

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

MONDAY, 8 DECEMBER 2025, AT 10:30
Judges Conference Room, Parliament House, Edinburgh

Present: Lord President (*Chair*)
Thomas Docherty (*attended by video*)
Fiona Drysdale
Lord Ericht
Malcom Graham (SCTS)
Nicola Irvine
Sheriff Lesley Johnston
Colin Lancaster (SLAB)
Iain MacRae
Sheriff Jillian Martin-Brown
Sheriff Frances McCartney
Adam McKinlay
Usman Tariq KC

In attendance: Chris Fyffe (*Court of Session*)
Rachel Grant (*LIT*)
Jonathan Hodges (*LPPO*)

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

Apologies: Lady Carmichael
Sheriff Principal Ross
Denise Swanson (*SG*)

Item 1 - Welcome, apologies and agreement of public and private papers

1. The Chair noted the apologies received, welcomed existing members and introduced Sheriff Lesley Johnston, Adam McKinlay and Usman Tariq who were attending their first meeting.
2. The Chair noted his thanks to Sheriff Way for his considerable contributions during his tenure.

Item 2 - Previous meeting

Item 2.1 - Items considered by correspondence (Paper 2.1)

- 3. Members noted the 3 items considered by correspondence.**

Item 3 - Work Programme

Item 3.1 - Civil Criminal Interface (Paper 3.1 & 3.1A)

4. Members discussed the draft policy paper that was published by the Scottish Government during September 2025.
- 5. Members will consider the civil criminal interface during the strategy day.**

Item 3.2 - Civil Justice Data (Paper 3.2)

6. To inform discussions on the type of data the Council requires the Access to Justice Committee has been liaising with the SCTS officials to further develop the Civil Justice Report.
- 7. Members will consider the Civil Justice Report during the strategy day.**

Item 4 - Aarhus

Item 4.1 - Aarhus Strategy (Paper 4.1)

8. Sheriff McCartney made some introductory remarks on the history of the Convention and the work of the Compliance Committee, then provided some context on the recent history of environmental actions in Scotland and the types of issues most likely to arise. Members then discussed the Aarhus Strategy paper, which considered the issues of recent concern before the Compliance Committee as well as the wider issues that the Council might wish to consider.

Concern A - The type of claims covered:

9. Members agreed with the aspirations narrated within paper 4.1. They concluded that the Council should now consult on fully extending the ability to apply for a PEO in the Court of Session and Sheriff Court, so that all types of civil procedure (other than Group Procedure) would be covered.

10. The Council agreed to run a 2026 Public Consultation on extending the availability of *Environmental PEOs* to:

- All relevant cases in the Court of Session (other than Group Procedure);
- All applications for *leave to appeal* onwards to the UK Supreme Court;
- All relevant cases in the Sheriff Appeal Court; and
- All relevant cases in the sheriff courts (under the rules for ordinary cause, summary cause, simple procedure, summary applications and statutory appeals).

11. The Secretariat will continue to liaise with SCTS officials to ensure the case management system (ICMS) is able to capture sufficient data on PEOs.

Concern B - The levels of the cost caps:

12. Despite the explanations given to date, the Compliance Committee still sees “on cause shown” as a vague term. Members concluded that using plain English should provide the “predictability” sought for lay users, such as amending RCS rule 58A.7 to read as “such other lower sum as may be justified” (or similar).

13. The Council will consult on the following policy positions:

- *If a PEO is granted, the maximum cap will be £5,000 but with the ability for the court to lower that figure through judicial discretion;*
- *The phrase “on cause shown” and the ability to shift the cap upwards will be omitted; and*
- *A suitable alternative phrase will be substituted to support lowering that £5,000 cap where it is considered reasonable to do so.*

Concern C (i) - The application procedure – terms of representation:

14. The courts focus is on the ability to pay, which can be determined from the information and estimates provided under other elements of the rules. If that information is deemed to be sufficient then seeking disclosure of terms of representation may be unnecessary.

15. The Council will consult on the following policy position:

- *Removing the requirement to provide ‘terms of representation’ when lodging a motion for a PEO.*

Concern C (ii) - The application procedure – confidentiality of information:

16. The Compliance Committee had raised concerns although the exact point of concern was unclear. Members noted the existing provision within the rules that does allow an applicant to request that information is kept confidential. There was no information to hand suggesting the terms of that rule had been breached, or that there was any difficulty in practice. Members noted that, in an adversarial system, information is required to be provided to opponents.
17. Posing a question within the 2026 consultation may help to identify whether there are any problems arising with current working practices and, if so, how those problems should be addressed.
- 18. The Council agreed to an open question on confidentiality being included within the next consultation**

Concern C (iii) - The application procedure – estimating expenses:

19. Using estimates is fraught with difficulties and members are aware that the natural tendency of parties is to overestimate (rather than underestimate). The court focuses on the ability to pay. In practice the “prohibitively expensive” test may be met without an applicant having to provide estimates of liability. It is unlikely that asking for an estimate of an opponent’s expenses provides sufficient added value but, in cases where the issue may be more finely balanced, the applicant is still able to provide any information that will assist the court in understanding why (without a PEO being granted) the costs and potential liabilities would be prohibitively expensive. That suggests that it may not be necessary to make such an estimate a mandatory requirement.

- 20. The Council will consult on the following policy positions:**

- ***Retaining the requirement on an applicant to provide a reasonable and proportionate estimate of their own expenses; and***
- ***Removing any requirement to estimate their opponent’s expenses.***

Concern D – Interveners:

21. RCS rule 58A.10 (2) provides an ability to impose expenses as a sanction for unreasonable behaviour. That may be perceived as a step too far given the court has already had an opportunity to reject unreasonable submissions when it considered the initial application for ‘leave to intervene’.

- 22. The Council will consult on the following policy position:**

- ***Omitting RCS rule 58A.10 (2) which will remove the potential for an award of expenses to be made “on cause shown”.***

Concern E - Court Fees:

23. In each previous update to the Compliance Committee the Council had confirmed its existing position that the £5,000 cap is inclusive of court fees.

24. *It was noted that a minor edit to the cost capping rule could reinforce the position that the £5,000 cap is “inclusive of court fees”.*

Concern F – Legal Aid:

25. Colin Lancaster offered to provide a post meeting update as paragraph 7 did not quite reflect the position his officials should take regarding regulation 15.

26. As a post meeting update, it should be clearly marked as an addendum.

Time limits in judicial reviews and statutory appeals:

27. These time limits flow from primary legislation so progressing any changes (if required) would be a matter for the Scottish Government to consider.

28. The Council noted that no further steps need to be taken by the SCJC.

Recovery of expenses by party litigants:

29. In England and Wales the hourly rate recoverable by a “litigant in person” was less than one-tenth (10%) of the sum that a legally represented party could recover. That concern does not arise in Scotland as taxation rule 3.10 (3) enables a ‘party litigant’ to recover reasonable expenses up to two thirds (66%) of the sum that a legally represented party could recover.

30. The Council noted that no further steps need to be taken by the SCJC.

Making better use of other modes of engagement:

31. The Secretariat is to consider what other steps can be taken to further engage with those interested in how the updated PEO Rules are intended to work.

Commissioning further research:

32. The Secretariat is to consider those areas where undertaking or commissioning further research may assist. At the annual strategy day members will set priorities regarding the suggestions made.

Item 4.2 - Consultation Analysis on the extension of PEOs (Paper 4.2)

33. Members noted the other suggestions for change made by respondents at paragraphs 63 and 64 of the Consultation Analysis report. The Secretariat will now prepare a Consultation Response report to convey that the Council will be running a 2026 Public Consultation on a fully compliant procedure for implementing the strategic decisions members have taken (under item 4.1).

Item 4.3 - The findings in communication 2017/150 (Paper 4.3 & 4.3A-B)

34. Members noted the findings in communication ACCC/C/2017/150 as tabled at the November 2025 Meeting of the Parties (MOP). Those conclusions related to a 2017 UK Government decision not to consult when preparing the “Withdrawal Act” (in advance of Brexit).

Item 4.4 - Consulting again on the extension of PEOs (Paper 4.4)

35. As the draft rules accompanying the 2025 Public Consultation were prepared ‘for consultation purposes’ the SCJC does need to consult again on rules specifically drafted for implementation purposes. To clarify the factors that drive that distinction the Secretariat will update paragraphs 14,15 and 18 of the publication covering “*The consultation process used by the SCJC*”.

Item 5 - AOB

Annual Strategy Day

36. The Chair noted his aim is to frame the work of the Council on the statutory function for “keeping the civil justice system under review”, which may in turn impact on the level of resources required, the Committee structures and the strategic aspirations of the Council. Members who have strategic matters they may wish to raise on the strategy day should liaise with the Secretariat.

Taxation of Accounts

37. Members discussed delays in the Office of the Auditor of the Court of Session

and noted that officials are actively looking at options to secure additional resources to help reduce that delay.

Dates of 2026 meetings

- Monday 09 March
- Monday 15 June
- Monday 28 September
- Monday 14 December