

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
RULES REWRITE COMMITTEE
TUESDAY 21 FEBRUARY 2016 AT 4.15 PM
JUDGES CONFERENCE ROOM, LEVEL +2 PARLIAMENT HOUSE

MINUTES

Members Present: Lord President (Chairman)

Lord Menzies

Lady Wolffe

Sheriff Principal Turnbull

Kenneth Forrest

Kenneth Campbell QC (Advocate)

Joel Conn (Solicitor)

Jaqueline Harris (Solicitor)

In attendance: Jane MacDonald (SCTS Legislation Implementation Team)

Chris Fyfe (Court of Session Clerking Services Manager)

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

Luke McBratney (Deputy Legal Secretary, Rules Rewrite Drafting Team)

Julie Davidson (Deputy Legal Secretary, Rules Rewrite Drafting Team)

Norman Munro (Deputy Legal Secretary, Rules Rewrite Drafting Team)

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

Apologies: Sheriff Thornton, Ian Shanks, Ian Dickson

Item 1: Welcome, apologies and agreement of private papers

1. The Chairman welcomed those present and noted apologies from Sheriff Thornton, Ian Shanks and Ian Dickson.
2. **The Committee agreed not to publish the following papers: 2.2, 3.2, 4.1, 4.1A, 4.2, 4.2A-C, 4.3, 4.4, 5.1, 5.1A, 6.1, 6.1A-B**

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

3. **The Committee approved the minutes from the previous meeting.**

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

4. **The Committee noted the progress that had been made on actions since the last meeting and the committee activity report provided.**

Item 3: Work Programme

Item 3.1 – Update from the Scottish Government on legislative developments

5. No update was available from the Scottish Government.

Item 3.2 Rules Rewrite Tracker (Paper 3.2)

6. Kenneth Htet-Khin provided an update on ongoing work and said that the Council Working Group is to meet later this month, at which time it will be considering the draft Fatal Accident Inquiry Rules which have been revised in light of the responses received to the recent consultation. It is anticipated that rules will be placed before the Council for consideration in March. The draft Simple Procedure Special Claims Rules have been the subject of recent focus group consultations and this has provided useful feedback to the drafting team. The Rules Rewrite Drafting Team (RRDT) held a recent talk with the Law Society about the latest rules developments and it is anticipated that further talks will be scheduled.

7. **The Committee noted the update.**

Item 4: Justice System Reform

Item 4.1 Rules Rewrite Project: Discussion Paper 7 – ICT in the courts (Paper 4.1, 4.1A)

8. Julie Davidson introduced the Rules Rewrite Discussion Paper No. 7 on ICT in the Civil Courts (**Paper 4.1A**). That the paper had been considered earlier this month by the ICT Committee, whose comments were available for the Committee's information.

9. The paper outlined the general recommendations made by the Scottish Civil Courts Review about the use of IT in the civil courts and the Courts Reform (Scotland) Act 2014 expressly provides the Court of Session with the power to make provision for or about the use of technology. It outlined the currently limited provision for technology in existing court rules and the ongoing developments of ICMS, Simple Procedure and the Civil Online portal. The paper proposed a broad, overarching vision for the expansion of Civil Online and for the digital recording and presentation of evidence in the civil courts in the short to medium term. The paper also examined the potential obstacles and challenges which may be faced in achieving that vision.

10. The Committee discussed the matters arising and in particular the different approaches which could be taken in implementing the vision, as well as a number of areas that will require to be considered in more detail by both the ICT Committee and this Committee once the broader principles have been agreed.

11. The Committee reached a consensus on some broader principles, taking account of the views expressed by the ICT Committee. The following matters were agreed:

- **that in principle the use of the Civil Online portal should be increased with a view to the ultimate, long term aim of developing an online court.**
- **that features of the Civil Online portal which should be developed ought to include the facility to lodge documents online and to adjust/amend pleadings online.**
- **that the digital presentation of evidence in the civil context raised several further considerations, which would require to be thought about in detail. The digital presentation of evidence should be considered in more detail at a later stage, potentially in the context of considering evidence on commission.**
- **whilst the presumption should be for cases to be progressed online, court rules should continue to provide for paper based litigation, in the short to medium term. The long term aspiration is to achieve a paperless court process.**
- **that increasing the use of Civil Online in the courts would require a 'vertical/services' approach. This will mean that new procedures will**

be developed under specified categories of business. Commercial actions in the Court of Session and Sheriff Appeal Court cases would be suitable starting points. Commercial actions in the sheriff courts would also be suitable.

- in light of the Committee's decision to consider the digital presentation of evidence in detail at a later stage, consideration of the approach which should be taken to increasing the use of digital presentation of evidence in the civil courts should be postponed.

Item 4.2 Rules Rewrite Project: Discussion Paper 8: Petition and Summons Procedure (Papers 4.2, 4.2A-C)

12. Luke McBratney introduced the Rules Rewrite Discussion Paper 8: Petition and Summons Procedure (**Paper 4.2**) and Dr Thomson's research report on Petition and Summons Procedure (**Paper 4.2A**) which was commissioned previously by the Committee. The Committee were provided with a Note from the Lord President (**Paper 4.2C**) containing comments on the research report.

13. In considering the papers, the Committee discussed the historical reasons and the policy justification for there being two principal procedures in the Court of Session. The Committee discussed developments in civil procedure which have affected the consistency and intelligibility of the procedural distinction. The Committee made a number of recommendations in relation to the development of civil procedure in the Court of Session under the New Civil Procedure Rules.

14. **The Committee recommended that:**

- the distinction between petition and summons procedure should not be a feature of the new civil procedure rules. The new rules should contain a fast track procedure for certain categories of case that do not require enhanced case management;
- the new rules should contain a list of types of action which will be allocated to the fast-track procedure;
- the new civil procedure rules should provide for the pursuer to have some limited and guided discretion about which procedure to use;
- the new rules should provide for the court, either on the application of a party or otherwise, to transfer cases between the fast-track and case-managed procedures;

- under the new rules, all remedies available to the court under general law should be capable of being granted regardless of the procedure used;
- rules of evidence should be dis-applied or modified in fast-track, for example judicial review, proceedings; and
- the new rules should permit the court to make orders about the manner and mode of proof and presentation of evidence required in any case.

15. The Committee considered that, in developing the rules, consistency of terminology will be an important factor in the context of access to justice. The Committee had previously made recommendations in this area under the Discussion Paper on the Form, Style and Language of the new court rules.

16. The Committee agreed that Dr Thomson's research report on Petition and Summons procedure will be published as an annex to the New Civil Procedure Rules First Report.

Item 4.3 Rules Rewrite Project: Procedural Narrative (Paper 4.3)

17. Norman Munro introduced this paper and explained that the next stage of the rules rewrite project is the preparation of a 'procedural narrative' for the new civil procedure rules. The narrative will describe in detail how a typical action would proceed through the courts. Once agreed by the Committee, it should then be possible to identify the core elements required of the new civil procedure rules and to begin to consider, in detail, the best way of structuring those core elements into draft rules.

18. The Committee considered and agreed the order of priority for the preparation of a procedural narrative for the new court rules under this phase of the project plan.

19. The Committee considered proposals on the approach to case management in certain types of specialised actions under the new rules. **The Committee agreed that the rules should contain no rules for specialised types of action, where possible, and that a set of standard orders could be used to provide default case management orders which could be adapted if appropriate for the specialised types of action.**

20. **The Committee agreed, that as this phase of the project plan moves forward, the RRDT should consider the default approach to the specialised chapters and make any further recommendations about whether that approach should be departed from, on a chapter-by-chapter basis.**

Item 4.4 Rules Rewrite Project: Next Steps (Paper 4.4)

21. Kenneth Htet-Khin introduced this paper which included proposals for the next steps in external engagement on the completion of Phase 1 of the Rules Rewrite Project Plan (RRPP) and for internal handling of Phase 2 of the plan.

22. **The Committee agreed the undernoted proposals will be submitted to the Council for approval:**

- **a Summer Tour will be planned with a view to engaging with the public, practitioners and other interested parties about progress to date on development of the new rules under the RRPP**
- **Cross- Council working groups will be established to consider the procedural narratives under Phase 2 of the RRPP.**

Item 5: Proposals for rules

5.1 Proposals for court rules – Vexatious litigants (Paper 5.1, 5.1A)

23. At its meeting in October, the Committee considered a request from the Deputy Principal Clerk of Session for a change to the Rules of Court of Session in relation to the procedure for handling applications seeking leave to institute legal proceedings, where the applicant has previously been declared a vexatious litigant under Vexatious Actions (Scotland) Act 1898. The Committee noted that the 1898 Act had been repealed with effect from 28th November 2016 but that certain orders made under the 1898 Act continue to have effect. The Committee therefore instructed LPPO to prepare draft rules for consideration at a later date.

24. The Committee considered the draft rules provided in **Paper 5.1A** which insert a new Rule 4.2ZA to deal with applications for leave to institute legal proceedings made under the 1898 Act. The Committee noted that the procedure provided is in similar terms to the procedure in Rule 4.2A, which applies to an application for permission to institute civil proceedings by a person who is the subject of an order under section 100 (vexatious litigation orders) of the Courts Reform (Scotland) Act 2014.

25. **Members approved the draft rules and agreed that they be submitted to the Council for consideration, subject to any stylistic or typographical amendment.**

Item 6: Rules Review

Item 6.1 Review of Judicial Review Rules – proposals for amendment to rules (Paper 6.1, 6.1A, 6.1B)

26. Kenneth Htet-Khin introduced these papers. The Scottish Civil Justice Council (“SCJC”) had committed to a review of the Judicial Review procedure which was introduced in September 2015. At its meeting in December, the Committee had previously considered a number of proposals for rule changes with a view to improving the procedure. The Committee noted that input was obtained from Lord Boyd, the Outer House Administrative Judge, operational staff in the Court of Session and the Asylum and Immigration User’s group. Mr Htet-Khin provided an overview of the content of the draft rules at Paper 6.1A. He set out consequential proposals for amendment of Chapter 30, relating to the procedures for withdrawal of agents. The Committee noted that the sheriff court rules on this area should be reviewed with a view to aligning procedures in both jurisdictions.

27. The Committee considered and approved the draft rules in Paper 6.1A and agreed that they be submitted to the Council for consideration, subject to any stylistic or typographical amendment.

28. The Committee considered proposals for amendment to Chapter 30 of Rules of Court of Session in relation to the withdrawal of agents and instructed the RRDT to prepare draft rules for consideration by correspondence in due course.

29. *Item 6.2 Review of Sheriff Appeal Court Rules - update (Oral)*

Kenneth Htet-Khin provided an update on progress with the rules review. The Secretariat and RRDT are working on an options paper to inform the review process. This will include feedback which is being obtained from operational staff and the Sheriffs Principal. A meeting to discuss progress and next steps is scheduled with Sheriff Principal Abercrombie for 27 February 2017.

Item 7: AOB

There were no other matters arising.

Item 8: Dates of future meetings

30. Members noted the dates of future meetings:

- 5 June 2017 at 4.15pm
- 3 October 2017 at 4.15 pm

Scottish Civil Justice Council Secretariat

February 2017