

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL  
COSTS AND FUNDING COMMITTEE  
MONDAY 4 FEBRUARY 2019 AT 4.15PM  
JUDGES CONFERENCE ROOM, LEVEL +2 PARLIAMENT HOUSE**

**MINUTES**

**Members Present:** Lord Burns (Chair)

Kenneth Cumming (Auditor of the Court of Session)

Ian Dickson (SLAB)

Elena Fry (SCJC member)

Hamish Goodall (SG)

Andrew Henderson (Thompsons)

Stewart Mullan (Law Accountant)

James Mure QC (Advocate)

Alan Rogerson (Claims Manager, Aviva)

Sheriff Charles Stoddart (Retired)

**Support:**

Andrea Campbell (Secretariat Business Manager, Scottish Civil Justice Council)

Roddy Flinn (Legal Secretary to the Lord President)

**Apologies:**

Nicola Anderson (SCTS LIT observer)

Christina Bardsley, Depute in Charge of Offices of the Court of Session (Observer)

Sheriff Thomas Hughes (SCJC member & Dundee Sheriff Court)

Yvonne MacDermid (Chief Executive, Money Advice Scotland)

Brandon Malone (SCJC member)

David Smith (SCTS LIT observer)

## **Item 1: Welcome, apologies and agreement of private papers**

1. The Chair welcomed those present and noted the apologies received from Christina Bardsley, Sheriff Hughes, Yvonne MacDermid, Brandon Malone, Nicola Anderson and David Smith.
2. **The Committee agreed not to publish the following papers: 2.2: 3.2: 4.1: 4.1A-D: 4.2: 4.2A-G: 5.1: 5.1A**

## **Item 2: Previous meeting**

### *Item 2.1 – Minutes of previous meeting (Paper 2.1)*

3. **The Committee agreed the minutes from the previous meeting.**

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

4. **The Committee noted the progress that had been made on actions since the last meeting.**

## **Item 3: Work Programme**

### *Item 3.1 – Update from the Scottish Government on legislative developments (Oral)*

5. Hamish Goodall provided the Committee with an update on legislative developments in the Scottish Government.
6. He advised that the deadline for written evidence on the proposed Children (Equal Protection from Assault) (Scotland) Bill had passed. Oral evidence sessions would now begin; Stage 1 will be completed by 31 May 2019.
7. Mr Goodall also noted that the Prescription (Scotland) Bill received Royal Assent on the 18 December 2018.
8. He indicated that the Stage 3 of the Damages (Investment Returns and Periodical Payments) (Scotland) Bill would be held in March 2019 and that introduction of the Family Law (Scotland) Bill will be delayed until after the summer recess this year.

### *Item 3.2 – Business Tracker (Paper 3.2)*

9. **Paper 4.2, which provided an update of the Committee's work, was noted.**

#### **Item 4: Justice System reform: Courts Reform**

##### *Item 4.1 – Section 8: Qualified One Way Cost Shifting (Papers 4.1 and 4.1A-D)*

10. Roddy Flinn introduced these papers which invited members to consider and comment on a first draft of the proposed Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules, Ordinary Cause Rules and Summary Cause Rules Amendment) (Qualified One Way Costs Shifting) 2019 (**Paper 4.1A**). The draft instrument introduces a new chapter to each set of court rules; the Rules of the Court of Session, the Sheriff Appeal Court Rules, the Ordinary Cause Rules and the Summary Cause Rules.

11. The Committee discussed the issues raised in Paper 4.1. In particular, consideration was given to tenders and whether a provision allowing an opponent to seek to dis-apply QOCS, where liability in expenses has been occasioned by late acceptance of a tender (as opposed to a failure to beat a tender), is appropriate. **The Committee agreed to instruct draft rules allowing provision for the disapplication of QOCS where a claimant unreasonably delays in accepting a tender.**

12. The Committee considered the approach in respect to abandonment, the 75% rule and procedure. **The Committee agreed that the while the judge would have complete discretion in the matter of expenses, following abandonment it would be appropriate to limit the courts discretion to the extent required by the 75% rule.**

13. The Personal Injury Committee (PIC) members previously indicated to the Committee that where appropriate, it would wish to contribute to the development of rules in respect to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (“the Act”). **The Committee agreed to share the draft instrument with PIC members and noted that it would welcome its comments before the final version is sent to Council for consideration.**

14. The Committee discussed whether QOCS should be excluded where the defender is an uninsured individual; provision is made in the Act to review this after 5 years from the date of Royal Assent. **The Committee agreed this should be kept under review and invited PIC when looking at the draft instrument to consider further.**

*Item 4.2 –Section 11: Awards of Expenses Against Legal Representation (Papers 4.2 and 4.2A-G)*

15. Roddy Flinn introduced these papers which invited invites members to consider and comment on a first draft of the proposed Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules, Ordinary Cause Rules, Summary Cause Rules and Simple Procedure Rules Amendment) (Expenses against Legal Representatives) 2019 (**Paper 4.2A**). The draft instrument makes amendments and introduces a new chapter to each set of court rules; the Rules of the Court of Session, the Sheriff Appeal Court Rules, the Ordinary Cause Rules and the Summary Cause Rules.

16. The Committee discussed the issues raised in Paper 4.2. **Members agreed that the existing common law relating to awards of expenses and other sanctions where there has been an abuse of process should not be excluded by the rules.**

17. The Committee considered further whether the court's power should, as at presently shown in the draft instrument, be limited to finding the culpable representative liable to parties other than the party he or she represents, but not his or her own client. **On balance, members considered that was preferable. Members agreed that the provision whereby it was not possible for a legal representative to evade the consequences of his or her behaviour by resigning from acting was appropriate.**

18. **The Committee discussed and agreed that where an award of expenses was to be made against a legal representative, it should be competent to seek an additional fee/percentage increase.**

**Item 5: Rules review and implementation procedures: Regulation of Fees**

*Item 5.1 – Request for uplift in fees from SMASO (Papers 5.1 and 5.1A)*

19. The Committee considered a written submission from the Society of Messengers-at-Arms and Sheriff Officers (SMASO) requesting an increase in the Tables of Fees for Sheriff Officers and Messengers-at-Arms.

20. The Committee considered its next steps regarding tranche 2 of the Review of Fees in the Scottish Civil Courts for the fees of all others, including messengers at arms and sheriff officers. **It was agreed that the Secretariat should write to SMASO to seek further information in relation to the request for the increase. A draft letter is to be circulated for comment.**

**Item 7: A.O.C.B.**

21. No other business was raised.

**Item 8: Dates of future meetings**

22. Members noted the date of the next meeting:

- Monday 13 May 2019 at 4.15pm

**Scottish Civil Justice Council Secretariat  
February 2019**