

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
COSTS AND FUNDING COMMITTEE
MONDAY 24 MAY 2016 AT 4.15PM
JUDGES CONFERENCE ROOM, PARLIAMENT HOUSE**

MINUTES (APPROVED)

Members Present: Sheriff Charles Stoddart (Chair)

Ian Dickson (SLAB)

Denise Swanson (Manager of Policy & Development, Scottish Government)

Sheriff Thomas Hughes (SCJC member & Dundee Sheriff Court)

James Mure QC (Advocate)

Iain Nicol (Solicitor)

Alan Rogerson (Claims Manager, Aviva)

Yvonne MacDermid (Chief Executive, Money Advice Scotland)

Stewart Mullan (Law Accountant)

In attendance: Jane MacDonald (SCTS Policy and Legislation Branch)

Support: John Thomson (Deputy Legal Secretary, Lord President's Private Office)

Stephen Feltham (Deputy Legal Secretary, Rules Rewrite Team)

Susan Brodie (Policy Officer, Scottish Civil Justice Council)

Apologies: Lord Burns (Chair)

Eric Baijal (Solicitor and SCJC member)

Kenneth Cumming (Auditor of the Court of Session)

Gillian Prentice (Deputy Principal Clerk of Session)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed all in attendance and introduced Stephen Feltham from the Rules Rewrite Drafting Team who prepared papers in relation to item 7 on today's agenda.

2. The Chair noted apologies particularly from Eric Baijal as this is Eric's last meeting as a Committee member. This is due to his Council tenure expiring on 27 May 2016. The Committee recorded it thanks to him for all the work he has carried out on behalf of the Committee and Council and wished him good fortune for the future.

3. **The Committee agreed not to publish the following papers: 2.2, 4.2, 5.1, 5.1A, 6.1, 7.1, 7.1A, 7.1B, 7.1C, 8.1 and 8.1A.**

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

4. **Members agreed the minutes from the previous meeting.**

Item 2.2 – Progress of actions from previous meetings (Paper 2.2)

5. **Members noted the progress that had been made on actions since the last meeting.**

Item 3: Proceedings

Item 3.1 – Membership (Oral)

6. The Committee noted the appointment of Lord Boyd and Sheriff Murphy as judicial members of the Council.

7. At its meeting of 16 May 2016, the Council considered a proposal from Sheriff Principal Murray indicating that it would be helpful for each of the Sheriffs Principal to be represented on the Council's Committees. Council members noted that they are currently represented on the Personal Injury Committee and Rules Rewrite

Committee and that a nomination is to be made in relation to the Family Law Committee. Council members agreed that it was not appropriate for standing appointments for Sheriffs Principal to be made to all established committees and that it would be for the Committee Chairs to consider in light of the remit and work of that Committee. The Council agreed to invite the views of Committee Chairs. Sheriff Stoddart, as the Deputy Chair, invited the Costs and Funding Committee to consider the proposal.

8. The Committee considered that if any of the Sheriffs Principal had a particular interest in its remit, that Sheriff Principal should approach the Council to seek specific appointment to the Committee. In relation to general Sheriff Principal representation, given the current size of the Committee, the Committee proposed that a Sheriff Principal could attend, either at the invitation of the Committee or at their request, to discuss any matters of interest as they arise.

Item 4: Work programme

Item 4.1 – Update from the Scottish Government on legislative developments (Papers 4.1, 4.1A and 4.1B)

9. Denise Swanson updated the Committee regarding the Scottish Government's draft proposals on Multi Party Actions and Auditor of Court provisions.

10. After discussion, the Committee noted Papers 4.1A and 4.1B.

Item 4.2 CAFC Work Tracker

11. Members noted this paper.

Item 5: Justice system reform – Taylor report

Item 5.1 – Policy Discussion Paper – Taylor Review (Papers 5.1 and 5.1A)

12. The Committee considered Paper 5.1A – a draft policy paper setting out the Committee's detailed proposals for the implementation of the recommendations made in Chapters 2 to 4 of the Taylor Review.

13. The Committee agreed that it did not wish to explore further, at this present time, the option of implementing selected recommendations in relation to additional fees in the Commercial Court.

14. The Committee discussed the timing for certification of expert witnesses. The Committee's views were split in this area, with proposals suggested including

certification prior to instruction of the expert; before the expert carries out the work; following receipt of the expert's report and before receipt of the expert's fee.

15. **The Committee was unable to agree on an appropriate time for the certification to take place and it was agreed that this matter would be revisited during the preparation of draft rules.**

16. **The Committee did agree that decisions to refuse certification should be *in hoc statu*. The Committee also agreed that decisions to refuse sanction for the employment of counsel should also be *in hoc statu*.**

17. **The Committee agreed that the Policy Discussion paper, as amended, be submitted to the Council for consideration.**

Item 6: Regulation of fees

Item 6.1 Regulation of Fees of Shorthand Writers (Paper 6.1)

18. **The Committee considered Paper 6.1 and agreed to propose a rate of increase for shorthand writers. It was agreed that a draft instrument be produced for the Committee to consider at its next meeting.**

Item 7: Proposals for rules

Item 7.1 Pre-action Protocols (Paper 7.1, 7.1A, 7.1B and 7.1C)

19. **The Committee thanked Stewart Mullan for producing such a detailed paper and thanked Alan Rogerson and Iain Nicol for their input to the content of the paper.**

20. Stewart Mullan informed the Committee the paper fell into two separate areas that were closely related, this being Pre-action Protocols and Pre-Litigation Fees. The Committee first considered the issue of the expenses that should be payable in the event of settlement being achieved in accordance with the compulsory pre-action protocol. Issues of transparency and predictability were at the heart of the matter. Any table of protocol fees required to be equitable, robust and fair, whilst maintaining a reasonable relationship with the court fee table.

21. **The Committee agreed with Stewart Mullan's proposals as set out in Part A of Paper 7.1A:**

- a) **the existing model under the voluntary protocol in which the fee payable comprises an 'instruction' element and a 'completion' element should be adopted;**

- b) there should be two parts to the 'instruction' element – a fixed sum and a flat-rate percentage of the principal sum;
- c) the proposed flat-rate percentage should be calculated with reference to the proposed £25K limit on protocol claims. In the event of the protocol being adopted on a voluntary basis for use on a higher value claim, it is envisaged that the percentage element will be capped at that level;
- d) the same basis of calculation of the 'instruction' should apply whether the claim settles above or below the summary cause / simple procedure threshold;
- e) the 'completion' element should be calculated along the lines of the voluntary protocol – the principal sum being split into bands subject to reducing percentages. The bands should be adjusted to reflect the effect of inflation since the voluntary protocol was introduced;
- f) the protocol should, if possible, address the issue of disagreements over outlays by including provision requiring parties to refer disputes to an auditor for determination.

22. The Committee agreed to postpone discussion of Part B of Paper 7.1A until the next Committee meeting and in the meantime for Stewart Mullan, Alan Rogerson and Iain Nicol to meet and consider Part B, using the same principles and methods as they previously used during their meeting in relation to Part A of Paper 7.1A.

23. The Committee confirm the delegation to attend the Personal Injury Committee (PIC) Meeting on 6 June 2016 would consist of Alan Rogerson and Iain Nicol. The Committee noted Stewart Mullan is unavailable to attend the PIC meeting on this date.

Item 8: AOCB

Item 8.1 Pursuers' Offers (Papers 8.1 and 8.1A)

24. It was noted that the Committee was due to consider draft rules on Pursuers' Offers at its next meeting and that it would probably therefore be premature for the issue to be included for discussion at the joint meeting with the PIC on 6 June 2016.

Item 9: Dates of future meetings

25. **Members noted the dates of future meetings:**

- Monday 27 June at 4.15pm
- Monday 7 November at 4.15pm
- Monday 19 December at 4.15pm

Scottish Civil Justice Council Secretariat

June 2016

APPROVED