

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
COSTS AND FUNDING COMMITTEE
MONDAY 5 NOVEMBER 2018 AT 4.15PM
JUDGES CONFERENCE ROOM, LEVEL +2 PARLIAMENT HOUSE**

MINUTES

Members Present: Lord Burns (Chair)

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

Ian Dickson (SLAB)

Elena Fry (SCJC member)

Hamish Goodall (SG)

Andrew Henderson (Thompsons)

Yvonne MacDermid (Chief Executive, Money Advice Scotland)

Stewart Mullan (Law Accountant)

James Mure QC (Advocate)

Alan Rogerson (Claims Manager, Aviva)

Sheriff Charles Stoddart (Retired)

Support: Andrea Campbell (Policy Officer, Scottish Civil Justice Council)

Roddy Flinn (Legal Secretary to the Lord President)

Apologies: Kenneth Cumming (Auditor of the Court of Session)

Sheriff Thomas Hughes (SCJC member & Dundee Sheriff Court)

Brandon Malone (SCJC member)

Nicola Anderson (SCTS LIT observer)

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 Kenneth Cumming, Sheriff Hughes, Brandon Malone, and David Smith who was attending in place of Nicola Anderson on behalf of SCTS Legislation Implementation Team.
2. The Chair welcomed Roddy Flinn, who is attending in place of John Thomson as support from the Lord President's Private Office.
3. **The Committee agreed not to publish the following papers: 2.2; 3.1; 3.1A-B; 3.2; 3.2A; 4.2; 5.1; 5.1A; 5.1C; 5.2; 5.2A; 5.3; 5.3A-B; 6.1; 6.1A**

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

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

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

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

Item 3: Justice System reform: Courts Reform

Item 3.1 – Taxation Rules and Taxation Procedure (Papers 3.1 and 3.1A-B)

6. Roddy Flinn introduced these papers. Paper 3.1 invited the Committee to consider further revisions to two draft Acts of Sederunt: Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 (**Paper 3.1A**) and Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules and Ordinary Cause Rules Amendment) (Taxation of Judicial Expenses) 2019 (**Paper 3.1B**).
7. **The Committee considered and approved the amendments to both draft instruments at Papers 3.1A and 3.1B and that they should be submitted to the Scottish Civil Justice Council for consideration.**

Item 3.2 – Implementation of Taylor Recommendations – Summary (Papers 3.2 and 3.2A)

8. The Committee was invited to consider Paper 3.2A, which provided the Committee with a summary on the position on the Council's implementation of the recommendations in Chapters 2 to 4 of Sheriff Principal Taylor's Review. **It was agreed that the summary Paper 3.2A be submitted to the Council for consideration and to approve the publication of the document.**

9. The Committee noted that the implementation of recommendations 4, 8 and 10, relating to block table of fees, will be addressed in conjunction with the rules rewrite project.

10. The Committee agreed that recommendation 30 of Sheriff Principal Taylor's Review in relation to fixed expenses, is a matter already governed by primary legislation and agreed not to take this recommendation forward. At the Committee's 29 January 2018 meeting, the Committee was invited to consider the implications of the judgment in *Graham v Farrell* in relation to expenses in simple procedure cases. The issue concerning the terms of the of The Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 was highlighted again and remitted to Scottish Government representative.

11. It was agreed recommendation 32 should be considered further and that a policy paper would be prepared for consideration at a future meeting.

Item 4: Work Programme

Item 4.1 – Update from the Scottish Government on legislative developments (Oral)

12. Hamish Goodall provided the Committee with an update on legislative developments in the Scottish Government. He intimated that a consultation on regulation of success fee agreements under regulation 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 will be launched by the Scottish Government on 8 November 2018.

Item 4.2 – Business Tracker (Paper 4.2)

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

Item 5: Scottish Legislation: Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018

Item 5.1 – Rules request under Section 8: Qualified One Way Cost Shifting (Papers 5.1 and 5.1A-C)

14. Roddy Flinn introduced these papers. Paper 5.1 invited members to consider a policy paper submitted by the Scottish Government seeking rules of court on section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (“the Act”) in relation to qualified one-way cost shifting (“QOCS”) at Paper 5.1A.

15. The Scottish Government agreed with the conclusions of the Scottish Civil Justice Council Personal Injury Committee (“PIC”) and that rules of court are required in order to provide further exceptions from the general rule whereby the pursuer will lose the benefit of QOCS where; there is failure to beat an offer; the case is summarily dismissed; and the case is abandoned.

16. **The Committee was content for an initial draft of rules relating to Qualified One-Way Costs Shifting to be prepared for consideration on the basis of the PIC policy recommendations.** Members discussed general matters and proposed exceptions provided for in sections 8(2), 8(4), 8(6) of the Act and in particular discussed appeals at some length. **Members are content with a retrospective test and not prospective one.**

Item 5.2 – Rules request under Section 9: pro bono work (Papers 5.2 and 5.2A)

17. Roddy Flinn introduced these papers. Paper 5.2 invited members to consider a policy paper submitted by the Scottish Government seeking rules of court on section 9 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 relating to the *pro bono* provisions.

18. **Members considered and provided its views on Papers 5.2 and 5.2A, and was content for an initial draft of rules relating to *pro bono* work to be prepared for consideration at the next appropriate meeting.**

Item 5.3 – Rules request under Section 11: Awards of Expenses Against Legal Representation (Papers 5.3 and 5.3A-B)

19. Roddy Flinn introduced these papers. Paper 5.2 invited members to consider a policy paper submitted by the Scottish Government seeking rules of court on section 11 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 relating to awards of expenses against legal representatives.

20. **Members agreed that there should be no attempt to define the term 'serious breach of duties' by rules or that the power to make an order for legal expenses should not be extended to any third party.**

21. The Committee considered whether the court's power should as at present, 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. **Members agreed this area should be considered further and seek input from the Law Society of Scotland, Faculty of Advocates, and commercial representatives to seek input in relation to their role and procedures in place.**

22. **Members considered section 11 of the Act and it was agreed that rules should be drafted on the decision agreed at the Committees 28 May 2018 meeting (to limit the power conferred to a power to award expenses in so far as occasioned by the breach of duty and should guarantee the representative a right to appear and be represented in relation to any motion for expenses) .**

Item 6: Rules review and implementation procedures: Regulation of Fees

Item 6.1 – Review of Solicitor's Fees – Analysis of Responses (Papers 6.1 and 6.1A)

23. **Paper 6.1** invited the Committee to consider the analysis of responses to its Consultation on the Review of Fees in the Scottish Civil Courts: Fees of solicitor.

24. Members discussed the analysis and identified that a number of responses raised some valid points; in particular there is a notable concern of impact of technology in respect of the management of electronic documents. Members agreed that the analysis may be of interest to other Committees and that it be shared with the Commercial Court Users Group, Personal Injury Committee and Information Communication and Technology Committee. **Members approved the analysis at Paper 6.1A for submission to Council for publication on the Council's website and agreed that the responses will be taken into account in future fees reviews.**

Item 7: A.O.C.B.

25. No other business was raised.

Item 8: Dates of future meetings

26. Members noted the date of the future meeting:

- Monday 4 February 2019 at 4.15pm

**Scottish Civil Justice Council Secretariat
November 2018**