

Court Rules

Guidance for Policy Teams

Introduction

1. This guidance is designed for use by policy teams who are working with primary or subordinate legislation or who are otherwise considering policy which might affect or require rules of court.
2. The guidance provides information on what court rules are and how they are made, what the key considerations are for policy teams and what engagement should take place in the various stages of policy development.
3. In preparation for implementation of the forthcoming Courts Reform (Scotland) Bill, which will require new and significant changes to the court rules, it is intended to produce revised guidance around spring 2014. Suggestions for amendments or improvements to the guidance are welcomed and can be submitted to scjc@scotcourts.gov.uk.

Background

What are Rules of Court for?

4. Rules of court are a form of subordinate legislation governing the practice and procedures of the Scottish courts. Court rules regulate matters such as how and in what form proceedings may be initiated, what happens when a final decision is taken, and how decisions may be appealed. Rules can be general, or may make provision for certain types of proceedings (for example, applications to courts under new legislation may require specific provision to be made).
5. Rules of court generally do not cover matters such as when proceedings may be brought before a court, what remedies are available, or which court has jurisdiction. These matters are provided for by legislation or common law.
6. New or revised rules might be needed to give effect to primary or secondary legislation, to a court ruling or to improve the procedures followed in court.
7. Rules of court can be found in a number of places, including:
 - [Rules of the Court of Session 1994](#)

- [Sheriff Court Ordinary Cause Rules 1993](#)
- [Summary Applications etc. Rules 1999](#)
- [Summary Cause Rules 2002](#)
- [Small Claims Rules 2002](#)
- [Criminal Procedure Rules 1996](#)

How court rules are made

8. Rules of court are made by the courts and are a form of subordinate legislation. Rules are laid before the Scottish Parliament and they are subject to parliamentary scrutiny by the Delegated Powers and Law Reform Committee of the Scottish Parliament.

Civil court rules

9. Rules of the civil courts in Scotland (the Court of Session and the sheriff courts) are made by the Court of Session, which embodies these rules in a Scottish Statutory Instrument known formally as an Act of Sederunt.
10. The powers for the Court of Session to make rules are primarily contained within section 5 of the Court of Session Act 1988 and section 32 of the Sheriff Courts (Scotland) Act 1971. The Scottish Government is preparing to introduce a Courts Reform (Scotland) Bill to the Scottish Parliament, in which it proposes to restate and amend the rule-making powers of the Court of Session.¹

Criminal Court rules

11. Rules for criminal proceedings (which take place in the Justice of the Peace, sheriff court and, for more serious or appeal cases, in the High Court of Justiciary) are made by the High Court of Justiciary in a Scottish statutory instrument known as an Act of Adjournal.
12. The powers of the High Court of Justiciary are primarily contained at section 305 of the Criminal Procedure (Scotland) Act 1995.
13. Some statutes make specific provision in respect of the powers of the courts to make rules, however, and policy teams may wish to consult their legal advisers in this respect.

¹ The Scottish Government consultation on a draft Courts Reform (Scotland) Bill, which closed in June 2013 is available here: <http://www.scotland.gov.uk/Publications/2013/02/5302>. Sections 85-87 of the draft Bill propose to amend the current rule-making powers contained in the 1988 and 1971 Acts.

Rule drafting bodies

14. There are a number of bodies involved in the consideration and preparation of new rules of court.
15. In respect of procedure in the civil courts, the Scottish Civil Justice Council (SCJC)² prepares draft rules which are then submitted to the Court of Session to be passed as an Act of Sederunt, subject to the Court's approval.
16. Similarly, the Criminal Court Rules Council (CCRC) prepares draft rules for the criminal courts, submitting these to the High Court of Justiciary, to be passed as an Act of Adjournal subject to that court's approval.
17. Both the Court of Session and the High Court of Justiciary retain the ability to make rules of their own initiative (although the Court of Session must consult the SCJC before making rules for the sheriff courts).

Key considerations for policy teams*In the policy development/Bill drafting stages*

18. In general terms, new court rules, or amendment of court rules, will be required when legislation leaves a gap in the court rules in respect of the procedure that would apply. For example, a statute might provide for a new type of court order. In that case, rules may be required to set out the form in which an application for that order must be sought and how it should be lodged with the court.
19. At the policy development and legislative development stages, it is useful to consider what implications proposals may have for court procedure. Policy teams may wish to consider in particular: 1) the extent to which legislation is really needed or whether the changes sought might be deliverable through rules of court and 2) how will the proposals fit with existing court procedures (can existing procedures be used or will new procedures be required?) and 3) if new procedures are required, do the courts have sufficient rule-making powers to provide for the proposed procedure or is a specific rule making power necessary?
20. When considering policy which might have implications for court procedure or require changes to court rules, it is helpful to engage at an early stage with the Secretariats for the Scottish Civil Justice Council and

² The Scottish Civil Justice Council was established on 28 May 2013 and replaces both the former Sheriff Court Rules Council and Court of Session Rules Council. The SCJC differs from the previous Councils and from the Criminal Courts Rules Council in that it has an additional policy function to keep the civil justice system under review and make recommendations on its development.

Criminal Courts Rules Council, which sit within the Lord President's Private Office. Their contact details are:

Scottish Civil Justice Council

Parliament House

Edinburgh

EH1 1RQ

scjc@scotcourts.gov.uk

Criminal Court Rules Council

The Lord President's Private Office

Parliament House

Edinburgh

EH1 1RQ

lppo@scotcourts.gov.uk

Sheriff Court Proceedings

Appeals

21. Where primary legislation provides for an appeal to the sheriff against an act or decision of an administrative body such as a local authority it is helpful to specify:
 - the scope of the appeal;
 - who the appeal is to;
 - the grounds of appeal; and
 - the sheriff's power on hearing the appeal (i.e. the extent to which the sheriff may interfere with the act or decision).
22. Policy teams may also wish to consider whether a specific rule-making power should be prescribed.
23. It is also helpful if the primary legislation makes explicit provision as to whether the decision of the sheriff is final or if there is to be any further appeal from the sheriff either to the sheriff principal or to the Court of Session and whether it is to be on fact or law or on both fact and law.

24. It is also recommended that express provision is included that an appeal to the sheriff is by way of summary application.

Warrants Authorising Entry

25. Provision is regularly made in primary legislation for an application to the sheriff for a warrant authorising entry to land or premises. Often it is not clear, however, from a reading of the legislation whether such an application is of a civil or criminal nature. For the avoidance of doubt it is recommended that unless this is obvious it should be expressly stated.
26. An example of this was in relation to section 44 of the Forth Crossing Act 2011, which provides for an application to be made to either a sheriff or a justice of the peace for a warrant authorising entry onto land. The provision does not make it clear whether it is to be a civil or criminal application. After enquiry, it transpired that the policy intention was that this should be by way of a civil application. A question then arose as to the method of application, i.e. was it to be by summary application or a prescribed form?

Implementation

27. SCJC and CCRC will consider the need for provision in the rules as a result of legislation coming into force. Policy teams should bear in mind that the process for preparing new rules can take some time and should consult the relevant Secretariat in early course to discuss implementation timetables and to allow any potential issues to be identified and addressed at an early stage.

Submitting requests or proposals for rules

28. It is helpful to submit a formal proposal to the SCJC or CCRC Secretariat using the template provided at the Annex. Proposals will generally be put to the next appropriate Council or committee meeting.
29. The SCJC meets 6 times per year and meeting dates are available [here](#). Committee meeting dates are available [here](#).
30. The CCRC meets on:
- the second Monday in February;

- the first Monday in June; and
- the third Monday in October.

31. Policy teams will wish to be aware that the Councils are subject to the provisions of the Freedom of Information (Scotland) Act 2002 (FOISA). The SCJC routinely publishes agendas and minutes of meetings as well as selected papers. Please inform the Secretariat if a paper is being submitted to a Council or committee in confidence. While any documents submitted confidentially will be treated as such, it may still be releasable under the terms of FOISA.

Other engagement

32. As well as engaging with the SCJC and CCRC, policy teams should consult the Policy and Legislation Branch of the Scottish Court Service on any proposal which might have operational implications for the courts, and the Judicial Office for Scotland on matters relating to the judiciary. Their contact details are:

Policy and Legislation Branch

Scottish Court Service

N1 Spur, Saughton House

Broomhouse Drive

Edinburgh EH11 3XD

plbenquiries@scotcourts.gov.uk

Judicial Office for Scotland

Parliament House

Edinburgh

EH1 1RQ

judicialofficeforscotland@scotcourts.gov.uk

REQUEST FOR COURT RULES

Purpose:

[Outlining the reason for requesting rules. For example, does this relate to: the commencement of an Act; new, or amendment of, subordinate legislation; or a policy initiative?]

Timing:

[Details of desired timescales, implementation timetables and/or any key dates which the Council or Committee should be aware of.]

Summary of request/proposal:

[Please provide background to the request, including (where appropriate):

- details of any relevant primary or secondary legislation (are rules purely consequential?),*
- desired policy aims,*
- any relevant consultation carried out,*
- any other relevant information that should be taken into consideration.]*

Vires:

[Please provide specific details as to what consideration has been given to the vires of the court to make the rules in question. Policy teams may wish to consult their legal advisers in this respect.]

Contact details:

[Please provide contact details]