

SCOTTISH CIVIL JUSTICE COUNCIL
COSTS AND FUNDING COMMITTEE (CAFC)

MINUTES (AMENDED & APPROVED)

PARLIAMENT HOUSE, 4.15PM, MONDAY 16 NOVEMBER 2015

- Members present:** Lord Burns (Chair)
Sheriff Charles Stoddart (Retired)
Sheriff Thomas Hughes (Dundee Sheriff Court)
James Mure QC
Stephen O'Connor (Manager of the Expenses and Funding of Civil Litigation Bill Team, Scottish Government)
Ian Dickson (SLAB)
Alan Rogerson (Claims Manager, Aviva)
Iain Nicol (Solicitor)
Eric Baijal (Solicitor, SCJC member)
- Society of
Messenger-At-Arms
& Sheriff Officers
Members (SMASO)
Present for item 2:** Joy McLaughlin, President of SMASO
Kevin MacKay, immediate past President of SMASO
William Cameron, Chair of SMASO Fees Committee
- Present for item 5.2:** Lord Doherty (Senator and Member of the Consultative Committee on Commercial Actions)
- In attendance:** Edward McHugh (Deputy Legal Secretary to the Lord President)
John Thomson (Deputy Legal Secretary to the Lord President)
Graham Crombie (Deputy Legal Secretary, Rules Rewrite Drafting Team)
Jane MacDonald (Policy and Legislation Branch, SCTS)
Gillian Prentice (Deputy Principal Clerk of Session)
Susan Brodie (Policy Officer, SCJC Secretariat)
- Apologies:** Kenneth Cumming (Auditor of the Court of Session)
- Non-attendance:** Yvonne MacDermid (Chief Executive, Money Advice Scotland)

Item 1: Introduction, welcome, apologies and private papers

1. The Chair welcomed all in attendance and noted apologies received. The Chair firstly addressed the members of the CAFC, confirming that members of the Society of the Messenger-at-Arms and Sheriff Officers (SMASO) would be attending the meeting to speak in support of their submission on the levels of fees of Messenger-at-Arms and Sheriff Officers, and their proposal that the fees charged for collecting Council Tax arrears should be regulated by the Court of Session.
2. **The Committee agreed not to publish the following papers:**

2.1, 2.1A, 2.1B, 2.2, 2.2A, 3.1, 3.2, 4.3, 5.1, 5.2, 6.1, 6.1A, 6.1B, 7.1, 7.1A and 7.1B.
3. The Chair went on to introduce Edward McHugh and asked Edward to provide the Committee members with a background to papers: **2.1, 2.1A, 2.2 and 2.2A.**

Item 2: Regulation of Fees

Item 2.1: Review of Fees of Messenger-at-Arms and Sheriff Officers **[Papers 2.1, 2.1A & 2.1B]**

4. The Chair welcomed members of the Society of Messenger-at-Arms and Sheriff Officers (SMASO).
5. Joy McLaughlin outlined the process which had taken place historically and summarised why there had been no increase in fees since 27 January 2014.
6. SMASO clarified to the Committee the historical methods used for applications of review of fees, timing of the previous applications and why this was relevant to their submissions to the Committee. The Committee was invited to consider and thereafter to put forward any recommendations to the Scottish Civil Justice Council (SCJC).
7. The Chair outlined to SMASO representatives the work that the CAFC working group are currently carrying out on identifying methodologies for regulating prescribed fees within Sections 105 and 106 of the Courts Reform (Scotland) Act 2014 ("2014 Act").
8. Joy McLaughlin said SMASO would be happy to be involved in any consultation carried out regarding this area for long term reviews. However, SMASO were currently looking for an increase in their fees on an interim basis.

Item 2.2: Review of Local Authority Payments [Papers 2.2 & 2.2A]

9. Joy McLaughlin provided a summary of the practices that have developed in relation to tendering for the collection of Council Tax arrears, and in relation to the awarding of contracts. SMASO now feel that these practices have distorted the market and that these fees should therefore be regulated in the same manner as those for other official duties carried out by members of SMASO.
10. After further discussions the Chair thanked the members of SMASO for attending the meeting. The Chair confirmed members would discuss the issues raised and will correspond with SMASO in due course.
11. The Committee firstly considered *Item 2.2, the review of local authority payments*. After discussion the Committee, although sympathetic to the situation, agreed that section 106 of the 2014 Act does not give the Court of Session power to regulate debt collection work that does not involve formal diligence. Therefore the Committee is unable to put forward any recommendations to SCJC regarding debt collection fees being regulated in the same manner as other official functions carried out by members of SMASO.
12. **Members agreed to inform SMASO of their decision by way of correspondence and to also correspond with the Scottish Government regarding the committee's concerns about this issue.**
13. The Committee noted that it may take some time to complete the work involved in devising a methodology to be applied when reviewing regulated fees. In the meantime, having considered SMASO's proposals regarding review of their fees, **members were unanimous to recommend to SCJC that an interim measure be recommended to the Council, to be put into place.**
14. **The Committee agreed to inform SMASO of the outcome of the CAFC's deliberations and to put forward a draft fees instrument, to Council for consideration by way of correspondence to enable the instrument to come into force on 1st April 2016.**

Item 3: Minutes of previous meeting

Item 3.1: Minutes of previous meeting [Paper 3.1]

15. **The Committee approved the minutes of the previous meeting.**

Item 3.2: progress of actions from previous meetings [Paper 3.2]

16. Members approved the completion and progress of the actions upon Paper 3.2.

Item 4: Forward Work Programme

Item 4.1: Update from Scottish Government

17. Stephen O'Connor provided an oral update from the Scottish Government. In particular, he advised the Taylor Bill has been deferred until the next Parliament within the year 2016/17. The Scottish Government continue to have a stakeholder reference group in relation to the proposed Taylor Bill and Scottish Government would welcome more participants. An initial paper on core Taylor proposals will be produced in the near future. Stephen also confirmed that the Scottish Government was currently working on the Courts Reform (Scotland) Act 2014, regarding subordinate legislation.

Item 4.2 SCJC updates

18. **Susan Brodie** provided an oral update on the activities of the SCJC.

Item 4.3 CAFC Activity Tracker [Paper 4.3]

19. Members noted the progress of the actions to date.

Item 5: Implementation of the Recommendations of the Taylor Review

Item 5.1 Discussion Paper 3 – Expert Witnesses [Papers 5.1]

Regulation of Experts' Fees

20. The Committee resumed consideration of Discussion Paper 3 for the purpose of addressing the issue of the regulation of experts' fees.

21. Against the background of the previous discussion on the issue **John Thomson** invited members to consider the option of a table of recoverable fees for experts that would apply on a default basis unless the party seeking certification of the expert witness satisfied the court that the table should be dis-applied in the particular circumstances.

22. Following discussion of this option, Members agreed that consideration should be further deferred pending the outcome of the exercise currently being conducted by SLAB which is aiming to arrive at suggested hourly rates for various categories of expert. **Ian Dickson believed he would be better placed at the CAFC January 2016 meeting to advise when the exercise is likely to be completed. Members suggested this be put on the agenda for the CAFC March 2016 meeting.**

Item 5.2: Discussion Paper 4 – Outstanding Recommendations within Chapters 2 – 4 of Taylor Review [Paper 5.2]

Pilot Schemes in the Commercial Court

23. The Chair invited Lord Doherty's comments on Taylor recommendations 33 to 36 which involve proposals for piloting of a number of approaches to expenses in commercial cases, either exclusively in the Court of Session, or in both the Court of Session and sheriff court.
24. Lord Doherty advised that there were concerns about the Commercial Court being used as the forum for various pilot schemes. Lord Doherty advised there has to be a perceived need before any option is alighted upon and he was not sure that any of the proposed pilots met such a test out with the recommendation of summary assessment of expenses.
25. Regarding Taylor recommendation 33 on fixed costs, Lord Doherty noted if there was to be a role for such a scheme, it may be in relation to simpler and lower value actions. Although it may not be appropriate for the Court to be required to apply such a scheme however, it may be better if it was an option available to the Court.
26. Of the three suggested schemes, as previously noted Lord Doherty stated that there appeared to be some support amongst practitioners for summary assessment. He considered that it may be inappropriate for assessing the expenses payable in respect of the entire proceedings, but that it may work for assessing the expenses of individual hearings.
27. **Members agreed that the possibility of taking forward a summary expenses pilot should be explored and that LPPO should prepare a paper looking at how it may be taken forward. The Committee proposes the remaining suggested**

pilot schemes within Taylor recommendations 33 – 36 may not be considered at this present time.

Interest on Expenses

28. The Committee discussed Taylor recommendation 15 **and agreed to propose this recommendation to the Council with the formulation that would be with the discretion of the court and not mandatory.**

Lodging of Account of Expenses

29. **Members were content to propose to the SCJC, that the Ordinary Cause Rules should be amended to include a rule in terms of Taylor recommendation 16 regarding lodging of Account of Expenses.**

Review of Tables of Inclusive Fees

30. **After discussion the Committee were content that further consideration of these recommendations should be deferred with a view to being reconsidered when the tables of fees are revised to reflect the rules rewrite project.**

Item 6: CAFC Working Group

Item 6.1: Options and methodologies for considering or reviewing fees provisions [Papers 6.1, 6.1A & 6.1B]

31. Ian Dickson spoke to these papers, providing the committee members with a general update of the progress of the CAFC working group. Providing recommendations to the Members of the Committee regarding how it may wish to progress with this task and project.
32. **Members noted the information provided and after discussion agreed to recommend to the SCJC the appointment of a law accountant to the CAF Committee.**
33. **After further discussion with the SCJC Secretariat the Chair agreed an information gathering exercise may be carried out by the CAFC sub working group. This exercise would invite views sought on the approach of reviewing prescribed fees within sections 105 and 106 of the Courts Reform (Scotland) Act**

2014. The Chair approved this to be carried out by way of letter to the list of organisations agreed to at the CAFC meeting.

Item 7: AOCB

Item 7.1: Fees of Solicitors in the Sheriff Appeal Court [Papers 7.1, 7.1A & 7.1B]

34. **Graham Crombie** spoke to these papers explaining why these matters were being individually raised, to ensure the Committee's decisions on these matters are recorded.
35. **After further consideration the Committee agreed it is content to proceed with the instrument as presently drafted and noted the amendments that were made to the draft fees instrument in response to their comments at its last meeting of 12 October 2015.**

Item 8: Future Business

Item 8.1 Date of next meetings

Members were asked to note the following dates:

- Monday 18 January 2016
- Monday 21 March 2016
- Tuesday 24 May 2016