

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

MONDAY 22 JANUARY 2024 AT 10.30AM

VIRTUAL MEETING

Present: Lord President (Chair)
Denise Swanson (Scottish Government)
Lady Carmichael
Fiona Drysdale
Thomas Docherty
Sheriff Martin-Brown
Iain MacRae
Riley Power (SCTS – attending for Eric McQueen)
Sheriff Principal Ross
Sheriff Way
Sheriff McCartney

In attendance: Yvonne Anderson (Court of Session)
Rachel Grant (LIT)

Support: Jessica Flynn (Secretariat)
Sarah Jane McNicol (Secretariat)
Paula Preston (Secretariat)
Graeme Welsh (Secretariat)

Apologies: Lord Ericht
Jacqueline Harris
Colin Lancaster (SLAB)
Eric McQueen (SCTS)
Catherine Smith KC
Nicola Irvine

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed members to the fifty-second meeting of the Council. He thanked Jaqueline Harris, who is now stepping down, for her invaluable contribution to the Council. He welcomed Martha De La Roche from the Access to Justice Foundation to speak to Council members on the work of the Foundation.

2. The Council agreed not to publish papers **3.1, 3.1A, 3.2, 3.2A, 3.3, 3.3A, 3.3B,3.4, 4.1 and 4.1A**

Item 1.1 Access to Justice Foundation

3. Due to internet connection issues, this item will be rescheduled for the next Council meeting.

Item 2: Previous meeting

Item 2.1 - Items by correspondence (Paper 2.1)

4. The Chair introduced Paper 2.1 on the six matters considered by correspondence since the last meeting:

Draft Rules

Paper 2023.18 was issued on 02 June 2023 and invited members to consider and approve the updated rules on Reporting Restriction Orders which had been developed in response to the drafting instructions approved on 25 April 2022. Responses were invited by close of business on 14 June 2023. One response was received. Draft rules were approved.

Paper 2023.21 was issued on 26 June 2023 and invited members to consider and approve commencement of the Telecommunications Infrastructure Rules (TILPA). Responses were invited by close of business on 10 July 2023. Three responses were received. The SSI was laid on 11 August 2023 and came into force on 02 October 2023.

Administrative Matters

Paper 2023.19 was issued on 05 June 2023 and invited members to consider and approve the draft minutes from the Council meeting on 22 May 2023. Responses were invited by close of business on 12 June 2023. Two responses were received. Final minutes were published on the Council's website.

Paper 2023.20 was issued on 19 June 2023 and invited members to approve the appointment of Sheriff Principal Dowdalls to the Family Law Committee and Sheriff Jillian Martin-Brown to the Costs and Funding Committee. Responses were invited by close of business on 03 July 2023. No responses were received. The item was approved and both members were appointed to the committees for a period of three years.

Paper 2023.24 was issued on 14 August 2023 and invited members to approve the appointment of Sheriff Principal Wade to the Access to Justice Committee. Responses were due by close of business on 28 August 2023. One response was received. Sheriff Principal Wade was therefore appointed to the Committee for a period of three years.

Paper 2023.25 was issued on 03 November 2023 and invited members to approve the reappointments of Fiona Drysdale to the Access to Justice Committee and Sheriff Fife to the Personal Injury Committee. Responses were due by close of business 17 November 2023. Two responses were received. Both members were therefore reappointed to the Committees for a further three years.

The Council noted the update.

Item 2.2 - Age of Criminal Responsibility:

5. An oral update included:

- No applications have been lodged since the commencement of the Act on 17 December 2021;
- The next stage for developing draft forms includes review by a speech and language specialists. This is now being progressed; and
- The Scottish Government will host a learning event on Tuesday 30 January, which the secretariat will attend.

The Council noted the update.

Item 2.3 Consultation on the Ordinary Procedure Rules

6. An oral update included:

- The targeted consultation opened on 18 July 2023 to run for a standard 12 week period to 10 October 2023. Following requests from the consultees, the closing date was initially extended by 3 weeks to 31 October 2023 and then by a further 4 weeks to 30 November 2023; and
- Thirteen responses were received. These were published on the SCJC webpage. The Analysis of Responses report was published on 3 January.

Following the online publication of this analysis, the next steps will be:

- Drafting Instructions – Having considered the analysis report, the Rules Rewrite Committee will: a) agree the direction of travel; b) confirm their instructions for developing the next version of the draft rules; and c) summarise those views in a consultation response paper for publication online;
- Revised Draft Rules – Once drafted, the next version of the draft rules will be tabled with the Committee for their consideration and approval; and
- Consultation – the Committee will then consult again on that next version in late 2024.

Item 3: Work Programme

Item 3.1 – The Payment and Electronic Money Institution Special Administration 2023 Rules.

7. Members noted that the draft rules amended RCS Chapter 74 (Companies) of the Court of Session Rules and introduced Part XII - special administrative procedure specifically for use when a payment or electronic money institution has financial difficulties.

The Council approved the special administration rules for consideration by the Court of Session subject to any typographical or stylistic changes.

Item 3.2 – National Security Act 2023 – Part 2

8. Members noted that the draft rules amended RCS Chapter 89 (Terrorism Prevention and Investigation Measures) so that it will now cover both:
 - Applications for the court’s permission to impose prevention measures or enforcement measures - in response to terrorism threats; and
 - Applications for the court’s permission to impose prevention measures or enforcement measures - in response to national security threats.

The Council approved the National Security rules for consideration by the Court of Session subject to any typographical or stylistic changes

Item 3.3 - Regulated Fess - Sheriff Officers and Messengers at Arms

9. Members noted that:
 - SMASO had requested an 11.9% fees uplift to cover a 21 month period from December 2020. The request was submitted on 9 November 2022;

- At its March 2023 meeting, the Cost and Funding Committee accepted the evidence base provided by SMASO for that period as it conveyed significant business impacts from the cost of living crisis and the pragmatic steps taken by their members to mitigate those impacts.
- The Committee agreed that an 11.9% uplift was reasonable on the evidence base provided by SMASO, subject to the secretariat running a reasonableness check on the calculations.

The Council approved the fees instrument and accompanying Policy Note for consideration by the Court of Session, subject to any typographical or stylistic changes.

Item 3.4 - Retained EU Law Act 2023

10. Members noted that:

- The 2023 Act makes significant changes to the framework of Retained European Union Law. From the end of 2023 it has:
 - revoked all or part of 587 legislative instruments of EU-related origin (though thousands of other legislative instruments will be kept);
 - revoked all retained directly effective EU law (for example, rights and obligations formerly conferred directly under EU treaties or directives);
 - revoked the modified principle of supremacy of EU law (which governs the hierarchy of laws passed before the end of the transition period);
 - revoked the retained general principles of EU law (which govern the interpretation of REUL); and
 - renamed “retained EU law” as “assimilated law”
- Section 6 of the Act makes provisions for:
 - *6A References on retained case law by lower courts or tribunals*
 - *6B References to retained case law by law officers*
 - *6C Interventions on retained case law by law officers*
- Rules to support Section 6 should broadly follow those of devolution issues as outlined in the accompanying paper.

The Council agreed that the new rules should broadly follow the rules already in place for devolution issues.

Item 4.1 - Documenting the consultation process

Members noted that:

The three main reasons for documenting a Council specific approach are:

- To mitigate risk in the event of an action complaining of an unfair consultation;
- To raise awareness of the steps that build fairness into the eight stages of the consultation process; and
- To recognise the need to consult. There is an expectation that the Council will need to consult more frequently in future years.

Members provided comments which will be reflected in an updated version of the consultation process document.

The Council approved the *consultation process* for use with all future consultations.

Item 5: AOB

No other business was raised.

Item 6: Dates of Future Meetings

- 18 March 2024
- 17 June 2024
- 23 September 2024
- 09 December 2024

**Scottish Civil Justice Council Secretariat
January 2024**