

**MEETING OF THE SCOTTISH CIVIL JUSTICE
COUNCIL
THURSDAY 09 JULY 2020 AT 11.00AM
VIRTUAL MEETING
MINUTES**

- Present:**
- Lord President (Chair)
 - Lord Boyd of Duncansby
 - Lady Carmichael
 - Lynda Brabender QC (Advocate)
 - Kenneth Campbell QC (Advocate)
 - Joel Conn (Solicitor)
 - Jaqueline Harris (Solicitor)
 - Gavin Henderson (Scottish Government)
 - Colin Lancaster (Scottish Legal Aid Board)
 - Eric McQueen (SCTS)
 - Brandon Malone (LP member)
 - Employment Judge Joseph d’Inverno (LP member)
 - Sheriff Principal Murray
 - Sheriff Way
 - Sheriff Hughes
 - Thomas Docherty (Which?)
- In attendance:**
- Kay McCorquodale (SCTS)
 - Cameron Stewart (SCTS)
 - Diane Machin (Offices of Court of Session)
- Support:**
- Julia McCombie (SCJC)
 - Emma Laurie (SCJC)

Jessica Flynn (SCJC)

Andrew Campbell (LPPO)

Apologies: Elena Fry (Solicitor)

Nicola Anderson (SCTS)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present and noted the apologies received from Elena Fry and Nicola Anderson.
2. The Chair thanked members for their attendance at short notice to consider an urgent rules request from the SCTS. The Chair also thanked members for their work on the Group Proceedings rules which they had considered prior to this meeting.

Item 2: Proposals for Rules

Item 2.1 – Rules Request - Scottish Courts and Tribunals Service – Request to make use of Civil Online Mandatory for Simple Procedure

3. Paper 2.1 invited members to consider a policy paper submitted by the SCTS to make the use of civil online mandatory for Simple Procedure claims on a temporary basis. Members were asked to consider whether they agreed with the policy in principle and, if so, whether they agreed with the policy and draft instrument as presented.
4. Due to the urgency of the request, it was being presented to the Council directly. The members of the Access to Justice Committee, who first considered the request in December 2019, had been canvassed for views separately and an overview of the feedback received would be presented at the Council meeting.
5. Kay McCorquodale, Chief Development and Innovation Officer, introduced the rules request on behalf of the SCTS and spoke to paper 2.1A. By way of overview, it was reported that:
 - Due to the current COVID-19 restrictions, SCTS were conducting business in a new manner with an emphasis on digital means;
 - The policy proposed was that new Simple Procedure claims would be lodged electronically only, via civil online unless in

exceptional circumstances and on cause shown. The plan was that this would begin in Phase 3 of the current COVID-19 route map out of lockdown restrictions, i.e. no sooner than 30th July 2020;

- There were fundamental differences between the proposal that went to the Access to Justice Committee in December 2019 and the proposal being presented now. This included (i) the addition of a newly defined exception test to disapply the rule in recognition that not everyone may have the opportunity or ability to submit forms electronically; (ii) the inclusion of a sunset provision to ensure that the practical effects of the change could be monitored; and (iii) that work was underway to develop at pace an interface to enable solicitors to upload claim forms directly into the SCTS case management system ICMS from their own case management systems; and
- A new Equality Impact Assessment (EQIA), specifically relating to this rules request, had been undertaken and circulated to Council members, in light of feedback coming through from members of the Access to Justice Committee that the reliance on the previous EQIA for the introduction of Civil Online was not sufficient.

Access to Justice Committee Views

6. Lady Carmichael, Chair of the Council's Access to Justice Committee and member of the Council, presented feedback on behalf of the Committee.

7. The Committee had expressed a general agreement to support the drive towards digitally enabled court processes, particularly in the context of the restrictions in place as a result of COVID-19.

8. However, there were some concerns expressed about the policy as presented. These included:

- The need to ensure that the policy met its intention without adversely and significantly impeding access to justice for those unable to submit claims electronically;
- Whether the policy would also apply to respondents;
- The lack of an appropriate EQIA to support the policy proposal;
- The impact on vulnerable court users and the kind of support and guidance on the system which would be made available to them;

- The impact of the delay and transition period for solicitor firms as a result of the new interface (API) not being ready for use when the rules came into force;
- The current difficulties of using Civil Online for volume work; and
- The potential financial impact on solicitor firms who deal with volume cases.

9. The Committee members were in favour of the addition of the sunset clause with an expiry date of 30 September 2021. It would be beneficial for the SCTS to report to the SCJC on the impact of the rule change. The SCTS report should include ongoing monitoring, such as research data on user experience of the system, as well as data on the number, and nature, of requests being taken to the sheriff during the policy's first year of use.

10. Due to the public health crisis, members of the judiciary were unlikely to be able to access paper processes and were substantially reliant on online systems.

11. The Equal Treatment bench book, specifically in terms of equality duties, would need to be reviewed in light of any rule change of this nature.

Council Discussion – Civil Online

12. Council members were generally supportive of the principle of online justice and the move to online court systems. As a result of COVID-19, the courts were facing a backlog in processing new simple procedure claims. The implementation of the policy would increase capacity to deal with this backlog, as well as supporting the SCTS's long term goal to digitise the court system.

Availability of Interface

13. In discussion, the existence of an Application Programming Interface ("API"), and its compatibility with existing case management systems used by solicitor firms, especially those that process bulk debt collections, was raised. Some solicitor firms found Civil Online very difficult to use and not conducive to the proposals being suggested.

14. Some members wondered whether the development of the new API may not alleviate existing concerns by solicitor firms. Case management system providers may have to adapt existing systems so as to be compatible with the incoming API. Members discussed whether a grace period could be granted in implementing the rules so that these firms could manage the transition to using the API. It was recognised that there was a

short time frame for implementing this rule change and this may have wider impact on the legal profession when adapting to the change.

15. Members discussed whether there were more immediate alternatives to the mandatory use of Civil Online; for example submitting PDF documents as is done in Ordinary Cause proceedings. SCTS advised Council that development of the API was well underway and a version had been made available to some practitioners so that they could begin to build their own integrations. Work was ongoing for all documents in sheriff court civil actions to be loaded electronically through the online portal. SCTS had engaged with some solicitor firms who advised that they would not submit PDF documents by e mail as this was not a secure method. SCTS did not intend to permit the upload of a PDF claim form into Civil Online.

Access to Justice

16. Some members considered that the proposed policy risked possible access to justice issues. This view was not shared by all members. Some felt that the inclusion of an exception test would overcome issues relating to access to justice.

17. As a result of the concerns, the Council agreed that the policy should not place court users in a disadvantaged position and should not lead to procedures that were unduly onerous. There may be a wealth of reasons why a potential claimant may not be able to submit an electronic application. This included access to hardware, broadband issues and potential disabilities which may make it more challenging for a person to submit forms online. Although recent statistics showed that the general population were confident in having to use the internet, this confidence diminished greatly when faced with unknown specialised portals and forms.

18. Issues were raised regarding the proposed policy's impact on party litigants. Members queried if there was existing research available on the reasons why party litigants generally do not appear to use Civil Online and whether they found that there were barriers for them to use the online system. More research was required in relation to this group of court users. SCTS reported that the existing Civil Online system had a feedback function that was continually reviewed by the Digital Services Unit.

19. The impact of the current COVID-19 pandemic on other services, such as Citizens Advice Bureau (CAB), needed to be considered. The current rules advised that party litigants may seek further support from CAB but that users needed to appear in person. As CAB offices are currently closed, this may present a barrier.

20. Some members stressed that access to justice concerns were mitigated by the fact that Civil Online only required to be used to submit a claim. There would still be an option to submit a paper claim, as well as responses on paper. The process did not restrict respondents. Any paper responses would be accepted and scanned in to the system.

Test for Exception

21. In light of the concerns expressed in relation to possible access to justice, members commented on the suggested exception test which was included in draft rules provided to indicate how the policy may look in practice.

22. Members did not generally support the exception test as drafted. It could give rise to access to justice issues because it was too high a test. The test threshold should be flexible and provide discretion to the Sheriff whereby he/she is satisfied that the application could not reasonably have been submitted using Civil Online.

Inclusion of Sunset Clause

23. Members were supportive of a sunset clause with the expiry date of 30 September 2021 in recognition of the urgency and the need to review the policy in practice. Members also supported a requirement on SCTS to submit a report to the Council by 30 June 2021 that encapsulated data on how the rule had worked in practice.

24. The report would be likely only to capture data for those who had engaged with the system rather than those who had faced barriers to its use. It would be beneficial to give consideration to how to capture data of those that may have faced hurdles in the system and may not have engaged as a result. External research could be commissioned and could run concurrently to the monitoring of the rule, in order to establish the impact of the rule on court users.

25. In producing this report for Council, SCTS should engage with CAB, as well as reporting on the consumer experience of the rules.

Outcome of discussion

26. In conclusion, a majority of the members agreed that:

- They were in favour of the policy in principle, in particular in

order to support the current COVID-19 resourcing implications for the SCTS;

- The wording of an exception test should be flexible enough to ensure that anyone who is unable to submit a claim online may be excused from compliance with the rule;
- It would be beneficial if the Judicial Institute could provide guidance to Sheriffs in light of this rule change;
- A sunset provision with an expiry date of 30 September 2021 should be included in the new rule;
- The policy should be monitored throughout the sunset period to determine its level of success, including monitoring the effectiveness of the API when it is launched, with a report being submitted to the SCJC by 30 June 2021; and
- That the rules would return to SCJC for consideration in light of this monitoring.

27. It was agreed that the instrument would be redrafted and circulated to Council through correspondence at the earliest opportunity for agreement. The updated instrument would include a redrafted exception test for members consideration.

28. Council did not agree a commencement date for the rule change. In discussion, concerns were raised by some members in relation to the development of the API not being ready in time for the new rules coming into force. Some members noted that having the API implemented and available to the legal profession would be preferable prior to the commencement of the new rules. Council's view on the commencement date would be sought in parallel with consideration of the revised instrument.

Item 3: Any other Business

29. There was no other business raised.

Item 4: Date of next meeting

30. The next meeting is scheduled for:

- Monday 12 October 2020

**Scottish Civil Justice Council Secretariat
July 2020**