



**Annual Report of the Advisory Council on  
Messengers-at-Arms and Sheriff Officers**

**1 April 2011 to 31 March 2012**

**26 April 2012**

# Contents

	Foreword.....	Page 3
1.	Introduction.....	Page 4
2.	Membership.....	Page 5
3.	Meetings and work of the Council.....	Page 7
4.	Future Reports.....	Page 9
	Appendix 1.....	Page 10
	Appendix 2.....	Page 12
	Appendix 3.....	Page 16

## **Foreword by the Chairman of the Council**

I am pleased to present this the first Annual Report of the Advisory Council on Messengers-at-Arms and Sheriff Officers.

Officers of Court are the executive arm of the courts in Scotland and as such they make a vital contribution to the delivery of Justice by ensuring that obligations are met and rights can be enforced. The public must have confidence in them as a profession and it is right that they are properly regulated by the courts they serve and by their professional association.

The Advisory Council has been given an increased role in relation to this regulation and I am confident it has already made and will continue to make a meaningful contribution to this regulation in the future.

The Hon. Lord Uist  
(Chairman)

## **1. Introduction**

### *Establishment*

- 1.1 Section 76(1) of the Debtors (Scotland) Act 1987 (“the 1987 Act”) established the Advisory Council on Messengers-at-Arms and Sheriff Officers (“the Advisory Council”) whose functions are to advise the Court of Session on the making of Acts of Sederunt under section 75 of the 1987 Act and generally to keep under review all matters relating to officers of court.

### *History*

- 1.2 The Advisory Council first met on 2 November 1987. From that date until April 2008 it met once a year. Since April 2008 it has met, usually, twice a year. The Advisory Council has had three Chairmen, Lord Prosser (1987-2001); Lord McEwan (2001-2009); and Lord Uist (2009-present). The Advisory Council meets at Parliament House, Edinburgh.

### *Increased role*

- 1.3 Part 3 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 sought to effect a fundamental reform of the regulation of messengers-at-arms and sheriff officers. It sought to unify those two offices and establish a Scottish Civil Enforcement Commission with regulatory functions in respect of them.
- 1.4 The current Administration did not favour all of these reforms. Accordingly, they were never brought into force. Instead, by way of the Public Services Reform (Scotland) Act 2010, it effected significant modification of them. The unification of the two offices was reversed. The provisions concerning the Scottish Civil Enforcement Commission were repealed, with the majority of its proposed functions being placed instead on the Advisory Council or on the Lord President and the sheriffs principal or on the proposed professional association for officers of court (The Society of Messengers-at-Arms and

Sheriff Officers (“SMASO”) was designated the profession association for officers of court by the Scottish Ministers on 1 April 2011).

*Annual report*

- 1.5 Section 51 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (as amended) provides that the Advisory Council must prepare a report on its activities during the whole of each financial year as soon as practicable after the end of the period to which the report relates. Section 51 came into force on 31 January 2011. Accordingly, this is the Advisory Council’s first annual report and is for the period 1 April 2011 to 31 March 2012.
- 1.6 The Advisory Council must send a copy of the report to the Scottish Ministers and publish the report.

**2. Membership**

- 2.1 Section 76(2) of the 1987 Act provides that the Advisory Council shall consist of –
- (a) the following persons appointed by the Lord President of the Court of Session –
    - (i) a judge of the Court of Session (who shall act as chairman);
    - (ii) two sheriffs principal;
    - (iii) two officers of court;
    - (iv) two solicitors; and
    - (v) such other persons (not falling within sub-paragraphs (i) to (iv) above) as the Lord President considers appropriate;
  - (b) one person appointed by the Lord Advocate; and
  - (c) the Lord Lyon King of Arms.

2.2 Section 76(3) provides that the Secretary of the Advisory Council shall be appointed by the Secretary of State (by virtue of section 53 of the Scotland Act 1998 this function is now performed by the Scottish Ministers).

2.3 As at 1 April 2011 the membership of the Council was as follows:

The Hon. Lord Uist (Chairman)

Sheriff Principal Kerr QC

Sheriff Principal Dunlop QC

Mr. Roderick Macpherson – Officer of Court

Mr. Stuart Hamilton – Officer of Court

Mr. Frank McConnell – Solicitor

Mr. David MacLennan – Solicitor

Ms. Yvonne MacDermid – Money Advice Scotland

Ms. Charlotte Barbour – Chartered Accountant

Ms. Vida Gow – Citizens Advice Scotland

Ms. Jill Clark – Scottish Government

The Lord Lyon King of Arms

The Secretary was Mr. Michael Anderson – Legal Secretary to the Lord President, who was assisted by Mr. Christopher Nicholson – Deputy Legal Secretary to the Lord President.

2.4 Since 5 October 2012 the membership of the Council has been as follows:

The Hon. Lord Uist (Chairman)

Sheriff Principal Kerr QC

Sheriff Principal Scott QC

Mr. Roderick Macpherson – Officer of Court

Mr. Stuart Hamilton – Officer of Court

Mr. Frank McConnell – Solicitor

Mr. Mark Higgins– Solicitor  
Ms. Yvonne MacDermid – Money Advice Scotland  
Ms. Charlotte Barbour – Chartered Accountant  
Ms. Vida Gow – Citizens Advice Scotland  
Ms. Jill Clark – Scottish Government  
The Lord Lyon King of Arms

The Secretary is Mrs. Kathryn MacGregor – Legal Secretary to the Lord President, who is assisted by Mr. Christopher Nicholson – Deputy Legal Secretary to the Lord President.

### **3. Meetings and work of the Advisory Council**

*19 April 2011*

- 3.1 The Advisory Council met on 19 April 2011. That meeting was not a scheduled meeting as the Advisory Council had last met on 31 January 2011; rather, it had been arranged by the chair because the Lord President had asked the Advisory Council to provide him with a draft response to the Scottish Government’s consultation paper entitled “Officers of Court – Business Organisation”.
  
- 3.2 That consultation, which was launched on 21 March 2011, was in contemplation of the Scottish Ministers making regulations under section 61 (2) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (as amended by the Public Services Reform (Scotland) Act 2010) as to the types of business association which officers of court may form; the ownership, membership, management and control of those business associations and the prescription of conditions which those business associations must satisfy. Before making any such regulations the Scottish Ministers must consult the Lord President and the sheriffs principal.

3.3 A copy of the minutes of that meeting can be found in appendix 1 of this report. A copy of the consultation document can be accessed at <http://www.scotland.gov.uk/Publications/2011/03/18095153/0>. A copy of the response sent by the Lord President can be found in appendix 2 of this report.

*13 February 2012.*

3.4 Due to problems with the availability of members the Advisory Council did not meet again until 13 February 2012. A copy of the minutes of that meeting can be found in appendix 3 of this report.

3.5 In so far as keeping under review all matters relating to officers of court was concerned, the Advisory Council discussed a number of matters and received updates from the SMASO and the Scottish Government. Of particular interest and concern was the practice and procedure being followed in relation to the service of calling-up notices as provided for by section 19(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970; it was agreed that the matter should be brought to the attention of the Lord President.

3.6 In relation to advising the Court of Session on the making of Acts of Sederunt under section 75 of the 1987 Act, at the request of the Lord President the Advisory Council initiated a review of the Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991 ("the 1991 Rules"); this was with a view to bringing the 1991 Rules up to date (the 1991 Rules had been made under section 75 of Act of 1987 as would any replacement or amendment rules).

*Future meetings*

3.7 The Advisory Council is due to meet again in October or November of 2012.



#### **4. Future Reports**

The Advisory Council is giving consideration to including in future reports a statistical analysis of the performance by officers of court of their functions as envisaged by section 51 of the 2007 Act. Such an analysis would involve requesting information from SMASO under that section, though it is hoped that the provision of such information would be as a corollary of the provision of information to the Lord President in support of SMASO's annual application for an increase in fees for officers of court.

## Appendix 1

### ADVISORY COUNCIL ON MESSENGERS-AT-ARMS AND SHERIFF OFFICERS

Meeting – 19 April 2011, 3.00 pm, at Parliament House, Edinburgh

#### **Present**

The Hon. Lord Uist (Chairman)  
Mr. Roderick Macpherson – Messenger-at-Arms  
Mr. Frank McConnell – Solicitor  
Mr. David MacLennan – Solicitor  
Ms. Jill Clark – Scottish Government  
Ms. Vida Gow – Citizens Advice Scotland

#### **Secretariat**

Mr. Michael Anderson – Legal Secretary to the Lord President  
Mr. Christopher Nicholson – Deputy Legal Secretary to the Lord President

#### **Apologies**

The Lord Lyon  
Sheriff Principal Kerr QC  
Sheriff Principal Dunlop QC  
Mr. Stuart Hamilton – Messenger-at-Arms  
Ms. Yvonne MacDermid – Money Advice Scotland  
Ms. Charlotte Barbour – Chartered Accountant

#### **Background**

1. By virtue of section 61 (2) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (as amended by the Public Services Reform (Scotland) Act 2010) the Scottish Ministers may by way of regulations:
  - (a) prescribe the types of business association which officers of court may form in order to carry out their functions;
  - (b) make provision about the ownership, membership, management and control of those business associations; and
  - (c) prescribe conditions which must be satisfied by those business associations.

Before making any such regulations the Scottish Ministers must consult the Lord President and the sheriffs principal.

2. The Scottish Ministers published a consultation paper entitled “Officers of Court – Business Organisation” on 21 March. The closing date for responses is 30 June.
3. The Lord President asked the Advisory Council to provide him with a draft response in pursuance of its statutory function. This meeting was called to discuss and formulate the response.

### **Welcome and apologies**

4. Lord Uist welcomed those present at the meeting; in particular for coming at short notice. It had been important that a meeting was called as soon as possible so that the Council was able to provide the Lord President with the advice he had requested.
5. Lord Uist noted apologies.

### **Declaration of interest**

6. Mr McConnell declared that as a solicitor he had previously represented one of the larger firms of officers of court.

### **Discussion**

7. Mr Macpherson advised the Council that the Society of Messengers-at-Arms and Sheriff Officers had not yet taken a view. There were many differing views within the Society and as a result any views expressed by him today were personal. Mr McConnell made some remarks about how he saw the operation of the profession from a solicitor’s standpoint.
8. Lord Uist then directed the Council to the questions asked in the consultation paper. Members discussed these questions and their views are reflected in the annex to the minutes. It was agreed that the draft response would be circulated to the Council. Members would then have an opportunity to comment before the draft was finalised.

## Appendix 2

### **Response by the Lord President to the Scottish Government's consultation paper "Officers of Court – Business Organisation".**

Question 1: Do you consider that the current business arrangements are satisfactory?

If not, why not?

No.

Current business arrangements are largely unregulated. Any person, regardless of his suitability, may invest in a firm of officers of court. As a result there is an inconsistency between the regulation of a firm of officers and an individual officer. Those regulations that do exist, such as the prohibition of an officer of court forming, or being employed by, a company in respect of his or her official functions (rule 14 (5) of 1991 Rules), give rise to a number of ambiguities. For example, though an officer of court may not form a company he or she may form a Limited Liability Partnership (LLP). Further, a company may form an LLP to own, in whole or in part, a firm of officers of court. There should be a consistent approach to these issues.

Question 2: Do you consider that the existing organisation of officers of court serves remote or outlying areas well?

Yes and No.

The profession is aware of the importance of being able to serve remote or outlying areas and takes a number of steps to ensure that this remains the case. In particular, some of the larger firms of officers of court operate satellite offices in remote locations and offer regular remote services. This view is supported by the fact that there has not been, in recent memory, any complaints made by those instructing

officers of court about their ability to accept instructions in remote and outlying areas.

However, remote services may be of lesser quality than those provided elsewhere. An example of this would be when an officer of court drives from a location in central Scotland to a remote area. That officer of court will, invariably, have little knowledge of that area or the people who live there, in contrast to an area where that officer of court may live and work. Further, remote services exist as a result of there being no local offices.

Question 3: Can non-officer investors improve the standard of service that the public receives from officers of court?

Yes.

Non-officer investors can improve the working of a firm of officers of court by way of the investment of capital and business expertise, the benefits of which are capable of being passed on to the public. For example, if a firm of officers of court were to assume as a partner an IT manager he or she may be able to improve the electronic records kept by the firm which would allow it to answer, quickly and confidently, any questions asked by the public. Further, an improved internet site may allow for a debtor to make payments to an account on-line.

Question 4: Should officer of court businesses be wholly owned by officers of court? If not, what level of ownership for non-officer investors should be allowed?

No.

The Scottish Government previously consulted on “*Business Organisation of Enforcement Officers*” and the conclusions reached are expressed in the current consultation paper at paragraphs 20.10 to 2.11, namely, that the ownership or control of either a limited company or a LLP by non-officer investors had the potential to result in a conflict of interests and lowering of standards; individual officers of court are subject to regulations and are accountable for the way in which they behave but non-officers of court and firms of officers of court are not; such firms should, in the public interest, be subject to a greater level of scrutiny; and each partner in a firm of officers of court must hold a commission as such.

That consultation was, however, undertaken some time ago. The reality today is that some officers of court businesses are already no longer wholly owned by officers of court. There has not, to my knowledge, been any lowering of standards and some businesses may be benefiting from this course of action (like the examples given in response to question 3).

That being said, the current arrangements are only satisfactory because firms of officers of court continue to be controlled by officers of court and the quality of non-officer investors is satisfactory. There is, therefore, a need to regulate that effective control of firms of officers of court remains with officers of court and non-officer investors are regulated to a standard akin to that of officers of court; this would require a new or additional system of regulation.

Question 5: Is foreign ownership or control of an officer of court business appropriate?

Yes, though only if subject to the level of regulation mentioned in answer to question 4.

Question 6: Are there examples of ownership or control of an officer of court business by other business types/sectors of professions which would be inappropriate? Please explain your answer, in particular, if yes, please detail what these business types are in what way they would be inappropriate.

Yes.

There are professions and persons that are inappropriate by virtue of their position within society. Although it is not possible to provide an exhaustive list, ownership or control by a member of the Faculty of Advocates, a member of the Law Society of Scotland, a member of a local authority, a Member of Parliament and a police officer are examples which come to mind. Indeed, many of those examples form the list provided for by rule 15(3) of the 1991 Rules of positions that an officer of court cannot hold.

Question 7: Is a fitness test and/or disqualification for improper behaviour necessary in relation to the ownership and control of officer of court businesses?

Yes.

Since officers of court are the executive arm of the court it is important that non-officer investors are people of good character and are likely to respect the professional duties that officers of court have. Accordingly, those with criminal convictions should be precluded from being investors.

Lord President  
Edinburgh  
21st June 2011

## **Appendix 3**

*(Draft minutes to be approved at the next meeting of the Council)*

### **ADVISORY COUNCIL ON MESSENGERS-AT-ARMS AND SHERIFF OFFICERS**

**Meeting – 13 February 2012, 2pm at Parliament House, Edinburgh**

#### **Present**

The Hon. Lord Uist (Chairman)  
The Lord Lyon  
Sheriff Principal Kerr QC  
Mr. Roderick Macpherson – Officer of Court  
Mr. Stuart Hamilton – Officer of Court  
Ms. Yvonne MacDermid – Money Advice Scotland  
Ms. Charlotte Barbour – Chartered Accountant  
Ms. Vida Gow – Citizens Advice Scotland  
Ms. Jill Clark – Scottish Government

#### **Secretariat**

Mrs. Kathryn MacGregor – Legal Secretary to the Lord President  
Mr. Christopher Nicholson – Deputy Legal Secretary to the Lord President

#### **Apologies**

Sheriff Principal Scott  
Mr. Frank McConnell – Solicitor  
Mr. Mark Higgins – Solicitor

#### **Item 1: Welcome and apologies**

1. Lord Uist welcomed those present at the meeting and noted apologies.
2. Since the last meeting of the Council there had been two changes in membership. Sheriff Principal Scott had replaced Sheriff Principal Dunlop and Mark Higgins had replaced David MacLennan. In relation to the latter it was agreed that the secretariat write to Mr MacLennan to convey the Council's appreciation of his contribution to the work of the Council over the years.

#### **Item 2: Minutes of the meeting 31 January 2011 and matters arising**

2. The minutes of the meeting on 31 January 2011 were approved subject to the substitution of following for the last line in paragraph 13:



*“The next meeting is due to take place in June 2011; Scotland may host a subsequent meeting in January 2012 and members would be invited”.*

### **Item 3: Amendment of the 1991 Rules**

3. Members were informed that as a result of a number of changes to the profession of officers of court, most notably the designation of the Society of Messengers-at-Arms and Sheriff Officers (SMASO) as the professional association, the Lord President is asking the Council to review the Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991 (SI 1991/1397) (“the 1991 Rules”) with a view to ascertaining what amendments are required to bring the 1991 Rules up to date. The 1991 Rules were made under section 75 of the Debtors (Scotland) Act 1987 and in terms of section 76 of that Act it is one of the functions of the Advisory Council to advise the Court of Session on the making of Acts of Sederunt under section 75.
4. The secretariat had prepared an initial list of amendments that were thought to be appropriate.

#### *Rule 5 – requirement of CPD*

5. Members were informed that it is a requirement of SMASO’s constitution that provision is made for the administration and supervision of compulsory continuous professional development (“CPD”) for officers of court, but CPD is not currently compulsory. It was suggested, therefore, that rule 5 be amended to require officers of court to comply with any CPD requirements set down by SMASO. Members discussed whether a failure to meet such a requirement would constitute “misconduct” in terms of section 79 of the Debtors (Scotland) Act 1987. It was agreed that the rule change should make express provision in this regard.

#### *Rule 6 – Committee of Examiners*

6. Members were informed that as a matter of practice SMASO review the membership of their Committee of Examiners every three years, though this is not required in terms of the 1991 rules. Members discussed the benefits of providing that members of that committee will hold office for three years and be eligible for reappointment. Members agreed that this was a useful change.

#### *Rule 14 (5) – Companies Act Reference*

7. The minutes of the meeting of the Council on 31 January 2011 record the following:-

*“11. Item 4 related to the 1991 Rules. Rule 14(5) referred to section 735(1) of the Companies Act 1985 which had been repealed by the Companies Act 2006. SMASO were of the view that the 1991 Rules required to be amended as a result. Lord Uist referred members to section 1297(5) of the 2006 Act which made provision for the “continuity of the law” (by way of re-*

*enactment); an amendment was not therefore required (though the matter could usefully be picked up when the rules were otherwise being amended)."*

Members agreed that this change should be made.

*Rule 17-18 – Communication of information: Sheriffs Principal to SMASO*

8. Members were informed that the sheriffs principal and SMASO had prepared a protocol for the keeping of records. The protocol would facilitate the transmission of information held by the sheriffs principal to SMASO for the purposes of a central (membership) register of officers of court. The secretariat was of the view that such a protocol or practice would require a legislative basis to be fully compliant with data protection legislation. An amendment of the rules would achieve this. Members agreed that this seemed sensible.
9. The secretariat informed members that the process of reviewing the 1991 Rules for changes not already identified would not happen overnight and they were invited to contact the secretariat meantime should they have any suggestions. Ms. MacDermid noted that rule 15 (3) required to be updated to take account of Members of the Scottish Parliament.

**Item 4: Update from the Scottish Government**

10. The Council noted the terms of the Scottish Government's draft paper entitled 'Consultation on Officers of Court – Business Organisation, Analysis of Consultation Responses'. It was clear that changes to the current regulatory system required to be made but there was no consensus as to what those changes should be. The Scottish Government were considering their position.
11. Mr Macpherson and Mr Hamilton informed members that there existed an anxiety among officers of court as a result of the ongoing uncertainty as to the Scottish Government's intentions, and, in particular, the possibility of firms of officers of court being bought by non-officer firms. Members discussed who the potential buyers could be; this included debt recovery firms and firms of solicitors. Members agreed that there were clearly some business associations that were inappropriate such as those listed in paragraphs (a) to (h) of rule 15 of the 1991 Rules. Ms Barbour was of the view that insolvency practitioners should be added to that list. Members agreed.
12. Generally, members supported a form of entity regulation where non-officers could own officer of court firms though subject to a fit and proper person test. Sheriff Principal Kerr informed members that in their response the sheriffs principal stated that they were against the idea of officer court firms being wholly owned by non-officers.

## **Item 5: Memorandum from the Society of Messengers-at-Arms and Sheriff Officers**

13. The memorandum informed members about ten issues and was spoken to by Mr Macpherson.
14. Item 1 was the Society's Constitution which had been amended as result of the Society being designated as the professional association for officers of court. A copy of the Constitution was attached to the memorandum for information. Item 2 was the Society's Code of Practice which could be found at Appendix 1 of the Constitution.
15. Item 3 was the Society's annual fee. Members were informed that concerns have been raised by members of the Society paying the full annual fee where they are, for whatever reason, not working for all of the year in question. SMASO were of the view that neither the 2011 Regulations nor the 1991 Rules provide scope for the Society to allow a discount or abatement of the annual fee. The Executive Council of the Society was currently considering appropriate circumstances that may allow for a period of discount or abatement, including the use of the Society's benevolent fund to meet annual fees during periods of absence. Lord Uist was of the view that section 65A (2) (c) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 allowed the Society to offer an abatement or discount on the annual fee. Mr Macpherson thanked Lord Uist for bringing this to his attention.
16. Item 4 was compulsory CPD, which had already been discussed in relation to agenda item 3. Item 4 was misconduct. Members discussed the current arrangements provided for in section 79 of the Debtors (Scotland) Act 1987 (investigation of alleged misconduct). Item 5 was the protocol between the Society and the sheriffs principal, which had already been discussed in relation to agenda item 3. Item 6 was the Council's Annual Report. The secretariat informed members that the Council's Annual Report had not yet been drafted. A draft would be made available to members before its publication but statistical information from SMASO was not, at this stage, required (though its inclusion in future reports may be useful). Item 7 was the Business Organisation Consultation, which had already been discussed in relation to agenda item 3.
17. Item 8 was the discounting of fees. Members noted that an appeal by Mark Fishman against a decision of Sheriff Principal Scott regarding the discounting of fees was currently before an Extra Division of the Inner House of the Court of Session and agreed that it was appropriate to wait for the court's decision in that case before discussing the matter further. Item 9 was the review of the tables of fees. Mr Macpherson informed members of the changes that had been made to the tables of fees for the year 2012. This included a restructuring of the tables of fees and a 3.8% increase. A comprehensive review of the tables of fees was, however, ongoing.

18. Item 10 was the service of calling-up notices as provided for by section 19 (1) of the Conveyancing and Feudal Reform (Scotland) Act 1970. In the case of *Santander UK Plc v David Gallagher* (2011 - Edinburgh Sheriff Court) service of a calling-up notice by means of letter box service (depositing) had been held not to constitute "delivery to the person" for the purposes of the 1970 Act. As a result recorded delivery is being viewed as a preferable method of service, not least because if it is not successful then service can be made at the Extractor's Office. Members discussed the issue and agreed that it be brought to the attention of the Lord President.

**Item 6: Annual (membership) fee - SMASO**

19. This had already been dealt with under agenda item 5.

**Item 7: A. O. B.**

20. None.

**Item 8: Date of next meeting**

21. The next meeting, which was likely to take place in October or November, would be fixed in due course.