

Scottish Civil Justice Council

Information on Requesting Changes to Civil Court Rules

Introduction

1. This information is for use by policy teams in the Scottish and UK Governments who are working on primary or secondary legislation or are otherwise considering policy which might affect or require rules of court. The information will also assist any other individual or group wishing to submit a proposal for changes to civil court rules.
2. This document describes **what court rules are** and **how they are made**, what the **key considerations** are and **what engagement** should take place with the Scottish Civil Justice Council (“the Council”) in the various stages of policy development.
3. Suggestions for amendments or improvements to this document are welcomed and can be submitted to the Council Secretariat at scjc@scotcourts.gov.uk.

What are court rules for?

4. Court rules are a type of secondary legislation which set out the practice and procedures of the courts.
5. Rules can be general or may make provision for certain types of proceedings. New or revised court rules might be needed to give effect to primary or secondary legislation, to a court ruling or to improve the procedures followed in the courts.
6. Court rules **CAN** regulate procedural matters such as:
 - how and in what format court proceedings may be initiated
 - timescales for carrying out procedural steps in a case
 - what happens when the court makes a final decision, and
 - how court decisions may be appealed.

7. Court rules generally **DO NOT** cover substantive matters such as:
- which proceedings may be brought before a court
 - what [legal] remedies are available (though diligence can be covered), or
 - which court has jurisdiction

as these matters are usually provided for by legislation or common law.

8. There are a number of sets of court rules regulating proceedings in Scotland's civil courts. These include:
- [Rules of the Court of Session 1994](#)
 - [Sheriff Court Ordinary Cause Rules 1993](#)
 - [Summary Applications etc. Rules 1999](#)
 - [Summary Cause Rules 2002](#)
 - [Simple Procedure Rules 2016](#)

How are court rules made?

9. Civil court proceedings in Scotland can take place in the sheriff courts, the Sheriff Appeal Court and the Court of Session. The rules for all courts are made by the Court of Session.
10. The Court of Session's power to make civil court rules is primarily contained within sections 103 and 104 of the **Courts Reform (Scotland) Act 2014**. The rule-making powers are a comprehensive replacement, restatement and expansion of the Court of Session's powers to make civil procedure rules by Act of Sederunt. The powers allow rules to be made for or about the procedure and practice to be followed in proceedings in the court and any matter incidental and ancillary to such proceedings.
11. The 2014 Act contains illustrative lists of ways in which these powers may be used, including by making provision for or about:
- avoiding the need for, or mitigating the length and complexity of, proceedings,
 - other aspects of the conduct and management of proceedings, including the use of technology,

- simplifying the language used in connection with proceedings or matters incidental or ancillary to them,
 - the form of any document to be used in connection with proceedings, or matters incidental or ancillary to them,
 - the steps that a court may take where there has been an abuse of process by a party to proceedings.
 - This means that rules can potentially include creative or novel provisions.
12. Other legislation may make specific provision about the powers of the courts to make rules and so policy teams may wish to consult their legal advisers for advice when making a request for new or amended court rules.
13. Statutory Instruments are secondary legislation made by powers conferred by the UK or Scottish Parliaments, commonly on the Scottish Ministers or UK Ministers. Statutory Instruments usually take the form of regulations, orders, rules or schemes and provide for the legal detail necessary for primary legislation to operate effectively.
14. An **Act of Sederunt** (meaning a meeting or sitting of a court) is a type of Scottish Statutory Instrument (“SSI”) and is the means by which the Court of Session makes the procedural rules governing court actions in civil cases in Scotland.
15. When made, the SSIs are laid before the Scottish Parliament and are subject to parliamentary scrutiny by the Delegated Powers and Law Reform Committee (DPLRC) and the Justice Committee of the Scottish Parliament.
16. The DPLRC examines each SSI to ensure it is drafted to the Parliament’s standards. The Justice Committee considers each SSI from a policy perspective and is informed by the DPLRC’s views on the drafting.
17. All SSI’s are published on the UK Government’s legislation website (www.legislation.gov.uk).

Who prepares civil court rules?

18. The Scottish Civil Justice Council considers and prepares draft rules of procedure for the Scottish civil courts.
19. The Council also has a number of subject specialist committees, (for example: family law, personal injury and costs and funding) which will consider rules within their subject area remits. Where a committee considers that new or amended rules are required, it will make recommendations to the Council to that effect.
20. When approved by the Council, draft rules are submitted to the Court of Session for consideration and, if approved by the Court, an Act of Sederunt is made.
21. The Court of Session has the ability to make rules of its own initiative but the Court must consult the Council before making rules for the sheriff court or the Sheriff Appeal Court.

Key considerations

Policy development when instructing legislation

22. In general, new or amended court rules may be required when proposed or draft legislation makes provision for new applications to the courts but leaves a gap about the procedure that would apply. For example, a Bill, once enacted, might provide for a new type of court order and rules may be needed to specify how an application for that new type of order must be made and how it should be lodged with the court.
23. At the policy development and legislative development stages, it is important to consider if the proposals might have implications for court procedure. In particular, it would be helpful, in preparing the Bill or the secondary legislation, to consider:
 - whether proposed changes might be delivered through rules of court
 - how will the proposals fit with existing court procedures - can existing procedures be used or will new procedures be required? It

is generally the case that bespoke rules should only be needed where existing rules will not provide an appropriate procedural mechanism

- if new procedures are required, do the courts have sufficient rule-making powers to provide for the proposed procedure or does a specific rule-making power need to be conferred?
- Which court will have jurisdiction to consider applications?
Generally, proportionality dictates that routine civil business is dealt with in the lower courts.

24. Generally, the rule-making powers referred to in paragraph 10 above will be sufficient to deliver rules but there may be exceptional cases where a bespoke rule-making power is justified. For example, the Civil Litigation (Expenses and Group Proceedings) Act 2018 introduces “group procedure” to Scots law for the first time which justifies the creation of a new rule-making power.

Implementation

25. When considering policy which might have implications for civil court procedure or require changes to civil court rules, please contact the Scottish Civil Justice Council Secretariat at an **early stage**. The Council will consider the need for new or amended rules as a result of legislation coming into force or transitional or other ancillary arrangements.

26. Policy teams should be aware that the process for preparing new rules can take some time. Implementation timescales can vary dependent upon the scope of the changes required and in line with the Council’s business priorities. You should discuss planned implementation timetables to allow any potential issues to be identified and addressed at an early stage. For example: minor rules changes could be considered by the Council at one meeting and rules instructed for consideration and approval at a subsequent meeting (this could take around 4-6 months). A new Act containing a number of new civil applications could be considered by the Council, or where appropriate, delegated to a subject specific committee. The policy development for rules and their subsequent drafting and revision could require to be considered at several meetings over a number of months before rules are made.

27. The Secretariat can provide advice on current rules and procedures, the impact of any new proposals and the timescales required for the Council to consider new proposals.

Contact: Scottish Civil Justice Council Secretariat, Parliament House, Edinburgh, EH1 1RQ or by email: scjc@scotcourts.gov.uk

28. The Council will consider the need for new or amended rules as a result of legislation coming into force or transitional or other ancillary arrangements.

Sheriff Court Proceedings

Appeals

29. Where 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;
- the grounds of appeal (fact and law, or law only); and
- the sheriff's power on hearing the appeal (i.e. the extent to which the sheriff may interfere with the act or decision).

30. In the absence of contrary provision the arrangements for onwards appeals will be as per sections 110 to 113 of the Courts Reform (Scotland) Act 2014. If having reviewed these standard arrangements there is an intention to depart from them, the proposed legislation may make explicit provision about the following matters:

- whether the decision of the sheriff or the Sheriff Appeal Court is to be final;
- what are the grounds for any further appeals (fact or law or both fact and law).

Warrants Authorising Entry

31. Legislation regularly makes provision for an application to the sheriff for a warrant authorising entry to land or premises. It is often unclear in the legislation whether an application is under civil or criminal jurisdiction. For the avoidance of doubt, it is recommended that, unless obvious,

jurisdiction should be expressly stated in the legislation. This will ensure the policy intention is clear and is particularly important when conferring jurisdiction on the sheriff. Specific consideration should also be given to the position of summary sheriffs. Similar issues may arise where forfeiture powers are to be conferred on sheriffs.

Submitting requests or proposals for rules

32. Please submit a formal proposal to the Council Secretariat scjc@scotcourts.gov.uk using the template provided in the Annex. Proposals will be allocated to either a subject matter Committee or directly to the Council and will be tabled for consideration at the next appropriate Council or committee meeting determined by the Secretariat.
33. The Council meets around 6 times per year and meeting dates are available [here](#). Further information about the Council's committees is available [here](#).
34. Please be aware that the Council is subject to the provisions of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council and its committees publish the agenda, minutes of meetings and selected papers from each meeting. Please inform the Secretariat if a proposal for changes to civil court rules is being submitted to the Council or a committee in confidence. Any documents submitted confidentially will be treated as such by the Council but may still be releasable under the terms of FOISA.

Other considerations

35. As well as engaging with the Council Secretariat, policy teams should consult:
- the Legislation and Implementation Team of the Scottish Courts and Tribunals Service about any proposal which might have operational implications for the sheriff courts;
 - the Principal Clerk of Session about any proposal which might have operational implications for the Court of Session;
 - the Judicial Office for Scotland on matters relating to the judiciary;

- The Criminal Courts Rules Council for advice on any proposals which might have implications for criminal court rules.

Contacts:

Legislation Implementation Team, Scottish Courts and Tribunals Service,
Spur N1, Saughton House, Broomhouse Drive, Edinburgh EH11 3XD

Email: litenquiries@scotcourts.gov.uk

Judicial Office for Scotland, Parliament House, Edinburgh, EH1 1RQ

Email: judicialofficeforscotland@scotcourts.gov.uk

Criminal Courts Rules Council, Lord President's Private Office, Parliament House, Edinburgh, EH1 1RQ

Email: lppo@scotcourts.gov.uk

The Criminal Courts Rules Council (CCRC) prepares draft rules for the criminal courts. These are submitted to the High Court of Justiciary for consideration and if approved are passed as an Act of Adjournal. Further information about the CCRC is available on SCTS website [here](#).

ANNEX

REQUEST FOR CIVIL COURT RULES

Purpose:

Outline the reason for requesting rules. For example, does this relate to the commencement of an Act; new or amended subordinate legislation; or a policy initiative?

Timing:

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

Summary of request/proposal:

Provide the background to the request, including:

- *details of any relevant primary or secondary legislation (are rule changes purely consequential?),*
- *the desired policy aims,*
- *a step-by-step explanation of how you envisage the proposed court process to operate in the various possible permutations of outcome,*
- *any relevant consultation carried out,*
- *any other relevant information that should be taken into consideration.*

Where rules are required to implement new or amended legislation, your request should give thought to what court rules may be required and why. It is not helpful to simply narrate the provisions of the Act. The Council Secretariat will be pleased to assist with advice.

Vires:

Provide specific details about what consideration has been given to the vires of the court to make the requested rules. Policy teams may wish to consult their legal advisers about this.

Contact details:

Please provide your contact details.