onto the new system and that functionality is available on the system to upload older cases should the need arise. Guidance has been issued to staff on this.

13. Sheriff Principal Abercrombie noted his thanks to the ICMS team and to operational court staff who have worked extremely hard on the project.

Item 4.3 - Business Tracker (Paper 4.3)

14. **The Council noted Paper 4.3 which provided an update of the Council's work.**

Item 5: Justice System Reform: Rules Rewrite

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

15. Kenneth Htet-Khin, Head of Rules Rewrite Drafting Team, provided an update on the work of the Rules Rewrite Drafting Team. In particular, he advised that:- updates to the Simple Procedure rules regarding provisions on trainee solicitors and enforcement procedures have been prepared; the personal injury pre-action protocol comes into force in December; the review of Judicial Review Rules is to commence in December; a Review of the Sheriff Appeal Court Rules will soon commence – the secretariat and drafters are due to meet with Sheriff Principal Abercrombie later this month; three papers have been considered under the Rules Rewrite Project and the Committee intends to circulate an interim paper to Council in December; and the FAI working group has prepared draft rules for consultation.
16. Ian Maxwell said that he found the work tracker very useful and asked who is tracking the progress of all the recommendations of the Scottish Civil Courts Review (SCCR). Craig McCorkindale advised that a "SPICE" briefing is available on the Scottish Parliament website with the 206 SCCR recommendations as part of the Making Justice Work programme. **Members noted Paper 5.1.**
17. The Lord President advised he has noticed a falling off in members' attendance at some Committees and suggested that an event be arranged aimed at engaging members.

Item 5.2 - Simple Procedure Special Claims Rules: Consultation (Papers 5.2 and 5.2A-G)

18. Norman Munro introduced these papers which set out: a draft implementation timetable for the implementation of simple procedure (special claims); a proposed methodology for consultation on these draft rules; and draft rules for simple procedure (special claims), for the purpose of consultation.
19. Mr Munro provided an overview of the implementation timetable and the proposals for consultation. The Access to Justice Committee (ATJC) is developing all of the special claims rules apart from the personal injury rules, which are being developed by the Personal Injury Committee (PIC). When planning the implementation timetable, ATJC and PIC have taken account of the fact that the Making Justice Work Project Board has agreed that the Simple Procedure (Special Claims) Rules will commence in September 2017. The timetable has been planned to ensure that sufficient time is available to carry out the related work under each part of the rule making process.
20. In relation to the consultation proposals, Mr Munro explained that a full public consultation took place for the draft Simple Procedure Rules. Due to the specialist nature of the special claims rules, the ATJC recommends targeting stakeholders in fields such as housing and personal injury as the most effective method of obtaining relevant and useful feedback. It is proposed that this be carried out as a series of focus groups with relevant interested parties. The ATJC also recommend holding a readability exercise of the draft rules with lay persons. Mr Munro advised that Professor Fran Wasoff (ATJC member) and Maria Maguire QC (PIC member) have kindly agreed to facilitate the focus groups for their respective committees.
21. **The Council considered and approved the implementation timetable and the consultation proposals.**
22. Mr Munro provided an overview of the content of the draft special claims rules and explained the drafting approach taken including a number of policy decisions made by ATJC and PIC. **The Council considered the draft rules and agreed a number of policy matters, in particular:**
 - **the special claims rules should not contain provision for more complex cases (e.g. mesothelioma claims, claims following a death, or provisional and further damages claims); and**
 - **the special claims rules should not include a presumption (put forward at recommendation 119 in the Scottish Civil Courts Review) that only evidence from a medical practitioner who treated or examined the claimant should be led.**

23. The Council approved the draft special claims rules for the purpose of consultation.

Item 5.3. Section 115 of the Courts Reform (Scotland) Act 2014 (Papers 5.3 and 5.3A)

24. The Council considered Paper 5.3A and discussed a number of potential options in relation to the implementation of Section 115 of the Courts Reform (Scotland) Act 2014 (“the 2014 Act”). The Lord President outlined the current procedure in the Court of Session for seeking leave to appeal. The Council noted that S115 of the 2014 Act introduces a new Section 31A to Court of Session Act 1988. S31A provides a mechanism for the leave stage of appeal proceedings to be combined with a sifting process whereby grounds of appeal can be struck out. The Council noted that the Rules Rewrite Committee has considered this issue a number of times and has recommended that:

- The Council partially implement section 31A of the Court of Session Act 1988 as introduced by section 115 of the Courts Reform (Scotland) Act 2014; and
- The Council exercise the power set out in Section 3(2)(f) of the Scottish Civil Justice Council and Legal Assistance Act 2013 by recommending to the Scottish Ministers that they partially repeal new section 31A of the Court of Session Act 1988.

25. The Council approved the recommendations and instructed the Secretariat to write to the Scottish Ministers with a recommendation in these terms.

Item 5.4 Fatal Accident Inquiry Rules: consultation (Papers 5.4 and 5.4A-B)

26. The Council considered draft fatal accident inquiry rules at **Paper 5.4A** which have been prepared by the Council Working Group for the purpose of stakeholder consultation. The Council also considered a draft consultation document (**Paper 5.2B**) to accompany the draft rules. Members provided general feedback on the content of the rules and **the Council approved the draft consultation rules and the consultation document for issue.**

27. The Council considered a proposed amendment to the consultation timetable which would reduce the consultation period to six weeks. Having expressed concern that the consultation is taking place over the festive period and the fact that this may reduce the time available for potential respondents to consider the documents, **the Council agreed that the consultation should run until 23 January 2017.**

28. The Council was of the view that the implementation timetable may require to be adjusted in order to provide sufficient time for analysis of consultation responses and further revision of draft rules after the consultation closes.

Item 6: Proposals for Rules

Item 6.1. Pursuer's offers (Papers 6.1 and 6.1A-B)

29. John Thomson introduced these papers. **Paper 6.1** sets out policy proposals and **Paper 6.1B** provides draft rules developed by the Costs and Funding Committee. The proposal seeks to establish a formal system of pursuers' offers in the Court of Session and in the sheriff court ordinary procedure.

30. On consideration of the draft rules two issues were raised by members. One concerned the use of a pursuer's offer to settle a claim for financial provision on divorce or dissolution of civil partnership. John Thomson advised that the rules had not been intended to permit the use of a pursuer's offer in these circumstances, but agreed to consider whether this could be made clearer. The other concerned whether the use of the term "decree for expenses as taxed" in the context of the Ordinary Cause Rules was sufficiently clear in its meaning. John Thomson agreed to consider whether this also could be made clearer.

31. **The Council agreed that the draft rules should be submitted to the Court of Session for approval, subject to any revisal arising from the foregoing, and subject to any stylistic or typographical amendment.**

32. The Council noted that it will be necessary for the applicable table of fees to be amended to include fees for making and considering pursuer's offers and that this issue is currently under consideration by the Costs and Funding Committee. **The Council recommended that the Court allow sufficient lead in time to permit a related fees instrument to be considered and approved.**

Item 6.2. Small Business, Enterprise and Employment Act 2015 and Insolvent Companies (Reports on Conduct of Directors) (Scotland) Rules 2016 (Papers 6.2 and 6.2A-B)

33. Roddy Flinn introduced **Paper 6.2A** which is a policy request from the Office of the Advocate General seeking amendment to court rules arising due to changes in two items of legislation; namely *Small Business, Enterprise and Employment Act 2015* ("the 2015 Act") and *Insolvent Companies (Reports on Conduct of Directors) (Scotland) Rules 2016*. **Paper 6.2B** contains draft rules making consequential amendments to existing rules arising from changes in the primary and secondary legislation noted by OAG.

34. The Council noted that the 2015 Act inserted a number of new provisions into the Company Directors Disqualification Act 1986 and the Insolvency Act 1986 which

create several new types of court order and **agreed that these should all be applied for by way of petition.**

35. The Council considered and approved the draft rules at Paper 6.1A for submission to the Court of Session for approval, subject to any stylistic or typographical amendment.

Item 6.3. Court of Session Jury Precept Form (Papers 6.3 and 6.3A)

36. Roddy Flinn introduced these papers which contain a request from SCTS seeking amendment to the Form of Jury Precept (Form 37.2A) contained in the Rules of the Court of Session. The Council noted that the request comes as a result of new procedure for citing jurors in the Court and that the change will provide clarity of procedures in court operations.

37. The Council considered and approve the draft rule and agreed that it be submitted to the Court of Session for approval, subject to any stylistic or typographical amendment.

Item 6.4. Human Trafficking and Exploitation (Scotland) Act 2015 (Papers 6.4 and 6.4A-B)

38. The Council considered policy proposals from the Scottish Government set out in **Paper 6.4A** which requests new rules of court and prescribed forms in order to implement the Human Trafficking and Exploitation (Scotland) Act 2015.

39. The Council agreed:

- **that there is no requirement to prescribe court forms in relation to Trafficking and Exploitation Prevention Orders (TEPOs) and Trafficking and Exploitation Risk Orders or authorisation of the release of property under Section 13 of the 2015 Act;**
- **there is no requirement to provide rules of court for the manner of application for such orders/interim orders.**

Item 7: A.O.C.B.

40. Brandon Malone intimated that he proposed to lodge a paper for Council's consideration on the subject of how the profile of the Scottish courts as a venue for litigation might be raised.

Item 8: Dates of future meetings

41. Members approved Monday 23 January 2017 as the date for the Council's annual strategy meeting. Members noted that this would be an all-day event and agreed that it would be worthwhile for Committee members to be invited.

42. Members noted the dates of future meetings:

- 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

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