



Scottish
Civil Justice
Council



Scottish Civil Justice Council

Annual Report 2020/2021 and Annual Programme 2021/2022

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ISBN: 978-1-9996970-2-0

Report number: 2021/01

Laid before the Scottish Parliament by the Scottish Civil Justice Council in pursuance of section 5(4) of the [Scottish Civil Justice Council and Criminal Legal Assistance Act 2013](#) on 23rd August 2021.

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Published by the Scottish Civil Justice Council

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Chair's Foreword

It is a pleasure to introduce the eighth Annual Report of the Scottish Civil Justice Council, covering the period from 1 April 2020 to 31st March 2021.

During this reporting period the Covid-19 pandemic has had a significant impact on the delivery of the Council's business, and its available resources. We have however adapted effectively and changed working practices to ensure that our business priorities can be progressed as appropriate.



The Council and its committees continued to respond to rules requests in light of new legislation and policy initiatives. New rules, as well as amendments to existing rules have been implemented over a broad spectrum of subject matters including the introduction of Group Procedure and various instruments that arose in response to the United Kingdom's exit from the European Union. A total of seven sets of draft rules have been prepared by the Council and given legal effect by the Court of Session during this reporting period.

The Council continues to support the wider programme of civil court reform in taking forward preparatory work to implement further aspects of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. That includes significant work in relation to the development of draft rules that will in due course enable qualified one-way costs shifting as envisaged under section 8 of the 2018 Act.

As always, I am grateful for the support of all Council and Committee members whose dedication is absolutely vital in ensuring that the councils work is progressed effectively. I am also grateful to the Council's Secretariat and to the staff of the Lord President's Private Office for their hard work and commitment over the course of the year.

**The Rt. Hon. Lord Carloway
Lord President
Chair of the Scottish Civil Justice Council**

About us

Introduction

The Scottish Civil Justice Council was established in 2013 under the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013.

Under section 2 (1) of the 2013 Act, the Council's key functions are:

- keeping the civil justice system under review;
- reviewing the practice and procedure followed in the Court of Session and in civil proceedings in the Sheriff Appeal Court or the sheriff court;
- reviewing the practice and procedure followed in inquiry proceedings under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016;
- preparing and submitting to the Court of Session: draft civil procedure rules, draft fees rules and draft inquiry procedure rules;
- providing advice and making recommendations to the Lord President on the development of, and changes to, the civil justice system in Scotland; and
- providing advice on any matter relating to the civil justice system that may be requested by the Lord President.

Guiding principles

Under sections 2 (2) and 2 (3) of the 2013 Act, the Council must have regard to the following principles when carrying out its functions:

- the civil justice system should be fair, accessible and efficient;
- rules relating to practice and procedure should be as clear and easy to understand as possible;
- practice and procedure should, where appropriate, be similar in all civil courts; and
- methods of resolving disputes which do not involve the courts should, where appropriate, be promoted.

In order to ensure that these statutory guiding principles are built into the work of the Council an assessment of compatibility with each of the principles is carried out every time the Council considers new rules proposals. These principles are also incorporated into the individual remits of each Council committee and members must have regard to the principles when formulating rules proposals.

Who we are

Membership

The Scottish Civil Justice Council is to have not more than 20 members, encompassing a range of interests and experiences across the civil justice system. The categories of membership are provided for in the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, as follows:

Judicial members

- The Lord President (Lord Justice Clerk may deputise) (Chair)
- At least 4 judges, including a minimum of 1 judge of the Court of Session and 1 sheriff principal or sheriff

Standing appointments

- The Chief Executive of the Scottish Courts and Tribunals Service
- The principal officer of the Scottish Legal Aid Board
- 1 member appointed by the Scottish Ministers

Legal members

- at least 2 practising advocates (“advocate members”)
- at least 2 practising solicitors (“solicitor members”)

Other members

- at least 2 persons (“consumer representative members”)
- up to 6 other persons considered by the Lord President to be suitable to be members of the Council (“LP members”).

The current members of the Council are:

Category	Position	Name
Chair	The Lord President and Lord Justice General, by virtue of that office	The Right Hon. Lord Carloway
Ex officio members	Chief Executive of the Scottish Courts and Tribunals Service, by virtue of that office	Eric McQueen
	Principal officer of the Scottish Legal Aid Board, by virtue of that office	Colin Lancaster
	1 member appointed by the Scottish Ministers	Gavin Henderson
Judicial members Appointed by the Lord President	At least 4 judges including a minimum of: 1 judge of the Court of Session, and 2 sheriffs principal or sheriffs	The Right Hon. Lord Boyd of Duncansby (Deputy Chair) The Hon. Lady Carmichael Sheriff Principal Murray Sheriff Hughes Sheriff Way
Advocate members Appointed by the Lord President in consultation with the Faculty of Advocates	At least 2 practicing advocates	Lynda Brabender QC Catherine Smith
Solicitor members Appointed by the Lord President in consultation with the Council of the Law Society of Scotland	At least 2 practicing solicitors	Joel Conn Elena Fry (<i>until April 2021</i>) Jacqueline Harris
Consumer representative members Appointed by the Lord President in consultation with the Scottish Ministers	At least 2 persons who, between them, appear to the Lord President to have — (i) experience and knowledge of consumer affairs, (ii) knowledge of the non-commercial legal advice sector, and (iii) an awareness of the interests of litigants in the civil courts, and	Thomas Docherty (Which?) Vacancy
LP members Appointed by the Lord President in consultation with the Scottish Ministers	Up to 6 other persons considered by the Lord President to be suitable to be members of the Council	Employment Judge Joseph d'Inverno Brandon Malone

The Council has nominated a number of observers to attend Council and committee meetings in order to assist in the carrying out of its functions. In addition to the members above, the following observers attend Council meetings:

Cameron Stewart	Director of Development and Innovation, Scottish Courts and Tribunals Service
Nicola Anderson	Legislation Implementation Team, Scottish Courts and Tribunals Service
Diane Machin	Deputy Principal Clerk of Session, Scottish Courts and Tribunals Service

Committees

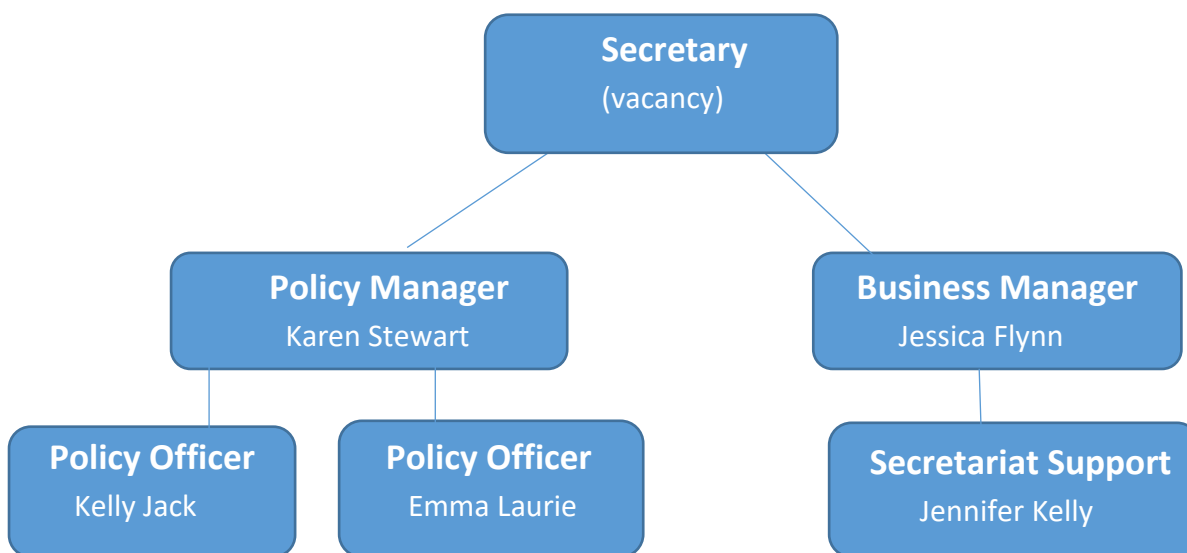
The Council has established the following committees to assist it in carrying out its work:

Committee	Chair	Remit & Functions
Access to Justice	The Hon. Lady Carmichael	This Committee monitors the effect on access to justice and the operation of the civil justice system; to keep relevant rules under review; to develop and consider proposals for modification and reform and, where appropriate, to draft rules for SCJC consideration.
Costs and Funding	The Hon. Lord Burns	This Committee is concerned with matters that can be regulated by the Court of Session Rules in civil matters including award of expenses and fees provisions. The Committee keeps the relevant rules, tables and fees under review; It considers proposed reforms and puts forward recommendations and draft rules when applicable, to the SCJC.
Family Law	The Hon. Lady Wise	This Committee is concerned with family actions and cases involving children. It keeps the family law civil rules under review; makes proposals for change; aims to ensure, via court rules and guidance, that cases are dealt with expeditiously and efficiently; reviews, develops and promotes a case management structure; reports to the SCJC with recommendations for change and drafts new rules where required. At its core, the Committee has, as a paramount consideration, the welfare of children.
Information and Communications Technology	Vacancy	This Committee considers how ICT can be used effectively within the Scottish civil courts; to make recommendations to the SCJC with regard to initiatives relating to the use of ICT; to review the rules of court and propose reform and draft rules where appropriate.
Personal Injury	The Hon. Lord Armstrong	This Committee keeps the relevant personal injury civil rules under review; makes proposals for change; develops rules relating to action to be taken before proceedings are brought and encouraging fair, just and timely settlement of disputes; make provision for any

		type of personal injury claim of any value at any stage of proceedings; and report to the SCJC with recommendations for change and new rules where necessary.
Rules Rewrite	The Rt. Hon. Lord Carloway, Lord President	This Committee oversees the management of the Rules Rewrite Project (RRP); develops a framework for reviewing new rules prepared under RRP & reforms under the Courts Reform (Scotland) Act 2014; considers issues that do not fall under remit of any other Committee.

Support

The Scottish Courts and Tribunals Service (SCTS) provides secretariat support for the Council. The Secretariat consists of six posts: 1 secretary, 1 secretariat business manager, 1 policy manager, 2 policy officers and 1 administrative support role.



Legal support for the council is provided by the Lord President’s Private Office (LPPO) which is staffed by government lawyers on secondment from the Scottish Government Legal Directorate (SGLD).

Key achievements and ongoing work

The Council's work during the period 2020/21 can be categorised as follows:

- Consideration of primary and subordinate legislation, and developments in case law;
- Consideration of potential improvements to procedures (*without primary legislation*); and
- Rules Review Exercises (*where the Council has agreed to a review*).

Consideration of primary and subordinate legislation, and developments in case law:

One of the Council's functions is to review court rules and procedure in light of changes in the law, either through new legislation or through developments in case law. This work can often be reactive and difficult to plan for and as a result, the work may impact on existing priorities. This has been especially true during 2020/21 where Brexit deliverables did cause disruption to the Council's other ongoing work priorities.

Brexit:

A number of rules requests arose in consequence of the United Kingdom's withdrawal from the European Union. The subsequent new rules were set out in: a) the [Act of Sederunt \(Rules of the Court of Session 1994 and Sheriff Court Rules Amendment\) \(Miscellaneous\) 2020](#) , b) the [Act of Sederunt \(Challenges to Validity of EU Instruments \(EU Exit\)\) \(Amendment\) 2020](#) and c) the [Act of Sederunt \(Rules of the Court of Session 1994 and Sheriff Court Rules Amendment\) \(Miscellaneous\) 2021](#)

Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018:

- Group Procedure

The [Act of Sederunt \(Rules of the Court of Session 1994 Amendment\) \(Group Proceedings\) 2020](#) makes provision about group procedure, as provided by Part 4 of the 2018 Act.

Group procedure is a new form of proceedings available in the Court of Session enabling two or more people with the same, similar, or related claims, to raise court proceedings in a single action for the first time. This new approach will be particularly useful in cases where lower value claims are considered too costly for individuals to raise separately. Potential litigants will now be able to raise a group proceedings case in the Court of Session in a cost effective way. An example of this would be a large scale consumer dispute where different people want to seek financial damages against the same company for the same, similar or related reasons. These litigants can now raise a court action together, rather than one at a time. These new rules came into force on 31 July 2020.

- Qualified One-Way Costs Shifting (QOCS)

During the reporting period, the Council's Costs and Funding Committee made significant progress in developing new court rules to implement Section 8 of the 2018 Act, which establishes a qualified one way cost shifting regime. The underlying principle is that, provided proceedings have been conducted in an appropriate manner, the court must not make an award of expenses against the person bringing a personal injury action (or related appeal) even if the person loses their claim. The Act sets out some exceptions to that principle and provides that court rules may specify further exceptions. The committees work has now been concluded with its proposals for QOCS being submitted to the Council for consideration at year end. If approved by council, it is anticipated that the new court rules making provision for QOCS will be implemented by summer 2021.

Consideration of potential improvements to procedures (without primary legislation)

One of the Council's functions is to review current practice and procedure in the courts and consider related proposals for amendment of rules. The Council may also consider rule changes in response to wider policy initiatives developed by government or general requests for changes to rules, or of its own accord. The work progressed this year without a requirement for primary legislation included:

Fees for Service of Documents in Scotland:

A rules request was received for amendments to provide fees for the service of documents in Scotland under the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters (commonly referred to as the “Hague Service Convention”). The subsequent new rules were set out in the [Act of Sederunt \(Fees for Messenger-at-Arms and Sheriff Officers\) \(Hague Service Convention\) \(Amendment\) 2020](#)

Family Actions and Judicial Review:

Rules requests were received to modify Chapter 49 (Family Actions) and Chapter 58 (Judicial Review) of the Rules of the Court of Session. The outcome for family actions was to amend rule 49.33(3) covering adjustment and further procedure, and to insert a new rule 49.33A covering the lodging of productions and witness lists. The outcome for judicial review procedure was to amend rule 58.4 (the petition: intimation and service) to extend the time period for which a petition for judicial review may be sisted for legal aid from 28 days to two months. The subsequent new rules were set out in the [Act of Sederunt \(Rules of the Court of Session 1994 Amendment\) \(Miscellaneous\) 2021](#).

Mandatory Online Submission (Simple Procedure Claims):

As part of the operational response to the Covid pandemic the council was asked to consider an urgent rules request from the Scottish Courts and Tribunals Service to make the use of Civil Online mandatory for the submission of simple procedure claims, with appropriate safeguards for party litigants unable to access or use the online service. The relevant public health objectives were to minimise both physical attendance at courthouses and the manual handling of paper documents. That resulted in the [Act of Sederunt \(Simple Procedure Amendment\) \(Civil Online\) 2020](#) which set out temporary rules which became effective from 1 December 2020 and expire on 30 September 2021.

Regulation of Fees (Messengers-at Arms and sheriff officers):

The Council's Costs and Funding Committee continued its work on assessing the methodology for setting fees of sheriff officers and Messengers-at-Arms and the committee's work has been concluded with proposals for a fee uplift being submitted to the Council for consideration. If approved by council, it is anticipated that new court rules making provision for an uplift to the Tables of Fees will be implemented by summer 2021.

Rules Review Exercises

The Council has an agreed policy position for the review of any new rules which it develops on its own initiative. This work can be as time-consuming as the initial development of the new rules and accordingly such review work is progressed only when resources allow or where there is a clear and pressing need for existing rules to be amended. There was one rules review exercise commenced during the 2020-21 period:

- As part of the Covid response the [Act of Sederunt \(Simple Procedure Amendment\) \(Civil Online\) 2020](#) had set out temporary rules which became effective from 1 December 2020 and are due to expire on 30 September 2021. The early pending expiry of those rules did create a pressing need for ongoing monitoring and review and during this reporting year the Council's Access to Justice Committee initiated a public consultation exercise to assist the Council in determining whether or not those temporary rules should continue in force after their expiry date.

Formal Recommendations Made

Another function of the Council is to advise and make recommendations on the development of and changes to the civil justice system in Scotland. The 2013 Act provides the Council with the power to take such action as it considers necessary or desirable in pursuance of this function¹ and for a summary of any such recommendations to be included in the Council's Annual Report². During the reporting year 2020/2021, the Council made no formal recommendations under Section 3 (2) (f) of the 2013 Act.

Summary of Rules Prepared

In relation to the Council's work areas as discussed above, this section provides a summary of the seven sets of draft rules that were submitted by the Council to the Court of Session for consideration during the 2020/21 reporting period:

- The [Act of Sederunt \(Rules of the Court of Session 1994 Amendment\) \(Group](#)

¹ Section 3

² Section 5(3)

[Proceedings\) 2020](#) was laid in parliament on 6th July 2020 and came in to force on 31st July 2020. This Act of Sederunt makes provision about group procedure, as provided by Part 4 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (“the Act”). Group procedure is a new form of proceedings which will be available in the Court of Session. The instrument amends the Rules of the Court of Session (“the RCS”) by, among other matters, the insertion of the new Chapter 26A.

- The [Act of Sederunt \(Simple Procedure Amendment\) \(Civil Online\) 2020](#) [SSI 2020/293](#) was made on 22nd September 2020 and came in to force on 1st December 2020. This Act of Sederunt temporarily modifies the Act of Sederunt (Simple Procedure) 2016 so as to require all simple procedure claims to be submitted using Civil Online or the internet interface to the Scottish Courts and Tribunals Service’s case management system. It expires on 30th September 2021. Claims may still be sent using one of the other methods mentioned in rule 6.6 of the Simple Procedure Rules but when doing so claimants will require to provide a note, to accompany the Claim Form, explaining why it could not have been sent using either the portal on the Scottish Courts and Tribunals Service website or the internet interface to the case management system. The sheriff will only permit the claim to be registered if the sheriff considers, from the explanation in the note, that the claimant could not have sent it using either the portal or the interface.
- The [Act of Sederunt \(Fees for Messenger-at-Arms and Sheriff Officers\) \(Hague Service Convention\) \(Amendment\) 2020](#) was made on 10th December 2020 and came in to force on IP completion day. This Act of Sederunt amends the tables of fees in schedule 1 of the Act of Sederunt (Fees of Messengers-at-Arms) (No. 2) 2002 and schedule 1 of the Act of Sederunt (Fees of Sheriff Officers) (No. 2) 2002. The amendments provide fees for messengers-at-arms and sheriff officers for the service of documents in Scotland under the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters which was concluded on 15th November 1965 (commonly referred to as the “Hague Service Convention”).
- The [Act of Sederunt \(Rules of the Court of Session 1994 and Sheriff Court Rules](#)

[Amendment\) \(Miscellaneous\) 2020](#) was made on 17th December 2020 and came in to force on IP completion day. This Act of Sederunt amends the Rules of the Court of Session 1994 (the “RCS”), the Act of Sederunt (Sheriff Court Company Insolvency Rules) 1986 (the “1986 Rules”) and the Act of Sederunt (Fatal Accident Inquiry Rules) 2017 (the “2017 Rules”). The amendments made to Chapter 74 of the RCS, the 1986 Rules and the 2017 Rules are in consequence of the United Kingdom’s withdrawal from the European Union.

- The [Act of Sederunt \(Rules of the Court of Session 1994 Amendment\) \(Miscellaneous\) 2021](#) was made on the 18th January 2021 and came onto force on 22nd February 2021. This Act of Sederunt amends rule 49.33(3) (adjustment and further procedure) and inserts new rule 49.33A (lodging of productions and witness lists) into the Rules of the Court of Session 1994. This Act of Sederunt also amends rule 58.4 (the petition: intimation and service) to extend the time period for which a petition for judicial review may be sisted for legal aid from 28 days to two months, which period may be renewed on cause shown.
- The [Act of Sederunt \(Challenges to Validity of EU Instruments \(EU Exit\) \(Amendment\) 2020](#) was made on 12th December and came in to force on IP completion day. This Act of Sederunt amends the Act of Sederunt (Challenges to Validity of EU Instruments (EU Exit) in the Court of Session) 2019 (S.S.I. 2019/328) and the Act of Sederunt (Challenges to Validity of EU Instruments (EU Exit) in the Sheriff Appeal Court and Sheriff Court) 2019 (S.S.I. 2019/329) (“the two Principal Instruments”). The amendments made are in consequence of the United Kingdom’s withdrawal from the European Union.
- The [Act of Sederunt \(Rules of the Court of Session 1994 and Sheriff Court Rules Amendment\) \(Miscellaneous\) 2021](#) was made on 16th February 2021 and came in to force on 1st March 2021. This Act of Sederunt amends various Forms in the appendices of the Rules of the Court of Session 1994 and the Ordinary Cause Rules 1993. The Forms, which are simplified divorce and dissolution of civil partnership applications, are amended in consequence of the United Kingdom’s withdrawal from the European Union.

Annual Programme for 2021/2022

Summary of key priorities for 2021/22

Under section 5 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, the Council must prepare an annual plan setting out its priorities for each yearly period beginning on 1 April, before the start of that period (“the programme”).

The impact of COVID-19 had meant that some Council business was suspended for a period of time during 2020. When the Council reviewed its business priorities in March 2021 it agreed those items which it would carry forward from the prior year along with three new strategic priorities that were to be added for delivery in 2021/22:

Council Initiatives	<ul style="list-style-type: none"> • Case management in sheriff court family actions • Lay representation, lay support and party litigants • Pre-action protocol: clinical negligence • Pre-action protocol: disease • The New Civil Procedure Rules / Digitisation (<i>the Rules Rewrite Project</i>) • Simple Procedure Special Claims
Rules Reviews	<ul style="list-style-type: none"> • Mandatory Online Submission (<i>for Simple Procedure Claims</i>) • Core Simple Procedure Rules • Inner House Rules • Sheriff Appeal Court Rules
Legislation	<p><i>Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018:</i></p> <ul style="list-style-type: none"> • Sec 9 – representation free of charge • Sec 10 – third party funding • Sec 11 – awards against legal representatives
Other rules requests	<ul style="list-style-type: none"> • Judicial Rate of Interest • Extension of Simplified Divorce • Appointment of assessors (<i>under the Equality Act 2010</i>)

Further information and contacts

Full information about the Council and its activities is available at www.scottishciviljusticecouncil.gov.uk. The website is updated regularly with news about the Council and provides full details of Council and committee meetings, publications, draft rules under consideration and new rules made.

The Council publishes a newsletter, *Update*, providing information about ongoing work. *Update* is published around four times per year and can be accessed via the [publications](#) page of the website. If you would like to be added to our email list to receive links to future editions, please contact us.

You can also follow us on Twitter @ScottishCJC for the latest updates.

The Council welcomes all feedback in relation to the practical workings of the rules of court. You can contact us as follows:

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