

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

PERSONAL INJURY COMMITTEE

MONDAY 11 OCTOBER 2021 at 9.30AM

BY WEBEX

MINUTES

Members Present: Lord Armstrong (Chair)

Lord Boyd (Judicial member)

Sheriff Principal Stephen (Judicial member)

Sheriff R D M Fife (Judicial Member)

Maria Maguire QC (Advocate member)

Amber Galbraith QC (Advocate member)

Gordon Keyden (Solicitor member)

Ronnie Conway (Solicitor member)

Campbell Normand (Solicitor member)

Fraser Simpson (Solicitor member)

Walter Drummond-Murray (Scottish Government standing member)

Marie-Louise Fox (SLAB standing member)

Alan Rogerson (Consumer member)

In attendance: Christina Bardsley (Court of Session)

Mark Kubeczka (SCTS Legislation Implementation Team)

Support: Jessica Flynn (Secretariat Business Manager, Scottish Civil Justice Council)

Kelly Jack (Policy Officer, Scottish Civil Justice Council)

Emma Laurie (Policy Officer, Scottish Civil Justice Council)

Ian Vickerstaff (Deputy Legal Secretary, Lord President's Private Office)

Apologies: none received

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present.
2. **The Committee agreed not to publish the following papers: 4.1; 4.1A-B; and 4.2.**

Item 2: Previous meeting

Item 2.1 – Items by correspondence (oral)

3. Kelly Jack provided members with an update on committee action since the previous meeting:
 - Sheriff Fife has been appointed as judicial member following the retirement of Sheriff McGowan;
 - Campbell Normand has been reappointed to committee for a further 3 year period;
 - Amber Galbraith was appointed Queens Counsel in September 2020;
 - The Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment)(Qualified One-Way Costs Shifting) 2021 came into force on 30 June 2021; and
 - The Clinical Negligence Pre-Action Protocol has been considered by way of correspondence and has been tabled for further consideration today.
4. **The Committee noted the update.**

Item 3: Work Programme

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

5. Walter Drummond-Murray provided the Committee with an update on legislative developments in the Scottish Government:

- Noted the ongoing commencement of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, including Group Proceedings and Qualified One-Way Costs Shifting. A statutory review of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 will be due under the operation of Part 5 of the Act.
- Noted the legislative programme announced by the First Minister at the Programme for Government, which included Bills on legal aid and a consultation on legal profession regulation.
- Drew attention to forthcoming consultation on court fees, and on-going work to support the courts recovery, renewal and transformation process post Covid-19 pandemic.

6. **Members noted the update.**

Item 4: Rules review and implementation of procedures

Item 4.1 – Clinical Negligence Pre-Action Protocol (Papers 4.1 and 4.1A-B)

7. Ian Vickerstaff invited committee to consider Papers 4.1 and 4.1A-B on the compulsory Clinical Negligence Pre-Action protocol.
8. Members had previously considered a version by correspondence in April of this year. The comments received required the Lord President's Private Office and Secretariat to consult with the working group on taking forward the suggested changes.
9. The amendments made to the protocol concern the receipt of health records and references to the various statutory regimes in place to govern the provision of this information. Timescales contained in the last version of the protocol have been removed given that they are provided for in those statutory regimes and do not require to be replicated.
10. Committee raised a query in respect of the current drafting with health trusts being described as an indemnifier. Secretariat resolved to contact the Central Legal Office and Medical & Dental Defence Union of Scotland to clarify.
11. **The Committee:**
 - **Approved that subject to the query raised in paragraph 10, the Protocol be submitted to the Scottish Civil Justice Council, and thereafter to CAFC for the development of a fee structure.**
 - **Nominated Amber Galbraith and Maria Maguire of the committee in addition to Lyn Beattie, Darren Deery and Norma Shippin of the sub-**

group to the Council to provide assistance to CAFC should that committee wish for cross-committee participation when considering a fee structure.

- **Extended its thanks to members of the sub-committee for their careful consideration of the protocol.**

Item 4.2 – Damages (Investment Returns and Periodical Payments)(Scotland) Act 2019 (Papers 4.2 and 4.2A)

12. Kelly Jack invited members to consider **Papers 4.2 and 4.2A** which discussed the Damages (Investment Returns and Periodical Payments)(Scotland) Act 2019 which received Royal Assent in April 2019. The Act puts in place a new statutory regime for calculating the discount rate which should be applied to future pecuniary losses for PI cases and gives courts the power to impose periodical payment orders.
13. The Scottish Government have no immediate plans to enact various relevant provisions of the Act and have yet to provide a policy paper to Committee.
14. It is anticipated that court rules will be required to implement parts of the Act concerning periodical payments. Committee agreed that the Secretariat and Lord President's Private Office should begin preliminary work on identifying requirements to implement the provisions prior to the Scottish Government lodging a policy paper.
15. Committee considered whether a sub-group would be beneficial in the drafting of rules given the complexity of Periodical Payment Orders and that there are relatively few in Scotland. It was suggested that practice in England and Wales should be observed as orders are more common in this jurisdiction.
16. **The Committee considered and provided views on Paper 4.1 agreeing:**
 - **The Secretariat and Lord President's Private Office should proceed to undertake preliminary work on requirements to support implementation of the Act.**
 - **A sub-group should be created due to the complexity of Periodical Payment Orders.**
 - **That Gordon Keyden, Maria Maguire QC and Amber Galbraith QC sit on the sub-group, with Fraser Simpson and Alan Rogerson providing names of colleagues who may be in a position to assist.**

Item 5: A.O.B

17. Maria Maguire QC raised the matter of a committee response to the Scottish Civil Justice Council's consultation on Mode of Attendance at Court Hearings. Members agreed it would be helpful for individual responses of committee members provided so far be circulated to assist members in their consideration of the issues raised.

18. It was agreed that the responses already received by Secretariat would be circulated to committee.

19. Ronnie Conway raised that he had forwarded a query to the Secretariat on Recovery of Documents and had a further query in respect of the closing of the record in Personal Injuries cases. Ronnie requested that the matters be tabled as an agenda item for the next meeting.

20. It was agreed that Mr Conway would write to the Secretariat outlining his concerns.

Item 6: Dates of future meetings

21. Members were advised that a date would be identified early in 2022 for consideration of the Personal Injury Pre-Action Protocol review methodology and to provide an update on the work undertaken on the Damages (Investment Returns and Periodical Payments)(Scotland) Act 2019.

Scottish Civil Justice Council Secretariat

October 2021