

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
RULES REWRITE COMMITTEE
TUESDAY 6 DECEMBER 2016 AT 4.15 PM
JURY ROOM 9, PARLIAMENT HOUSE, EDINBURGH

MINUTES

Members Present: Lord President (Chair)

Lord Menzies (SCJC member)

Ian Dickson (SLAB representative)

Cameron Stewart (Scottish Ministers' representative)

Lady Wolffe

Sheriff Principal Turnbull

Sheriff Thornton

Kenneth Forrest (Advocate, SCJC member)

Kenneth Campbell Q.C. (Advocate)

Jacqueline Harris (Solicitor)

Joel Conn (Solicitor, SCJC member)

Ian Shanks (Parliamentary Counsel Office)

Support:

Kenny Htet-Khin (Head of Rules Rewrite Drafting Team)

Caroline Mair (Deputy Legal Secretary, Lord President's Private Office)

Luke McBratney (Deputy Legal Secretary, Lord President's Private Office)

Julie Davidson (Deputy Legal Secretary, Lord President's Private Office)

Karen Stewart (Business and Policy Manager, Scottish Civil Justice Council)

Apologies: Gillian Prentice (Deputy Principal Clerk of Session)

Jane MacDonald (SCTS Legislation Implementation Team)

Item 1: Welcome, apologies and agreement of private papers

1. The Chairman welcomed those present and noted apologies from Gillian Prentice and Jane MacDonald.
2. The Committee agreed not to publish the following papers: **2.2, 3.2, 4.1, 4.1A, 4.2, 4.2A, 4.3, 5.1, 5.1A, 5.1A, 6.1.**

Item 2: Previous meeting

Item 2.1- Minutes of previous meeting

3. **The Committee approved the minutes of the previous meeting subject to two minor revisions.**

Item 2.2– Progress of actions from previous meetings (Paper 2.2)

4. **Members noted the progress that had been made on actions since the last meeting and the update on the work of the other committees.**

Item 3: Work programme

Item 3.1 – Update from the Scottish Government on legislative developments (Oral)

5. Cameron Stewart provided members with an update on legislative developments in the Scottish Government. He advised that the Limitation (Childhood Abuse) Bill was introduced on 16 November 2016 and that subordinate legislation relating to the introduction of Simple Procedure and increases in court fees came into force on 28 November.

Item 3.2 - Rules Rewrite Tracker (Paper 3.2)

6. Kenneth Htet-Khin provided an update on outstanding work and advised that the FAI consultation has been issued and will run until 23 January 2017. **The Committee noted Paper 3.2.**

Item 4: Justice System Reform

Item 4.1 RRP Discussion Paper 5: Otiose provisions (Paper 4.1 and 4.1A)

7. Caroline Mair provided an overview of Paper 4.1A and advised that views had been canvassed with operational staff in the sheriff courts and the Court of Session

about redundant or rarely used rules. The Committee considered and discussed the papers and noted the outcomes of the exercise to identify provisions which may be otiose on account of lack of practical application. The Committee made a number of observations and provided feedback to the rules rewrite drafting team.

8. The chair advised that the SCTS Legislation and Implementation Team (LIT) intends to respond to any proposals made at a later date.

Item 4.2 RRP Discussion Paper 6: Transition to the new rules (Paper 4.2 and 4.2A)

9. Luke McBratney introduced Paper 4.2A which invited the Committee to consider the subject of implementation of and transition to the new civil rules. **The Committee considered and discussed various options and agreed in principle that:**

- a 'big bang' would be the preferred approach to facilitate implementation, subject to there being a discretionary provision in exceptional situations;
- transitional provisions will be drafted so that an instrument will only be retained in statute if its content is to have continuing effect, other acts of sederunt containing civil procedure rules will be revoked;
- a single practice note will be prepared for the Court of Session, consolidating all existing practice notes; all existing practice notes should be withdrawn;
- a practice note should follow the order, structure and numbering of the Rules of the Court of Session and, thereafter, new and additional matters will be incorporated by amendment.

Item 4.3 Rules Rewrite Project Paper (Paper 4.3)

10. Luke McBratney provided a draft project report which set out details of the policy recommendations and reasons that the committee has agreed to date.

11. **The members agreed to provide any comments on content, to the Rules Rewrite Drafting Team (RRDT), ideally, before Christmas.**

12. **The Committee approved the preparation of a project report summarising the Committee's policy decisions to date and the reasons for those decisions and agreed that it be shared with the Council by correspondence.**

Item 5: Proposal for Rules

Item 5.1 Court of Session Rules: Applications for leave to appeal from inferior court (Paper 5.1, 5.1A)

13. Julie Davidson introduced these papers which invite the Committee to consider a proposal for draft rules to amend the existing form for applications for leave to appeal to the Court of Session from the Sheriff Appeal Court. She explained that the proposed draft rules (set out in **Paper 5.1A**), would amend the existing Form 40.2.

14. The Committee noted that operational staff have raised concerns that the current form does not require the applicant to provide information on how an application meets the statutory test for permission to appeal which is set out in Section 113 of the Courts Reform (Scotland) Act 2014.

15. **Having considered and discussed the proposal, the Committee approved the proposal and the draft rules at Paper 5.1A and, subject to minor revisions, agreed that these be submitted to the Council for consideration and approval.**

Item 6: Rules Review

Item 6.1 Judicial Review proceedings (Paper 6.1)

16. Kenneth Htet-Khin introduced this paper which provides a summary of information gathered about the operation of the Judicial Review Rules since their commencement on 22 September 2015. The Committee considered the paper, discussed the matters arising and provided decisions on a number of specific matters.

17. **The Committee agreed:**

- **a respondent should have an opportunity to attend a hearing on ‘time-bar’ in a judicial review application;**
- **if the rules are amended to provide for this, consequential changes to the Form of Petition may be required;**
- **the wording ‘pleas-in-law’ in the prescribed Form of Petition for Judicial Review should be retained in the meantime;**
- **the rules relating to ‘relevant documents’ are to be reconsidered with a view to making recommendations for improvement;**
- **the timescale of 21 days in Rules 58.4(2)(b) is appropriate and should remain unchanged, the timescale of 14 days in Rule 58.7(1) is**

appropriate and should remain unchanged; the timescale in Rule 58.7(1)(b) should be extended to 14 days;

- the 30 minute period allowed for an oral hearing under Rule 58.9(1) is appropriate and should remain unchanged;
- the Rules of the Court of Session relating to withdrawal of agents should be reviewed and provision whereby a future diet already fixed in a case need not automatically be discharged should be included.

18. The Committee discussed the current procedure at the 'permission stage' of the judicial review process and procedural hearings. It made a number of suggestions on how these parts of the procedure could be revised to make operational efficiencies. **The Committee instructed the RRDT to prepare an options paper for changes to the "permission stage" to be considered at a future meeting. The RRDT were also instructed to consider changes to the procedural hearing.**

19. The Lord President advised that a Court of Session practice note is being prepared for the Outer House and includes the topic of authorities. **The Committee instructed the RRDT to consider this topic and to report back at a future meeting on the best way for parties to present authorities in electronic form.**

Item 7: Research and Consultations

20. Kenneth Htet-Khin provided the Committee with an update on the research into petition and summons procedure. He advised that it is anticipated that the research report will be available by the end of December 2016.

Item 8: AOB

21. Joel Conn enquired about when the Simple Procedure Rules will be reviewed. Luke McBratney advised that the Access to Justice Committee have a programme for review agreed and that SCTS LIT are maintaining an issues log.

Item 9: Date of next meeting

22. The Committee noted the date of the next future meeting:

- 21 February 2017 at 4.15 pm

Scottish Civil Justice Council Secretariat

December 2016