

RULES PROPOSALS: AMENDMENTS TO FEES OF SHERIFF OFFICERS AND MESSENGERS AT ARMS

Policy Proposal

1. The Scottish Civil Justice Council is invited to:

- approve a draft rules instrument at **Paper 3.2A** amending the fees of Sheriff Officers and Messengers at Arms by applying a 6% increase to the table of fees set out in the Act of Sederunt (Fees of Sheriff Officers) (No. 2) 2002 and the Act of Sederunt (Fees of Messengers-at-Arms) (No. 2) 2002 and to submit the draft rules to the Court of Session for consideration and approval, subject to any stylistic or typographical amendment; and
- agree that no policy note is required to accompany the draft rules.

2. A request from the Society of Sheriff Officer's and Messengers at Arms (SMASO) (**Paper 3.2B**) seeking an increase to their fees was considered by the Council's Costs and Funding Committee on 04 February 2019, 05 March 2019, 09 Sept 2019, 25 October 2019, 09 December 2019 and 09 November 2020.

Timing

3. The fee request was lodged by SMASO in February 2019. It would therefore be preferable to implement this change as soon as possible to provide SMASO members with a resolution to the outstanding request.

Rationale

4. The Council's functions under section 2 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013¹ include the preparation and submission to the Court of Session of draft fees rules. This includes the fees of Sheriff Officers and Messengers-at-Arms in relation to proceedings in the Court of Session and civil proceedings in the sheriff court and Sheriff Appeal Court.
5. The following fee increases were authorised from 2009 to the point at which the Council was established:

¹ <https://www.legislation.gov.uk/asp/2013/3/section/2>

- SSI 2008/431 – 4.35% from 12 Jan 2009
 - SSI 2011/48 – 3.6 % from 01 Mar 2011
 - SSI 2011/431 – 3.8 % from 23 Jan 2012
 - SSI 2012/340 – 2.45% from 28 Jan 2013
 - SSI 2013/346 – 2.15% from 27 Jan 2014
6. The Council has previously approved fee increases on two occasions:
- SSI 2016/100 - 1.3% from 1 April 2016; and
 - SSI 2018/126 - 2.6% from 4 June 2018. Fees have remained unchanged since the 2018 uplift.
7. Historically, fee increases have followed the rate of inflation. The last fee increase of 2.6% took account of the overall inflation increase of 5.1% in the period from February 2016 to December 2017. At that time, the Council noted it was projected that the annual inflation rate would continue at well in excess of 2% for some time.
8. The Council was satisfied that an increase at that stage was justified and appropriate and considered 2.6% as a fair settlement pending a review of fees and having regard to the level of price inflation and the impact on those whom the burden of any increase would ultimately fall.
9. The Council is now invited to approve a 6% fee increase. The proposed figure is arrived at by the Committee, taking account of a blend of the Consumer Price Index (CPI) and the Consumer Price Index including Owner-Occupier Housing costs (CPIH) over the period 2009 to 2020.

Issues raised during policy development stages

10. As a result of the request for a fee increase, the Committee considered the proposed methodology for reviewing the tables of fees and were of the view that any increase should be evidence based. The Committee sought evidence from SMASO demonstrating how appropriate fee levels (and therefore proposed increases) were established for their work, having regard to fee income, overheads including premises, staff costs, IT costs etc. and reasonable remuneration for principals.
11. In December 2019, the Committee considered a preliminary report prepared by Stewart Mullan on SMASO's proposals for a fees consultation methodology alongside a letter from SMASO responding to the report. SMASO proposed using Activity Based Costing. The Committee discussed a number of specific issues arising from this proposal. In particular, members noted concerns that the small pool of companies in the industry means there is potential risk that even

minor inaccuracies in evidence gathering could skew the outputs considerably. In addition, the sample size proposed (9 out of 26 companies) means it is highly likely that the outcome of the costing exercise would be unreliable. Members noted that this methodology would result in a costly annual exercise for SMASO and that there may be little incentive for companies to make efficiencies for the benefit of consumers. The Committee concluded that Activity Based Costing would not produce sufficiently robust results for the purposes of the Committee and so rejected this methodology.

12. The Committee concluded that in all the circumstances, the previous method of utilising external sources such as the Consumer Price Index would be a more realistic marker. In this regard, the Committee agreed in principle that a 'blended calculation', based on an average of three indices would be appropriate. The Committee recognised that in adopting this approach, it had come full circle in terms of policy but acknowledged that this decision was now based on a clearer understanding of the internal and external issues applicable and balances the need for fairness to the industry with openness and accountability to court users.
13. The Committee invited Stewart Mullen to prepare a report to consider the impact of three recognised Inflation Indices with a view to determining which, if any, offers the most reliable source data for use by the Committee when considering representations from professional bodies in support of fee increases. The report (**Paper 3.2C**) considered data provided by the Office of National Statistics ("ONS") and, in particular, three indices being:
 - The Retail Price Index
 - The Consumer Price Index
 - The Consumer Price Index including Owner-Occupier Housing Costs
14. Previous data considered by the committee had revealed that any examination of available data produced significant variations according to the start year and the period examined. The report noted that of the three indices, the RPI tends to be the most volatile and also produces the highest year on year increases in the longer term. CPI and CPIH tend to be more consistent but also produce smaller average annual increases.
15. The report noted that the RPI is no longer used by ONS as an accredited index for the purposes of measuring inflation (although it is used by some UK Government departments as the source index for certain state-controlled charges such as rail fares). It is accepted generally that it tends to overstate the true rate of inflation for the purposes of base cost calculation. The report recommended that RPI should not be regarded as a reliable source of data for the purposes of CAFC deliberations.

16. The report recognised that the 2008 financial crisis impacted upon all three indices and that any comparative exercise encompassing this period would require to reflect the way in which the downturn in the economy and government-induced stimulus impacted upon the various indices in the period thereafter.
17. The report noted that both the Law Society of Scotland and SMASO obtained fee increases in 2008/9 and suggested that this would be a suitable base year for the purpose of calculating the appropriate rate of increase. 2014 was suggested as an alternative if members felt a start position sufficiently removed from the 2008 crash was preferable. These base years gave indicative inflation figures over a ten and a five year cycle respectively (at the time the tables were compiled). Additionally, the Judicial Tables of Fees for Solicitors were revised in both years thereby providing directly comparable figures on the impact of adopting any particular index or blend.
18. The report provides data sets over these timespans using information extracted from ONS sources for each index together with results based upon the blended approach. The tables have subsequently been updated to include data from 2020.
19. It is observed that the 2009-2019 period is impacted by the 2008-2009 recession which was followed by a period of higher than normal inflation and negative growth. It is noted that the figures for 2020 have been impacted by Covid 19 as our economy is not properly functioning at the moment.
20. Based upon the reliability of the evidence and the stability of the source data, the report recommended that CAFC consider adopting the CPI index, the CPIH index or a blend of both. It recommended that the RPI index should not be used either as an individual source or as part of the blended data. The report recommended that the committee do not go beyond adopting the approved Index as a preferred source subject to further data being considered. This was on the basis that adopting any sole source would turn the task of reviewing fee rates into a mechanical exercise without the flexibility of responding to other factors not forming part of the data available.
21. The Committee considered the report on inflation indices by correspondence in February 2020. In particular, which time span would be appropriate for assessing the fee increase and which index blend was favoured.
22. Regarding the indices, those responding agreed the recommendation that the RPI should not be utilised and the majority agreed on an index blend of CPI/CPIH. There was initially a lack of consensus of approach by members regarding the appropriate time span for calculating an increase.

23. The Chair considered all the available information along with members' comments and proposed that the Committee approve an uplift of 6%, based on a blend of CPI/CPIH over the period 2009 to 2019. This proposal took account of the inflation figures over the ten-year period proposed in the report and utilised the index blend favoured by members. The proposed 6% increase took account of the fee uplift approved by the Council in 2018 and incorporated an element of inflationary uplift. This blended approach most closely matched the views of those members who responded to the inflation indices report.
24. The Committee approved this proposal on 10 November 2020 and submitted a draft rules instrument containing new tables of fees to Council for approval.
25. Having considered the proposed fees increase, the Council requested some further background information (now incorporated in this paper) and requested that the data sets be brought up to date. As noted previously, the tables now include data for 2020. Some members noted concern at the 6% increase proposed which is considerably higher than annual public pay increases agreed in the Scottish budget.
26. The current fees regulation were made in 2002. Annex A and B provide tables to show the pattern of % increases for every amendment order made since 2002. The indexation is provided on the same two baseline years used in the report i.e. 2009 & 2014. The tables provide a check on the level of proposed increase over those two periods (under both CPHI only, or the blended CPI / CPHI).
27. These tables indicate that the proposed figure of 6% appears to be a reasonable uplift to bring fees up to a fully inflation adjusted position (backdated to June 2018). Members may wish to note recent changes to the legal aid regulations² which provide a 5% increase to fees and outlays for legal aid and advice and assistance.
28. The Council will note that the Committee grappled with the methodology question and had considerable difficulty in finding an alternative to an inflationary increase. In their responses to the draft fees instrument, the Scottish Government and SLAB noted there is considerable read across to debates about whether/how to uprate other fee regimes, legal aid in particular. SLAB noted it was unable to suggest an evidence-based and methodologically sound alternative and advised that an expert group on legal aid payment arrangements has been considering these complex issues for some time now and continues to explore possibilities.

² SSI 2021/56 Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2021 came into force on 22 March 2021.

29. The Secretariat requested further information from Mr Mullen regarding an appropriate base month for future fee calculations. Mr Mullen advised that indices are subject to discernible monthly and seasonal variations. For example, in a typical year the indices normally dip in January and are at their highest in December so any range that covers periods of less than 12 months or a little more than 12 months runs the risk that it will not properly reflect the typical annual cycle. Mr Mullen therefore recommends that a specific month in a specific year be chosen and that all calculations be based on the chosen month being given a value of 100 base points. It is recommended that the Council consider January, failing which April 2015 as the base month as the ONS now use 2015 as the base year for all of their indices. This means that in future, it will be much more straightforward to identify the exact movement in each index as it will correspond with the ONS data in percentage terms.
30. Taking account of all available information, the Council may wish to proceed with approving the 6% inflationary increase proposed by the Committee on the clear understanding that an alternative approach still needs to be found (as suggested above, the work of the SLAB expert group may assist in that regard).
31. Council may also wish to note that recognising the failings of RPI, HM Treasury have a consultation underway on how the measurement can be improved. Once HM Treasury publish their final paper it may be worthwhile considering whether the RPI should form any future role in fee calculations.
32. Members may wish to approve January 2015 as the base month for calculations of any subsequent inflationary fee increases prior to implementation by Council of any new fee regime.

Compatibility with SCJC guiding principles

33.

Principle	Compatibility
<i>The civil justice system should be fair, accessible and efficient</i>	The draft rules provide appropriate fees chargeable for those carrying out relevant services in civil court proceedings and are designed to be fair, taking account of inflation and the impact on those whom the burden of the fee increases will fall.
<i>Rules relating to practice and procedure should be as clear and easy to understand as possible</i>	The rules amend provisions in existing Table of Fees and are designed to be clear and easy to understand. The rules employ a gender neutral drafting style.

<i>Practice and procedure should, where appropriate, be similar in all civil courts</i>	These rules make provision for the fees chargeable under civil court proceedings - no changes have been made to civil court practice or procedure.
<i>Methods of resolving disputes which do not involve the courts should, where appropriate, be promoted</i>	There is no scope within the context of these rules to promote methods of resolving disputes out with the courts.

Links to other initiatives

34. This rules instrument is linked to the Council's wider ongoing review of civil court fees.

Implementation

35. The Secretariat will share the approved rules instrument with the Scottish Courts and Tribunals Service Legislation Implementation Team in order that it may consider the impact of the rule changes on staff training and guidance and IT systems. The Judicial Institute will also be provided with a copy of the rules for consideration.

Consultation

36. The Secretariat and LPPO have consulted SMASO during the development of this rules instrument.

Legal advice

37. Legal advice is included in this paper.

Policy note

38. The Secretariat recommends that no policy note is required to accompany this rules instrument when it is laid in Parliament.

Recommendations

39. The Council is invited to:

- **approve the draft rules instrument at Paper 2020/08A amending the tables of fees payable to Sheriff Officers and Messengers at Arms and to submit the draft rules to the Court of Session for consideration and approval, subject to any stylistic or typographical amendment; and**
- **agree that no policy note is required to accompany the draft rules.**

Scottish Civil Justice Council Secretariat

April 2021