



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

1 April 2012 to 31 March 2013

1 May 2013

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Foreword by the Chairman of the Council

I am pleased to present this second 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.

I am confident that the Advisory Council continues to make a meaningful contribution to this regulation.

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 The provisions concerning the Scottish Civil Enforcement Commission were repealed, with the majority of its proposed functions being placed instead on the Advisory Council or on the Lord President and the sheriffs principal or on the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).

- 1.5 By virtue of Section 61 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, the Scottish Government have power to make Regulations in respect of functions of Officers of Court. In particular, under Section 61(2)(a) of the 2007 Act, they may prescribe the particular types of business association which Officers of Court may form to carry out their functions.

Annual report

- 1.6 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. This is the Advisory Council’s second annual report and is for the period 1 April 2012 to 31 March 2013.
- 1.7 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 2012 the membership of the Council was 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 was Mrs Kathryn MacGregor – 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
Ms. Yvonne MacDermid – Money Advice Scotland
Ms. Charlotte Barbour – Chartered Accountant
Ms. Pauline Allan – Citizens Advice Scotland
Mr Bobby Sandeman – Scottish Government
The Lord Lyon King of Arms

The Secretary remains Mrs. Kathryn MacGregor – Legal Secretary to the Lord President, who is assisted by Elise Traynor – Deputy Legal Secretary to the Lord President.

3. Meetings and work of the Advisory Council

12 November 2012

3.1 The Advisory Council met on 12 November 2012. The meeting discussed a number of matters. The main topic of discussion was a draft Act of Sederunt whose purpose was to update the 1991 Messengers at Arms and Sheriff Officers Rules in several respects.

3.2 A copy of the minutes of that meeting can be found in appendix 1 of this report. A copy of the resulting Act of Sederunt can be found [here](#).

18 March 2013

3.3 The Advisory Council met again on 18 March 2013 and discussed several matters. Representatives from the Scottish Government as well as SMASO

were present, and the Council received detailed written and verbal updates in relation to relevant matters. A copy of the minutes of that meeting can be found in appendix 2 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. The detail of these discussions can be found in the attached Minutes.

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 undertook a review of the Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991 (“the 1991 Rules”) with a view to bringing the 1991 Rules up to date. As mentioned above, the Council agreed that an Act of Sederunt be made for this purpose.

Future meetings

3.7 The Advisory Council is due to meet again in November 2013.

4. Statistical Information

In the Annual Report for 2011-2012, it was noted that Advisory Council was 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. It was anticipated that this would take the form of a report from the Accountant in Bankruptcy containing the statistics provided by officers of court under section 84 of the 1987 Act. Unfortunately the report for the financial year 2012-2013 was not available in time to be included with this annual report. It will be published separately when it becomes available. The report for 2011-2012 can be accessed [here](#).

Appendix 1

ADVISORY COUNCIL ON MESSENGERS-AT-ARMS AND SHERIFF OFFICERS

Meeting – 12 November 2012, 11am at Parliament House, Edinburgh

Present

The Hon. Lord Uist (Chairman)
The Lord Lyon
Sheriff Principal Scott
Mr Frank McConnell, Solicitor
Mr. Roderick Macpherson – Officer of Court
Mr. Stuart Hamilton – Officer of Court
Ms. Yvonne MacDermid – Money Advice Scotland
Ms. Charlotte Barbour – Chartered Accountant

Secretariat

Mrs. Kathryn MacGregor – Legal Secretary to the Lord President
Ms Elise Traynor – Deputy Legal Secretary to the Lord President

Apologies

Sheriff Principal Kerr, QC
Ms Pauline Allan, Citizens Advice Scotland
Mr Robert Sandeman, Scottish Government

Item 1: Welcome and apologies

1. Lord Uist welcomed those present at the meeting and noted apologies. It was noted that Ms Traynor had taken over the Secretariat functions from Mr Nicholson.
2. Since the last meeting of the Council there had been three changes in membership. Ms Vida Gow had been replaced by Ms Pauline Allan, on behalf of Citizens Advice Scotland. Mr Robert Sandeman had replaced Jill Clark as the Scottish Government representative. Unfortunately, neither of the new members was able to attend. The Council noted with disappointment that the Scottish Government representative was not in attendance.

3. Mr Mark Higgins, solicitor, had offered his resignation to the Council, and that had been accepted by the Lord President on 24 October 2012. The Law Society would require to nominate a new member of the Council.

Item 2: Minutes of the meeting on 13 February 2012 and matters arising

4. The minutes of the meeting on 13 February 2012 were approved subject to the following revisions on page 5:

On the first line, the word 'of' should appear between 'officer' and 'court';

On the first line of paragraph 14, the word 'as' should read 'a';

On the second last line of paragraph 15, the word 'abetment' should read 'abatement';

On the last line of page 5, '1967' should be '1987'.

5. There was one matter arising, namely the issue identified at paragraph 18 of the previous minutes concerning calling up notices. Following a discussion with the Lord President, the Secretariat informed the Council that in their view it was not necessary to amend the 1991 Rules in this respect. The Council noted this view.

Item 3: Amendment of the 1991 Rules

6. Members were provided with a draft Act of Sederunt dealing with the proposed update to the Rules agreed at the 13 February 2012 meeting of the Council. There was agreement that each of the following provisions should be made.

Rule 5 – requirement of CPD

7. Paragraph 2(2) of the draft Act of Sederunt provided that Continuous Professional Development shall be compulsory. Members approved the terms of this paragraph.

Rule 6 – Committee of Examiners

8. Paragraph 2(3) inserted a rule providing that members of the Board of Examiners could be reappointed after an initial period of three years in office. Members approved the terms of this paragraph.

Rule 14 (5) – Companies Act References

9. Paragraph 2(4)(a) altered the 1991 Rules to replace out of date references to the Companies Act 1985 with references to the Companies Act 2006. Members approved the terms of this paragraph.

Rule 15(3) – reference to Scottish Parliament and insolvency practitioner

10. Paragraph 2(5)(a) updated the 1991 Rules to reflect the change suggested by Ms MacDermid at the previous meeting to include ‘Member of the Scottish Parliament’ in the list of extra-official activities which must not be undertaken by officers of court. Paragraph 2(5)(b) inserted ‘insolvency practitioner’ to this list, a change which was suggested by Ms Barbour at the last meeting and agreed by Members to be a useful addition. Members approved the terms of these paragraphs.

Rule 18A – Communication of information: Sheriffs Principal to SMASO

11. Paragraph 2(6) inserted a new Rule 18A into the 1991 Rules to deal with the issue of communication of information to the Society from Sheriffs Principal. Members agreed at the last meeting that such a change would be made to provide a legislative basis for the protocol which had been prepared for the keeping of a central register of officers of the court. Members approved the terms of these paragraphs.

Rules 14 and 15 – proposed rule in relation to business associations of officers of court

12. At the February 2012 meeting of the Council, members discussed the ongoing uncertainty as to the Scottish Government’s intentions following the consultation on business organisation of officers of court. 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. The Secretariat had drafted a rule for the purposes of discussion at the meeting.

13. The Council was advised at the last meeting that this matter would ideally be addressed by the Scottish Ministers when they came to make Regulations under Section 61 of the Bankruptcy and Diligence etc (Scotland) Act 2007, given the specific powers conferred with regard to business associations, ownership and control of officers of court.
14. As an interim position, the Council was asked to consider the amendment to the 1991 Rules in the draft Act of Sederunt at paragraph 4(b) which would prohibit officers of court from forming any kind of direct or indirect business association (for the purposes of exercising their official functions) with a person mentioned in Rule 15(3). The Council was also asked to consider the stronger alternative, which was a prohibition on 'sustaining' such a business association.
15. The Council discussed the draft rule and noted that this provision would require a lengthy lead in. The prohibition on sustaining would be retrospective and therefore would have possible implications in terms of ECHR law. In particular, Article 1 of Protocol 1, which protected the right to peaceful enjoyment of 'possessions', would possibly be engaged. A further concern pointed out by the Secretariat was the use of the term 'direct or indirect' in the draft rule, in that there might be a difficulty with clarity of meaning. Lord Uist pointed out that this wording was commonly used in statutory provisions.
16. Members discussed the proposed Rule change. Mr Macpherson suggested instead the possibility of making a rule that no business association involving solicitors and officers should combine the functions of law agent and officer

in the same cause. Lord Uist and others commented and it was agreed that this could be unworkable in practice, but preferred to support the solution proposed by the draft rule.

17. Members noted that the underlying concern was to ensure the untrammelled independence of officers of court. Officers were an independent arm of the Court, whose function was to carry out the Court's instructions, rather than to do the will of their employer. Ms MacDermid pointed out that the OFT might be interested in potentially monopolistic practices.
18. Members acknowledged that there were difficulties with the rule in terms of the ECHR considerations noted previously. However, the Council noted the very wide powers of the Court of Session under Section 75 of the Debtors (Scotland) Act 1987.
19. It was noted that the Lord President was due to discuss the matter with the Cabinet Secretary for Justice, when he would raise the question of whether or not the Scottish Government was planning to make regulations dealing with this issue. Whilst being mindful of the concerns raised, the Council agreed to recommend to the Lord President that the rule be enacted in the form which would prohibit forming and sustaining of business associations.

Item 4: Update from the Scottish Government

20. There was no written update and the representative from the Scottish Government had been unable to attend the meeting of ACMASO at very short notice. Lord Uist requested that a letter be drafted by the Secretariat to draw attention to the inconvenience that this had caused, and to seek a written update in relation to the ongoing work of the Scottish Government.

Item 5: Memorandum from the Society of Messengers-At-Arms and Sheriff Officers

21. The memorandum informed members about thirteen issues and was spoken to by Mr Macpherson.
22. Item 2 was compulsory continuing professional development. This had already been discussed under item 3 of the agenda, the update of the 1991 Rules, as had item 4, the proposed rule change to deal with the transmission of information to Sheriffs Principal from the Society. In addition, the service of calling up notices (item 9) and the proposed changes to business organisation had been dealt with under agenda item 3.
23. Item 1 was the Society's annual fee. Following Lord Uist's comments 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, the Executive Council of the Society were drafting an appropriate amendment to the rules for the approval of members at the AGM of the Society on 1st December 2012.
24. Item 3 was misconduct. It was suggested previously that a Disciplinary Tribunal be formed to deal with cases of misconduct. However, concerns had been expressed within the Society as to how such a Tribunal would be funded and it was generally felt that the relatively small number of complaints made to Sheriffs Principal would not merit the creation of a Tribunal.
25. Items 7 and 8 related to Fees. The first matter, which was raised at the February meeting, concerned the Opinion of the Inner House in *Mark Fishman* dated 14th September 2012. The Society believed amendments were required to the general regulations within the table of fees to ensure the charging of

fees was clarified as being mandatory. Local Authority contracts might require separate provision. The Society was drafting amendments to the general regulations for submission to the Lord President as a matter of urgency.

26. In relation to the review of fees, the Society advised the Council that Baker Tilly were unable to provide the required expertise. Subsequent difficulties with the replacement required the engagement of a further alternative professional services firm. Johnston Carmichael has recently been engaged for this purpose. The Society remained confident of being able to submit next year's application for changes to fees through the Advisory Council as previously requested by the Lord President. In the meantime, the Lord President has allowed the Society to make one further application for an increase to the fees using the inflationary based formula and the outcome of that application was awaited.
27. Item 10 noted that the Society had hosted a meeting of the European Judicial Enforcement Project in Edinburgh in 2012. The Society is also one of the founder members of the European Chamber of Judicial Officers.
28. Item 11 was in relation to a matter of particular concern to the profession, namely the ever decreasing volume of business available to firms of Officers. This was thought to be as a result of new housing legislation, and a change in collection processes within HM Revenue and Customs. Redundancies had been the inevitable result. Ms MacDermid indicated that new legislation on Universal Credit might give rise to increased business. The Council agreed that while it could not do anything to alleviate this downturn, it would draw the matter to the Lord President's attention.
29. Finally, items 12 and 13 were the Society's change of address and new Administrative Secretary. After serving as Administrative Secretary for some

17 years, Alan Hogg had retired and had been replaced by Ian Munro. The Council wished Mr Hogg well in his retirement.

Item 7: A. O. B.

30. None.

Item 8: Date of next meeting

31. The next meeting, which was likely to take place in March or April, would be fixed in due course.

Appendix 2

ADVISORY COUNCIL ON MESSENGERS-AT-ARMS AND SHERIFF OFFICERS

Meeting – 18 March 2013, 2pm at Parliament House, Edinburgh

Present

The Hon. Lord Uist (Chairman)
The Lord Lyon
Mr Frank McConnell, Solicitor
Mr. Roderick Macpherson – Officer of Court
Mr. Stuart Hamilton – Officer of Court
Mr Robert Sandeman, Scottish Government
Ms Pauline Allan, Citizens Advice Scotland
Ms. Charlotte Barbour – Chartered Accountant

Secretariat

Mrs. Kathryn MacGregor – Legal Secretary to the Lord President
Ms Elise Traynor – Deputy Legal Secretary to the Lord President

Apologies

Sheriff Principal Kerr, QC
Sheriff Principal Scott QC
Ms. Yvonne MacDermid – Money Advice Scotland

Item 1: Welcome and apologies

1. Lord Uist opened the meeting and noted apologies. He welcomed those who were in attendance for the first time: Pauline Allan of Citizens Advice Scotland and Mr Robert Sandeman from the Scottish Government.
2. Lord Uist noted that there remained a vacancy on the Council for a solicitor member. The Private Office had written to the Law Society seeking a nomination in December 2012; none had yet been received. Private Office undertook to follow this up in the anticipation that a solicitor member would be in place for the next meeting.

Item 2: Minutes of the meeting on 12 November 2012 and matters arising

3. The minutes of the meeting on 12 November 2012 were approved subject to a revision to paragraph 16 suggested by Mr Macpherson.

Item 3: Update on Act of Sederunt made since last meeting

4. Members noted that Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) (Amendment) 2013 had been made since the last meeting. The instrument came into force on 18 March 2013 and made several amendments to the 1991 Rules.
5. The changes were as follows: Continuous Professional Development is now compulsory; members of the Board of Examiners could be now be reappointed after an initial period of three years in office; out of date references to the Companies Act 1985 have been replaced with references to the Companies Act 2006; 'Member of the Scottish Parliament' and 'insolvency practitioner' are now included the list of extra-official activities which must not be undertaken by officers of court and; there is now a legislative basis for the communication of information to the Society from Sheriffs Principal.
6. A lengthy discussion focussed on the issue of business associations between officers of court and solicitors. At the November 2012 meeting of the Council, 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. The Council recommended to the Lord President that a rule be enacted which would prohibit forming and sustaining of direct or indirect business associations between officers of court and persons mentioned in Rule 15(3).

7. The Council was advised that the Lord President sympathised with that recommendation, but, on reflection, was concerned about the *vires* of such a rule given its inevitable impact on solicitors as well as officers of court. These reasons had been explained in a letter dated 14 January 2013 to SMASO from the Lord President, which was copied to Council members. The Lord President wrote to the Cabinet Secretary in December 2012 setting out his concerns and asking whether Regulations could be made under Section 61 of the Bankruptcy and Diligence etc (Scotland) Act 2007.
8. The Cabinet Secretary declined to make such Regulations. The Scottish Government shared the concerns over the *vires* of such Regulations on the basis of potential breaches of Article 1 Protocol 1 and Article 8 ECHR. Mr Sandeman repeated these views at the meeting.
9. The Council noted that it was not in favour of solicitor ownership of firms of officers of court and recognised that there was a legitimate aim in preserving the independence of officers of court. However, it was agreed that there were difficult ECHR barriers to effecting a blanket prohibition on solicitor ownership. It was noted that there would require to be significantly more evidence in relation to the harm likely to be caused by ownership; the evidence was anecdotal at present. There was a need for a properly articulated argument supported by a well formulated policy and associated evidence. Regulations preventing ownership were not, at this stage, a proportionate response.
10. The Private Office advised the Council that the position of an individual officer of court forming an inappropriate business association was already a matter which could amount to 'misconduct' arising from a breach of the article 1 of the Code of Conduct. Members were of the view that the Code of Conduct did not provide a complete solution: it was too 'personal' and would

require there to be fault on the part of the officer of court, which was not necessarily the case.

11. Mr Macpherson returned to his previous suggestion that the matter could be dealt with on a case by case basis as a question of 'disqualifying interest' where an officer was being asked to perform an official function in a case where a solicitor with whom he had a business association was the pursuing agent. This was likened to the situation where an officer or a business associate had a personal interest in a debt, which conflict was dealt with in section 75 of the 2007 Act. Similarly, an officer and his solicitor owner/associate should not be allowed to act in the same cause as this could give rise to a conflict of interest. This, it was suggested, would have the effect of preserving independence while not raising the ECHR property issues. It was not clear how easily such an end could be achieved by legislation.
12. It was agreed that the overriding concern was to maintain the independence of officers of court. The Council recommended to the Lord President that some form of provision be enacted, whether by Act of Sederunt or government Regulations, to deal with this potential for conflict of interest.

Item 4: Update from the Scottish Government

13. There was a verbal update from the representative of the Scottish Government, which focused on the concerns outlined above in respect of solicitor ownership of firms of officers of court. There had been a helpful meeting between SMASO and Mr Sandeman in March 2013. The outcome of this was, however, that the Government's view remained that there was insufficient evidence to support an outright ban on solicitor ownership at present.

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

14. The memorandum informed members about several areas of interest. Mr Hamilton highlighted several issues.
15. Item 2 was compulsory continuing professional development. This had already been discussed under item 3 of the agenda, the update of the 1991 Rules, as had item 4, the transmission of information to Sheriffs Principal from the Society and 6, business organisation.
16. Item 1 was the Society's annual fee. An appropriate amendment to the rules had been approved by members at the AGM of the Society on 1st December 2012 and passed to the Lord President to note.
17. Item 3 was misconduct. It was suggested previously that a Disciplinary Tribunal be formed to deal with cases of misconduct. It was noted that there appeared to be little justification for a Tribunal.
18. Items 7 and 9 related to Fees. Counsel's views had been sought on the opinion of the Court in *Mark Fishman* dated 14th September 2012. The Society was still considering whether amendments were required to the general regulations. In relation to the review of fees, Johnston Carmichael had commenced an initial survey of diligence and citation. The Society remained confident of being able to submit next year's application for changes to fees through the Advisory Council as previously requested by the Lord President.
19. Item 12 was a matter of great concern to the profession and related to the ever decreasing volume of business available to firms of Officers. This was thought to be as a result of a general downturn in litigation by court users, new housing legislation, and a change in collection processes within HM

Revenue and Customs. Redundancies would be the inevitable result. The Council agreed that it would draw the matter to the Lord President's attention.

Item 6: Annual Report

20. The Private Office had prepared a draft annual report for consideration by the Council. Subject to the provision of statistical information by SMASO, the correction of a typing error and the insertion of the Minutes from the present meeting (which would be approved by email in advance) the Council was content to approve the Report.

Item 7: A. O. C. B.

21. None.

Item 8: Date of next meeting

22. The next meeting would take place on 18 November 2013; time to be confirmed.