

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
SCJC COSTS AND FUNDING COMMITTEE MEETING
31 OCTOBER AT 4.15 PM VIA WEBEX

MINUTES

Members Present: Lord Harrower (Chairman)

Ian Dickson (Scottish Legal Aid Board)

Susan Black (Scottish Government)

James Mure KC (Advocate)

Laura Blane (Solicitor Advocate)

Stewart Mullan (Law Accountant)

Alan Rogerson (Consumer representative)

Robin Macpherson (Auditor of Court of Session)

In attendance: Craig Anderson (Court of Session)

Support: Craig McCorkindale (Director of Strategy, SCJC)

Karen Stewart (Policy Manager, SCJC)

Paula Preston (Policy Officer, SCJC)

Apologies: Sheriff Hughes
Charles Stoddart

Item 1: Welcome, apologies and agreement of private papers

1. The Chairman welcomed those present and introduced new member Laura Blane who has been appointed in place of Andrew Henderson who is soon to retire. Apologies were tendered from Sheriff Hughes and Charles Stoddart. It was noted

that Charles Stoddart's tenure also expires this month. The Chair and membership expressed thanks to both members for their valuable contribution to the work of the committee during their tenures.

2. The Committee agreed the following papers would not be published: Papers 3.1, 4.1 and Appendices 1 & 2, 4.1A, 4.1B, 4.2, 4.3, 4.3A and 4.4.

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 2022/12 invited members to approve the minutes of the meeting held on 26 May 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 - Pre Action Protocol Fees Working Group – business update (Paper 3.1)

5. The Chair introduced Paper 3.1, which provided an overview of the progress of the Working Group since the last update. A revised work timetable was provided in Annex B of the paper for information. The Committee noted that the final Working Group meeting took place on 26 October 2022 at which time fees proposals were finalised. The Secretariat advised that the Working Group anticipates it will submit a report to the Committee by the end of the year.

Item 3.2 – Update from the Scottish Government on legislative developments (Oral)

6. Susan Black provided the Committee with an update on legislative developments in the Scottish Government:

- Moveable Transactions Bill – stage 1 is complete, timetable anticipate completion of stage 2 in January, stage 3 in March 2023 and commencement in summer 2024.
- Gender Recognition Reform Bill – stage 1 completed on 27 Oct 2022, timetable anticipates stage 2 in November 2022, stage 3 in December 2022 and commencement in early 2024.

- UKG Retained EU Law Bill - second reading date to be announced.
- National Care Services Bill - introduced in June 2022 and is likely to complete stage 1 in March 2023. No further timetable dates are available.
- Legal aid reform work is ongoing but there is no timetable agreed for introduction of a Bill yet but it is likely to be later in 2024.
- SSI making provision for civil protection measures following from Brexit will come into force in December 2022.
- Sect 9 to 11 of Civil Litigation (E & GP) (S) Act 2018 – commencement is pending the making of civil court rules. Hope this can be achieved by next summer.

7. The Committee noted the update.

Item 4: Proposals for rules

Item 4.1 – Rules Request: Law Society of Scotland request for fees uplift (Papers 4.1, Appendices 1&2, 4.1A, 4.1B)

8. Paper 4.1 provided a summary of members' responses to correspondence received from the Law Society of Scotland (Appendix B) relating to the request for an uplift to the Tables of Fees of Solicitors. Paper 4.1A provided a briefing from Stewart Mullan in response to the matters raised in the correspondence from the LSS.

9. The Committee considered and discussed all the papers produced with a view to determining the request for an uplift in solicitors fees.

10. The Committee acknowledged that cost recovery factors do feed into access to justice questions such as whether or not people choose to litigate and whether cases are raised in this jurisdiction or in others with better costs recovery. If solicitors do not recover sufficient judicial expenses, the shortfall is ordinarily passed onto clients. The Committee noted that as a result of current economic trends, under our system, the cost burden of litigation means that those entitled to awards of judicial expenses are likely to be worse off than they were 2-3 years ago. Having considered all factors, the Committee concluded that an increase to the Tables of Fees of Solicitors is appropriate at this time.

11. The Committee discussed the options for calculating an increase and made the following recommendations for submission to the Scottish Civil Justice Council:

- A fees uplift using a blended rate of CPI and CPIH to a Unit Rate of £18.00 and an hourly rate of £180.00, based on the figures put forward by the LSS is appropriate.
- In arriving at these figures the Committee agreed that given current economic trends it can be anticipated that there will be considerable volatility in consumer based indices over the next few years. In this respect the CPI/CPIH are likely to be unreliable measurements after September 2021 and that any future application based solely on CPI/CPIH calculations may not find favour. It was also noted that legal services are not a reflection of the economy as a whole.
- 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.
- The request that particular aspects of the April 2019 tables are given special consideration was refused. This was on the basis that the approach contained in the LSS report underpinning the request is considered as demonstrably non-objective. The Committee agreed that the dynamic way in which court procedures and practices change, along with the introduction of new technology and different work practices can result in established fee relationships becoming distorted with consequential unfairness. However, this is a two-way process and simply commissioning a Report with the aim of identifying potential unfairness to the vendor is not a reliable source that the Committee can make reference to.
- The Committee suggested that a consultation on the Tables of Fees of Solicitors may be useful at around the 5 year point to enable these tables to fully bed-in.

Item 4.2 – Rules Review: Protective Expenses Orders - the recovery of interveners costs (Paper 4.2)

12. The Committee has initiated a review of the rules for Protective Expenses Orders in order to address issues of potential non-compliance of the rules with obligations arising under the Aarhus Convention¹. The Chair noted that at the previous meeting, the Committee had considered this paper but had not concluded

¹ [Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters](#)

its scrutiny due to time constraints. The paper is therefor tabled to consider policy questions on the outstanding topic of the recovery of intervener costs.

The recovery of interveners costs

13. The Committee noted that the existing rule leaves the making of any conditions on expenses as a matter for judicial discretion when making each individual PEO. In practice, such expenses are only applied to an intervener by exception. Examples of such exceptions would include if the intervener has acted unreasonably (e.g. by protecting their private interest rather than a public interest or by introducing unnecessary delay to proceedings etc.).

14. The Committee agreed that the drafting of the rule needs to make the policy intent clearer in that orders for expenses would not normally be made for or against an intervener. However, the rules should also support the continuation of judicial discretion to deal with any potential abuse of process that might arise.

15. The Committee agreed the rule should reflect a policy that orders for expenses would not normally be made for or against an intervener, except on cause shown. Drafting instructions are to be issued to this effect.

The ability for interveners to access court documents

16. In order to meet the requirement for assisting the court, an intervener's submission needs to address new matters that have not already been covered by the parties. This requirement gives rise to a very pragmatic need for a potential intervener to gain access to relevant documents, to establish whether or not their intended submission would be a duplication of legal points already made within proceedings.

17. The Committee discussed two timing options available for providing such access to documents:

- *Option 1 (Early Access)* – where a potential intervener is able to demonstrate a legitimate public interest in avoiding the duplication of legal argument, a procedure could provide access to such documents at the discretion of officials. Sanctions may be required to avoid this option being used as a potential fishing expedition by persons without a genuine public interest;
- *Option 2 (Access with permission)* – a procedure to access documents could be set out within a court order that grants permission to intervene. The downside is that it is only if and when permission is refused, that an intervener may find out that their proposed submission would be a duplication of arguments already made.

18. The Committee noted the terms of RCS Rule 4.11 (1) which provides that the writ “...*may be inspected by any person having an interest*”. The Committee was advised that Court of Session officials have implemented a working practice whereby on receipt of an appropriate justification letter, the Deputy Principal Clerk of Session may exercise discretion and allow early access to documents. It was agreed that this approach could be formalised in court rules.

19. The Committee agreed that, in order to avoid unnecessary submission of applications to intervene, the rules should support legitimate interveners gaining early access to relevant documents. Drafting instructions are to be issued to make rules provision to this effect.

The ability for interveners to be aware of upcoming cases

20. The Committee discussed the existing provision of information by the Scottish Courts and Tribunals Service about forthcoming court cases. The Committee fully supports the aim of improving the availability of online information but notes that this will not require rule changes. The delivery of improvements to the information available to the public via its website is an operational matter for the SCTS. The Committee noted that the SCTS currently provides a webpage highlighting non-immigration judicial review cases. The SCTS website could potentially be updated following the proposed extension in scope of PEO's.

Item 4.3 - Civil Litigation (E&GP)(S) Act 2018 – Section 9 (Papers 4.3, 4.3A)

21. The Chair introduced Paper 4.3, which set out some matters of policy relating to a draft rules instrument previously considered by members (Paper 4.3A). The Committee noted that the draft instrument provides rules to implement Section 9 of the 2018 Act:

- It enables the court to make an award of expenses in favour of a successful party who has been represented pro bono;
- Requires the pro bono funded party to disclose this information to the court and all other parties; and
- Requires an order to be sought to allow payment to a designated charity

22. The Committee noted that it has more recently considered the issue of confidentiality of financial information in the context of Protective Expenses Orders. The Committee has agreed that for PEO's, the court needs to know the basis of representation, but that information need not be a matter of public record.

23. The Committee noted that Section 9 of the 2018 Act requires a party to disclose to the court the fact that some, or all, of the representation, is provided free of charge. The draft court rules go on to provide for such disclosure to all other

parties. There is however, no requirement for a party to disclose why, on what basis or explain any funding arrangements.

24. The Committee did not consider that there was any conflict in the respective policies underpinning the draft 'pro bono' provisions and those for PEOs. There was however agreement that draft rule 41D.3 (8) should be amended to provide that a party against whom an order is sought, is entitled to lodge a contra account of expenses with the court when seeking a deduction from the amount payable and not with the auditor as currently prescribed.

25. **Drafting instructions are to be issued to revise the draft instrument to this effect.**

Item 4.4 - Rules Request: Rules of the Court of Session – Chapter 42 Diets of Taxation (Paper 4.4)

26. The Committee considered Paper 4.4, which invited members to consider a rules request from Euan Mackenzie K.C, seeking to amend the procedural timescale set out in Chapter 42 of the Rules of the Court of Session for the lodging of objections prior to a diet of taxation from the currently prescribed 4 days to either 10 or 14 days.

27. The paper explained the rationale for the request and the Committee noted that Mr Macpherson, Auditor of the Court of Session, had been consulted on the matter. Whilst indicating some support for the proposal, he had suggested 7 days as an appropriate timescale.

28. The Committee discussed the issues arising and agreed that a period of 10 business days was appropriate for the lodging of objections prior to a diet of taxation. As well as providing sufficient time for the lodging of objections and any subsequent responses, the timescale also gives more time for parties to agree any prospective settlement.

29. The Committee discussed the current fee provisions for cancellations of diets and whether any timelines may require adjustment. The Committee agreed with Mr Macpherson that existing provisions could remain and would still work in practice.

30. The Committee noted that where possible, it was preferable to ensure procedural consistency across the civil courts. In this regard the timescale provisions for diets of taxation in the sheriff court will be considered for impact prior to drafting instructions being issued to LPPO. **The Secretariat agreed to look into the matter and consult with sheriff court auditors and report back to the Committee in due course.**

Item 5: AOB

31. There were no further matters raised.

Item 6: Dates 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

October 2022