

# MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

## SCJC COSTS AND FUNDING COMMITTEE

21 MARCH 2023 AT 4.15 PM VIA WEBEX

### MINUTES

**Members Present:** Lord Harrower (Chairman)

Ian Dickson  
Susan Black  
Laura Blane  
Sheriff Hughes  
Stewart Mullan  
Robin Macpherson

**In attendance:** Craig Anderson

**Support:** Craig McCorkindale  
Karen Stewart  
Paula Preston

**Apologies:** Alan Rogerson  
Ryan McRobert  
David Smith

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

1. The Chairman welcomed those present and noted the apologies tendered.
2. **The Committee agreed the following papers would not be published:  
Papers 4.1, 4.1A, 4.1B, 4.2, 4.2A, 4.3, 4.3B, 5.1**

#### **Item 2: Items by correspondence (Paper 2.1)**

3. The Chair introduced **Paper 2.1** which advised members of the outcome of consideration of matters by correspondence since the last meeting. One matter was considered:
  - Paper 2022/26 invited members to approve the minutes of the meeting held on 31 October 2022. The minutes were approved and published on the SCJC website.
4. **The Committee noted the content of the paper.**

### **Item 3: Work Programme**

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

5. Susan Black provided the Committee with an update on legislative developments in the Scottish Government:
  - UNCRC Bill - likely to progress to reconsideration stage ahead of summer recess.
  - Gender Recognition Reform Bill – pending ministerial input following appointment of new First Minister. Deadline for any judicial review application is 13 April 2023.
  - Trust and Successions Bill – introduced in November 2022 - indicative dates are stage 1 (October 2023), stage 2 (December 2023) and stage 3 in early 2024.
  - National Care Services Bill - stage 1 is complete. No further timetable dates are available.
  - Bankruptcy and diligence Bill and Legal Services Bill – timetable dates will be announced in the coming weeks.
  - Legal aid reform work is ongoing - there is no agreed timetable for introduction of a Bill and it is likely to be 2024 before progress is made.
  - UKG Retained EU Law Bill - second reading in UK Parliament on 19 April 2023.
  - Moveable Transactions Bill – stage 2 completed today. Stage 3 due to be completed May with a view to commencement in summer 2024.
  - Civil Litigation (E & GP) (S) Act 2018 – commencement of remaining sections is pending the making of civil court rules. Draft commencement orders are ready.
  - Various Tribunals are due to transfer functions with related regulations coming into force on 1 April 2023.
  - Noted that the Ministry of Justice is undertaking a strategic review of court fees in England and Wales and is currently evidence gathering. SG will be interested in the outcomes which are hoped will be available before SG's own fees review scheduled for 2025.
  - The next Scottish Law Commission report is due to be published before end of 2023.

#### **6. The Committee noted the update.**

### **Item 4: Proposals for rules**

#### *Item 4.1 - Pre Pre-Action Protocol Fees: Working Group Report (Papers 4.1, 4.1A, Annexes, 4.1B)*

7. The Chair invited Sheriff Hughes to provide an overview of the Working Group Report (Paper 4.1A). Sheriff Hughes outlined the key aims of the protocols and the policy matters considered by the Working Group in developing supporting fee structures.
8. The Committee noted that the policy aims of the PAPs are to assist parties to avoid the need for, or mitigate the length and complexity of, civil proceedings by encouraging the fair, just and timely settlement of disputes prior to the commencement of proceedings; and good practice, as regards:
  - early and full disclosure of information about the dispute;
  - early investigation of the circumstances surrounding the dispute; and
  - the narrowing of issues to be determined through litigation in cases which do not reach settlement under the Protocol.
9. The Committee acknowledged that various practical issues exist in litigating disease and clinical negligence cases. The Working Group has considered the key issues during development of a viable fees structure for each protocol:
  - issues of proportionality - which include considering the value of the claim, the potential for costs savings (in court time and judicial resources) and that remuneration is relative to the degree of complexity/specialist knowledge of the work undertaken;
  - provision for outlays incurred from third parties;
  - how to evaluate matters in multi-party claims and how fatal cases are to be treated under the protocols;
  - fairness to both parties including provision of a clear mechanism for resolving disputes about fees;
  - the pursuer's ability to litigate in the event of non-compliance with the PAP and sanction for lack of compliance with PAP
10. With a view to fulfilment of these overarching policy aims, the Committee noted that options for fee models were considered including fixed fees, tiered fees based on value of claim and variable scaled fees. Each of the prospective fee models now proposed provides criteria for an investigation fee, a settlement fee and proposals on how fatal cases/multi-party claims are to be treated.
11. With regard to fatal claims, the sub-groups suggest that CN claims should fall within the scope of the protocol but that disease cases be out with scope.

12. Mr Mullen was invited to provide an overview of Paper 4.1B which provided his analysis of the protocol proposals.

13. The Committee discussed the papers and relevant issues arising. Following full consideration, there were certain matters of policy which remain unresolved. In particular:

#### *Fatal cases*

14. The Committee discussed the differing approach to fatal cases in each of the protocols. There was no agreement reached on the way forward for incorporation or otherwise in each protocol. Members considered that advice should be sought from Council in this regard.

#### *Third party outlays*

15. Some members noted reservations on the inclusion of an automatic sanction for recovering the costs of instructing counsel in the protocols. However, it was noted too that those practitioners who assisted in developing the proposals, are experts in their field and appear content that this approach will be a workable solution across the sector. The Committee noted though that Working Group was unable to provide recommendations on a policy mechanism which could address the question of how, in the absence of litigation, parties could resolve disputes arising either in relation to the costs of outlays or sanction for the employment of counsel. This matter remains unresolved at Committee level.

#### *Data*

16. Lack of robust data is problematic for the Committee due to the need for transparency and a clear evidence base to underpin how fee levels will be set. Members noted that this issue was out with the Working Group's control and that whilst data is available to practitioners it would not be shared due to commercial sensitivities. Even if data is shared, the majority would be for litigated cases. It was noted that this may simply be a fact that has to be faced within the decision making process.

17. The Committee noted that these pre-litigation procedures are breaking new ground in these case types and members discussed the potential merits of a national scheme to pilot the protocols. The Committee noted that the scope of any pilot scheme would need to be carefully considered and the measures of success (or otherwise) in terms of policy aims clearly set out. The pilot would need to be capable of providing the right type of data for objective analysis on its conclusion. This could remain problematic as it would require practitioners

to agree both the methodology for in gathering data and a willingness to share it.

18. The Committee approved the PAPs fee models in principle but agreed on the need to remit these to Council along with further briefing on the outstanding policy questions. This will include an invitation that Council consider the potential merits of a pilot scheme.

#### *Consultation*

19. The Committee consensus was that there appears to be no particular merit in further consultation given the majority of specialist practitioner firms have been involved in development the protocols themselves as well as the fee proposals. The Committee agreed that this view would be proffered but that the question of consultation was a matter for Council's consideration in due course.

#### *Item 4.2 – Rules Request: SMASO request for fees uplift (Papers 4.2, 4.2A)*

20. Paper 4.2 provided an overview of correspondence received from the Society of Messengers-at-Arms and Sheriff Officers (SMASO) requesting an increase of 11.9% to the rates payable under 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. The requested increase is based on a blend of the Consumer Price Index/Consumer Price Index with Housing (CPI/CPIH) in the period January 2021 to September 2022.
21. In addition, the request invited the Council to consider a proposal to implement a system of annual fee increases.
22. The Committee considered and discussed the papers produced. The Committee noted that the last fee increase of 6% was approved on 26 April 2021 and came into force on 30 June 2021. It was arrived at taking account of a blend of CPI/CPIH over the period 2009 to 2019 and took account of a previous fee increase in 2018 and incorporated an element of inflationary uplift. At that time, the Council approved April 2021 as the base month for future inflationary adjustments, where that forms part of an evidence base for change.
23. The Committee noted that given current economic trends it is anticipated that there will be considerable volatility in consumer based indices over the next few years. Furthermore, in a previous fee request from another area of the justice sector, the Council had taken the view that the CPI/CPIH were likely to

be unreliable measurements after September 2021 and that fee uplifts based solely on CPI/CPIH calculations may not find favour.

24. The Committee acknowledged that current inflationary pressures and economic trends in the past 18-24 months may mean that fee rates are effectively reduced in real terms. Members considered the SMASO report (Paper 4.2A) which narrated the key issues driving increases in the core costs of service delivery with a view to providing an evidence base to assist the Committee in its' deliberations. In particular: overall inflation, energy costs, fuel prices and staff costs/retention.
25. The Committee again noted that the fee regime does not simply exist to fund corporate business structures and just because costs go up, does not mean that those costs should automatically be absorbed by end users. Members acknowledged though that the sector has undertaken cost saving activity and displayed business improvement over the period since the last fee increase was approved. This has primarily taken the form of reductions in staffing costs and operational overheads. It also acknowledged that unlike some other parts of the justice sector, SMASO members derive their income primarily in the form of fees chargeable. In this regard, any mitigation that SMASO can or cannot take on certain drivers is clearly a relevant consideration in providing support or otherwise for a fee increase.
26. Having considered all factors, the Committee concluded that a 'cost of living' increase to the Tables of Fees of Messengers-at-Arms and Sheriff Officers is appropriate at this time. The Committee agreed that the Secretariat should review the figures in light of the Committee's discussions and remit revised figures for members' consideration and approval.
27. The Committee adhered to the Council's policy that evidence-based fees reviews are to be undertaken at suitable junctures and where circumstances suggest that review is appropriate. In determining the question of whether fee increases are appropriate, it is preferable to maintain an agile approach to the prevailing circumstances at any point in time. In this respect, annual inflationary fee uplifts are not appropriate. This aspect of the SMASO request was refused.

*Item 4.3 Civil Litigation (Expenses And Group Proceedings) (Scotland) Act 2018 (Section 10): Funders Expenses Orders (Paper 4.3, 4.3A, 4.3B)*

28. Mr McCorkindale provided an overview of Paper 4.3 which invited the Committee to consider the Scottish Government rules request and respond to certain policy questions to inform the development of court rules for making a 'funders expenses order' in line with section 10 of the 2018 Act.

29. The Committee agreed:

- to instruct rules to support a cap on the expenses of a third party at the level of funding provided.
- to instruct rules to support a two-stage disclosure process envisaged in primary legislation. In particular: the initial disclosure of 'financial assistance' need only be made once for awareness, rather than repeatedly; and the rule should not mirror the more detailed approach taken for legal aid disclosures.
- that rules are needed across the main procedural codes.
- to instruct a rule that clarifies the fact that the primary legislation entirely dis-applies section 10, in a family action which is funded by a close family member.
- to instruct a rule that clarifies the fact that the primary legislation entirely dis-applies section 10, for those who are funded by legal aid.
- that a new rule is required regarding disclosure of 'financial assistance' by requiring intimation to all parties. The rule will require the initial disclosure of the fact there is 'financial assistance' from a third party funder, limited to a) the type of funding and b) the name and address of the funder.
- to instruct a rule providing for an exemption from disclosing 'financial assistance' for simple repayment and interest loans which are fully repayable regardless of the outcome of a case.
- to instruct a rule requiring disclosure of a funders 'financial interest' in the outcome of a case – this disclosure will be triggered once the successful party is known.
- to instruct a rule providing for an exemption from insurers making a 'financial interest' disclosure, where they have no financial interest in the outcome of the case.
- to instruct a rule providing a mechanism for the payment of expenses by a third party.
- that a Policy Note should be prepared to accompany these rules when made.

30. The Committee invited the Secretariat to instruct the preparation of draft rules for members' consideration in due course.

## **Item 5: AOB**

### *Item 5.1 The preferred terms in rules (Paper 5.1)*

31. The Committee noted the contents of paper 5.1. Due to the lateness of the hour, members agreed that it be tabled for discussion at a subsequent meeting.

**Item 6: Date of next meeting**

32. The next meeting of the Committee will be scheduled in due course and in line with business priorities.

**Scottish Civil Justice Council Secretariat**