

**SCOTTISH CIVIL JUSTICE COUNCIL**

**COSTS AND FUNDING COMMITTEE**

**MINUTES**

**PARLIAMENT HOUSE, 10.00AM, MONDAY 16 JUNE 2014**

- Members present:** Lord Burns (Chair)  
Sheriff Charles Stoddart (Retired)  
Sheriff Thomas Hughes (Dundee Sheriff Court)  
James Mure QC  
Lindsay Montgomery (Chief Executive, SLAB)  
Stella Smith (Legal Services Team Leader, Scottish Government)  
Julia Clarke (Principal Advocate, Which?)  
Alan Rogerson (Claims manager, Aviva)
- In attendance:** Gillian Prentice (Deputy Principal Clerk of Session)  
Roddy Flinn (Secretary to the Scottish Civil Justice Council)  
Graham Crombie (Deputy Legal Secretary to the Lord President)  
Neil Robertson (SCJC Secretariat)
- Apologies:** Eric Baijal (Solicitor, SCJC member)  
Mandy Williams (Policy and Legislation Branch, Scottish Court Service)

**Item 1: Introduction, welcome, apologies and private papers**

1. The Chair welcomed those present to the second meeting of the Costs and Funding Committee.
2. The Chair noted that the Scottish Civil Justice Council agreed at its 12 May meeting to Sheriff Clerk observers being replaced by the Scottish Court Service Policy and Legislation Branch and that Mandy Williams, from that Branch, has been appointed as an observer. Mrs. Williams replaces the current sheriff clerk representative Alan Nicol, and the Committee expressed its thanks to Mr. Nicol for his work.
3. The Chair welcomed James Mure QC as the advocate member for this Committee.

4. Apologies were received from Eric Baijal and Mandy Williams.
5. **The Committee agreed not to publish the following papers: 4.1, 4.1A, 4.1B, 4.2 and 4.2A.**

## **Item 2: Proceedings**

*Item 2.1: Minutes of previous meeting [Papers 2.1]*

6. **The Committee approved the minutes of the previous meeting.**

## **Item 3: Forward Work Programme**

*Item 3.1 Update from the Scottish Government [Oral]*

7. **Stella Smith** provided an update from the Scottish Government on legislative developments in three areas.
8. The Committee was advised that the Scottish Government response to the Taylor Report had been published on 3 June 2014, and that the Scottish Government's response divides the recommendations into three distinct categories:
  - a. Chapters 2 to 4 (cost of litigation): The Scottish Government considers that the recommendations in these chapters are mainly for the SCJC to consider and implement. Some of the recommendations will be dependent on the successful passage of the Courts Reform Bill.
  - b. Chapters 7 to 9 (speculative fee agreement and qualified one way costs shifting and damages based agreements), chapter 13 (claims management companies) and chapter 10 (referral fees): the Scottish Government proposes to take these recommendations forward through legislation and engagement with the relevant professional bodies.
  - c. Other issues, where the response sets out how the Scottish Government proposes to take the matters forward.
9. Members were informed that the Justice Committee was considering the Courts Reform (Scotland) Bill ("the Bill") at Stage 2 on 17 June 2014. The Committee was also informed that the debate was likely to cover amendments that could see the introduction of a test for sanction for counsel in the sheriff court, and a presumption in favour of sanction for counsel in sheriff court personal injury actions. It was also

noted that the Bill had already been amended so that the privative limit in the sheriff court would increase to £100,000 and not £150,000 as previously proposed.

10. Finally, the Committee noted that an amendment had been proposed that would seek to amend the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 so as to clarify the Council's powers in relation to the regulation of fees.

*Item 3.2 Making Justice Work Programme, SCJC update [Oral]*

11. **Neil Robertson** informed the Committee that the Scottish Civil Justice Council is to consider a recommendation at its next meeting to change the name of the Rules Rewrite Working Group to the Rules Rewrite Committee. It is also proposed that its remit will be extended to include rules not covered by other committees once the Group's final report is published. The Committee was also advised that Kenny Htet-Khin has been appointed as the Head of the Drafting Team and recruitment for members of the drafting team has been successful with the first member joining in August 2014.

**Item 4: Consideration of Sheriff Principal Taylor's Review**

*Item 4.1 Fees of Counsel in the sheriff court [Papers 4.1 and 4.1A-B]*

12. The Committee considered **Paper 4.1** from the Deputy Legal Secretary seeking the Committee's views on recommendations 17 to 22 of the Taylor Report. These recommendations principally concern aspects of sanction for counsel in the sheriff court (recommendation 17 to 21) and the amount of fees recoverable (recommendation 22).
13. The Committee discussed recommendations 17 to 22 in light of **Paper 4.1A** (a paper by Mr. Mure), the Scottish Government's response to the Taylor Report (**Paper 3.1**) and comments made by Committee members (**Paper 4.1B**).
14. **The Committee agreed that in principle it supported recommendations 17 to 22 of the Taylor Report and agreed that there should be rules specifying the test for sanction for counsel in the sheriff court. The Committee was of the view that any such rules should be flexible in nature. Thereafter, the Committee postponed any further consideration of recommendations 17 to 22 pending the outcome of proposed amendments to the Courts Reform (Scotland) Bill.**

15. **The Committee noted that Mr. Mure wished to record his dissent to the Committee's support for recommendations 17 to 22.**

*Item 4.2 Consideration of recommendations – members' comments [Papers 4.2 and 4.2A]*

16. At its meeting on 24 February 2014, the Committee agreed that its members should undertake detailed consideration of Sheriff Principal Taylor's recommendations by correspondence. **Paper 4.2A** collates members' views on all the recommendations.

17. The Committee considered **Paper 4.2** which sets out in detail members' comments on the Taylor recommendations for which no consensus was reached.

*Additional Fees (recommendations 2, 3, 6, 7, 9 and 13)*

18. **The Committee noted that while it was in favour of recommendations 2 and 3, it had concerns about whether the decision as to the additional percentage could be made at the outset of the proceedings in all types of actions. The Committee agreed that further research was required and that views should be sought from commercial judges and the Consultative Committee on Commercial Actions ("the CCCA").**

19. **After discussion, the Committee agreed that it was in favour of recommendations 6, 7, 9 and 13.**

*Cancellation/Commitment Fees (recommendations 24 and 25)*

20. **The Committee was in favour of recommendation 24 (cancellation fees).**

21. Members discussed the desirability of a commitment fee (recommendation 25). Despite the recommendation that they should play no part in a judicial account, the Committee considered that commitment fees might be appropriate in exceptional circumstances. However, it also considered that it would be necessary to specify clearly the principles which might justify the recoverability of a commitment fee.

22. **The Committee agreed that while recommendation 25 was in general a sound proposal, it was not minded to support an absolute ban on commitment fees.**

Accordingly, it agreed to consider further the principles which might justify departing from the general rule of non-recoverability of commitment fees in exceptional cases.

23. Mr. Mure agreed to prepare a paper on those principles for discussion by the Committee at its next meeting.

*Fees of Experts (recommendation 29)*

24. The Committee noted its support of this recommendation and discussed whether a table of fees for expert witnesses might assist the court in specifying the amount of expenses recoverable in respect of such a witness.

25. The Scottish Legal Aid Board offered to discuss with the Deputy Legal Secretary how such a table of fees could accommodate regular revisions to the level of fees, particularly if the table was intended to apply to a wide range of professional witnesses.

26. The Secretariat was asked to investigate and report on how fees of expert witnesses are determined in England and Wales and any developments in this area.

*Simple Procedure Expenses (recommendation 31)*

27. **Members supported this recommendation** and noted that if mandatory pre-action protocols were introduced it might be possible to have fixed fees in simple procedure personal injury actions.

*Patents County Court (recommendation 33)*

28. It was noted that recommendation 34 already proposes a pilot for summary assessment of expenses in the Commercial Court, and some concerns were expressed about how these recommendations might interact.

29. **The Committee agreed that it would be helpful to have the views of the commercial judges and the CCCA before considering this recommendation further.**

*Fees payable by the insured (recommendation 39)*

30. **The Committee broadly supported this recommendation, and noted the Scottish Government's position in relation to it.**

*Chapters 7 to 9 of the Taylor Report (recommendations 45, 50, 56, 61 and 62)*

31. The Committee noted the Scottish Government's intention to implement chapters 7 to 9 of the Taylor Report through primary legislation and that the Scottish Government intended to consult on these issues. **The Committee indicated its broad support of these recommendations and noted its intention to consider these recommendations further once the Scottish Government's position was known.**

*Disclosure to the Court (recommendation 78)*

32. **After discussion the Committee was of the view that it broadly supported this recommendation. The Committee noted that consideration might have to be given as to the nature of any disclosure of sources of funding and how rules might be drawn so as to prevent unwarranted disclosure.**

33. **Additionally, the Committee agreed to note that the Deputy Legal Secretary had identified that it might be necessary to seek a specific power to give effect to this recommendation, and agreed that this matter should be explored further with the Scottish Government.**

*Legal Aid (recommendation 79)*

34. The Committee expressed its broad support of this recommendation and noted that as part of its response to the Taylor Report the Scottish Government intended to bring forward policy proposals in this area.

*Other Taylor Report Recommendations*

35. Members confirmed they were content with Sheriff Principal Taylor's other recommendations, on which no dissenting views were expressed in correspondence.

36. The Committee discussed in general terms its priorities for taking forward the recommendations that it supports.

37. On the basis that the Committee had reached a view, so far as it was possible to do so at this stage, on all of Sheriff Principal Taylor's recommendations, it agreed that the Secretariat:

- a. could provide a summary of the Committee's consideration of the Taylor Report to the Scottish Civil Justice Council;
- b. is to prepare a draft report from the Committee to the Council on the Committee's proposed approach to implementation of the Taylor Report.

**Item 5: Future business**

*Item 5.1: Date of next meeting*

38. The Secretariat was asked to take forward arrangements for a meeting during the autumn and confirm the proposed date in due course.

**Item 6: A.O.C.B**

39. Mr. Mure indicated that he would contact the Secretariat in connection with certain EU law matters which he thought might touch upon issues within the Committee's remit.

40. Mr. Rogerson mentioned that difficulties had been encountered in relation to accounts of expenses for summary cause personal injury actions, particularly because the table of fees did not appear to reflect the new summary cause PI procedure. The Deputy Legal Secretary advised that this matter had been canvassed on a number of occasions at LPAC, and would be resolved for any summary cause PI actions raised on or after 1 March 2014, which could be charged on the basis of the new table of fees. The Deputy Legal Secretary indicated that LPAC had previously not been persuaded that it was appropriate to amend the table of fees to reflect the new procedure, and that the new table could not be retrospective because the enabling powers did not permit that.

**41. The Committee noted both of these matters.**

**Scottish Civil Justice Council Secretariat  
July 2014**