

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

MONDAY 31 JANUARY 2022 AT 10.30AM

VIA WEBEX

MINUTES

Members Present: Lord President (Chair)

Brandon Malone
Catherine Smith QC
Colin Lancaster (SLAB)
Denise Swanson (Scottish Government)
Employment Judge D’Inverno
Eric McQueen (SCTS)
Jaqueline Harris
Joel Conn
Lady Carmichael
Lord Boyd
Lynda Brabender QC
Sheriff Hughes
Sheriff Principal Murray
Sheriff Way
Thomas Docherty

In attendance: Diane Machin (Depute Principal Clerk of Session)
Cameron Stewart (SCTS)
Craig Anderson (SCTS)
Ysabeau Middleton (Lord President’s Law Clerk)

Support: Andrew Campbell (LPPO)
Craig McCorkindale (Director of Strategy, SCJC)
Graeme Welsh (Secretary, SCJC)
Ian Vickerstaff (LPPO)
Karen Stewart (SCJC)
Kelly Jack (SCJC)
Paula Preston (SCJC)

Apologies: None

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed members and attendees to the forty-fifth meeting of the Council. There were no apologies.
2. The Council agreed not to publish papers 3.1, 3.1A-C, 3.2, 5.1, 5.1C, 5.1C (a), 5.1(b) and 5.1(c).

Item 2: Previous meeting

Item 2.1 - Items by correspondence (Paper 2.1)

3. The Chair introduced Paper 2.1 which provided information on the outcome of two matters considered by correspondence since the last meeting:
 - Paper 2021/25 - confirmed the appointment of Lord Harrower as Chair to the Costs and Funding Committee; and
 - Paper 2021/26 – provided Compulsory Pre Action Protocols for Disease and Clinical Negligence for consideration, and confirmed the Council's agreement to remit those protocols to the Costs and Funding Committee to develop appropriate fee structures.
4. The Council extended their thanks to Lord Burns for the contribution he had made as the outgoing chair of the Costs and Funding Committee.

5. The Council noted the items approved by correspondence.

Item 2.2 – Standing Item - Age of Criminal Responsibility (Oral update)

6. Graeme Welsh provided the Council with a brief update on this standing item:
 - No applications had been lodged since commencement of the new rules on 17 December 2021; and
 - A working group of the Family Law Committee, chaired by Sheriff Tait, will meet on 16 February 2022 to progress the development of child friendly forms.

Item 3: Work programme

Item 3.1 - Consultation on Modes of Attendance (Papers 3.1, 3.1A – C)

7. The Chair introduced paper 3.1 covering the analysis of consultation responses and the accompanying impact assessments. The secretariat will arrange for printable versions of those documents to be uploaded to the Council's website.
8. In considering the next steps to be taken in response to that analysis, members discussed the following four options:
 - Option 1 – Withdraw the current approach to rules
 - Option 2 – Seek empirical evidence
 - Option 3 – Instruct revised practice notes and guidance
 - Option 4 – Instruct a different approach to rules
9. The Chair emphasised the need to harness the WebEx technology which had been successfully deployed in a number of areas. The following key points were noted from that discussion:
 - There was a direction of travel towards digital but strongly polarised views, which have been expressed by respondents, continue to act as a brake on what might otherwise be thought desirable. Some members favoured option 4 and others option 3. Ultimately it was decided that a mixed approach would be preferable, using a combination of new rules (option 4), accompanied by Scotland wide practice notes / improved guidance (option 3).
 - That mixed approach should provide: a) an opportunity to learn and gain experience as working practices evolve; and b) the flexibility to update guidance more rapidly than is possible through amendment of the rules of court.
 - To support ongoing monitoring and evaluation, a forum should be created to keep the approach taken under more regular review and to allow practitioners the opportunity to engage and influence the pace of change. That forum could usefully capture any issues which are easily resolved.
10. The Council concluded that a combination of options 3 and 4 would support the policy objectives by providing a degree of consistency and flexibility.
11. **The Council instructed the secretariat to:**
 - **Issue drafting instructions for new rules that reflect the feedback received from this consultation exercise;**
 - **Initiate a process for generating revised practice notes and guidance to deliver improved consistency; and**

- **Establish a forum to monitor the changes made and initiate more regular improvements in court practice.**

Item 3.2 - Judicial Rate of Interest (Paper 3.2)

12. The Chair introduced paper 3.2. Traditionally, in eras of low inflation, interest rates were set at 4 or 5%. More recently there has been a view that they should be about 1 or 2% above bank base rate. In the 70s and 80s the rate had increased incrementally from 5% to 15% before dropping to the current rate in 1993. Members noted the difficulties encountered in gaining UK wide co-operation for changing the judicial rate of interest. This has been an ongoing issue since the Council first discussed it at its inaugural meeting in June 2013. Although the Council had anticipated that action would be taken by the UK and/or Scottish Governments, it appeared that this was not likely to occur. There was continued criticism that the current rate was too high, having regard to current rate of return on investments. On the other hand, the rate was well below that charged to consumers on credit cards. There had been a Scottish Government consultation, in connection with the Bankruptcy and Debt Advice (Scotland) Act 2014, but it had closed in February 2020.
13. The Council noted that this remained an agreed priority on the Council's published work programme for 2021/22 and discussed what pragmatic steps could be taken to progress a change in this area.
14. **The Council agreed this matter should remain as a priority and instructed the secretariat to:**
 - **Engage with the Civil Justice Rules Council in E&W to establish their views on progressing a rate change: and**
 - **In light of the responses to the Scottish Government's consultation on the Bankruptcy and Debt Advice (Scotland) Act 2014, prepare a Discussion Paper for consideration and potential publication by the Council.**

Item 4: Aarhus Compliance

Item 4.1 - Protective Expenses Orders (Papers 4.1, 4.1A –D)

15. The Council noted the potential non-compliance issues which had been raised by the Aarhus Convention Compliance Committee and the need to develop an appropriate response. The Chair explained that not all of the Committee's criticisms were accurate. For example, a PEO could be sought in any action, even if the court rules only applied to Aarhus cases. The Chair mentioned the

impact of crowd funding. There were legitimate concerns about the maximum levels of contribution and the information which an applicant had to provide.

16. The Council agreed to remit the development of a plan of action to the Costs and Funding Committee; and

17. Work on the following policy topics will be prioritised as part of the Councils annual strategy workshop:

- **Extending the scope of the rules on PEOs to other cases and to simplifying the process.**

Item 4.2 - Court Fees and Aarhus Compliance (Paper 4.2)

18. The Council noted the Scottish Government consultation on court fees from 2022 to 2025. This proposed inflation adjustments and other changes to the statutory fee-charging and fee exemptions regimes. One consultation question sought views on whether a fee exemption should be established for environmental cases within the Aarhus Convention.

19. The Council instructed the secretariat to prepare a consultation response supporting the use of fee exemptions in relevant environmental cases.

Item 5: Rules Reviews

Item 5.1 - Reporting Restriction Orders (Paper 5.1, 5.1A – C, 5.1C (a-c))

20. The Council noted the position with the case before the European Court of Human Rights (Application no. 8562/19 - Duff and BBC Scotland v The United Kingdom) and the concerns raised by the BBC with regard to the recording of reasons when the courts issued Reporting Restriction Orders under current rules.

21. Members discussed: a) the principles which flow from the primary legislation such as protecting the identity of children; b) the relevance of the BBC's suggested improvements; c) the potential to add further clarity within the relevant rules of court; d) the extent of the guidance and information already made available; and e) the level of training currently delivered to the Judiciary and Sheriff Clerks. The Chair explained that it had been made clear to judicial officers that the principle of open justice required courts to think very carefully before issuing a reporting restriction. It ought to be only in very extreme circumstances that journalists could be excluded from court proceedings.

22. The Council agreed to establish a working group to review the concerns raised and to report back (for the April 2022 Council meeting).

Item 6: AOB

23. There was no other business raised

Item 7: Dates of Future Meetings

24. An ad hoc meeting will be scheduled in March 2022 for the Council's annual strategy workshop (as an in person event if practicable).

**Scottish Civil Justice Council Secretariat
January 2022**