



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

1 April 2013 to 31 March 2014

May 2014

Contents

	Foreword.....	Page 3
1.	Introduction.....	Page 4
2.	Membership.....	Page 5
3.	Meetings and work of the Council.....	Page 7
4.	Statistical Information	Page 8
	Appendix	Page 9

Foreword by the Chairman of the Council

I am pleased to present this third 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 These reforms were never brought into force. Instead, by way of the Public Services Reform (Scotland) Act 2010, significant modification of the reforms was effected. 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 The provisions concerning the Scottish Civil Enforcement Commission were repealed, with the majority of its proposed functions being placed instead on the Advisory Council or on the Lord President and the sheriffs principal or on the professional association for officers of court. The Society of Messengers-at-Arms and Sheriff Officers (“SMASO”) was designated as the professional 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. This is the Advisory Council's third annual report and is for the period 1 April 2013 to 31 March 2014.

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 Scottish Ministers.

2.3 As at 1 April 2013 the membership of the Council was as follows:

The Hon. Lord Uist (Chairman)
The Lord Lyon King of Arms
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 Secretary was Mrs Kathryn MacGregor – Legal Secretary to the Lord President, who was assisted by Ms Elise Traynor – Deputy Legal Secretary to the Lord President.

2.4 As at 13 January 2014 the membership of the Council was as follows:

The Hon. Lord Uist (Chairman)
The Lord Lyon King of Arms
Sheriff Principal Kerr, QC
Sheriff Principal Scott QC
Mr Frank McConnell - Solicitor
Ms Angela McCracken - Solicitor
Mr Roderick Macpherson - Officer of Court
Mr Stuart Hamilton - Officer of Court
Ms Kay McCorquodale - Scottish Government
Ms Pauline Allan - Citizens Advice Scotland
Ms Yvonne MacDermid - Money Advice Scotland
Ms Shelagh MacKay - Chartered Accountant

The Secretary was Mr Roddy Flinn – Legal Secretary to the Lord President, who is assisted by Mrs Elise McIntyre – Deputy Legal Secretary to the Lord President.

3. Meetings and work of the Advisory Council

13 January 2014

- 3.1 Due to problems with members' availability, the Advisory Council met only once during the year 2013-2014, on 13 January 2014. A copy of the minutes of that meeting can be found in the appendix to this report.
- 3.2 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 SMASO and the Scottish Government. The meeting discussed the removal of the compulsory retirement age for officers of court and a proposed review of the manner in which fees are determined. The detail of these discussions can be found in the attached Minutes.
- 3.3 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 to review the Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991 ("the 1991 Rules") with a view to consideration of the removal of the compulsory retirement age for officers of court. The Council agreed that an Act of Sederunt be made for this purpose. A copy of the resulting Act of Sederunt can be found [here](#).

Future meetings

- 3.4 The Advisory Council is due to meet again in October 2014.

4. Statistical Information

The Advisory Council previously indicated an intention to include in its report 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 2013-2014 was not available in time to be included with this annual report. It will be published separately on the Accountant in Bankruptcy's website when it becomes available. In the meantime, the report for 2012-2013 can be accessed [here](#).

Appendix

ADVISORY COUNCIL ON MESSENGERS-AT-ARMS AND SHERIFF OFFICERS

Meeting – 13 January 2014, 2.15pm at Parliament House, Edinburgh

Present

The Hon. Lord Uist (Chairman)
The Lord Lyon
Sheriff Principal Kerr, QC
Mr Frank McConnell, Solicitor
Ms Angela McCracken, Solicitor
Mr Roderick Macpherson – Officer of Court
Mr Stuart Hamilton – Officer of Court
Ms Kay McCorquodale, Scottish Government
Ms Pauline Allan, Citizens Advice Scotland
Ms Yvonne MacDermid – Money Advice Scotland
Ms Shelagh MacKay – Chartered Accountant

Secretariat

Mr Roddy Flinn – Legal Secretary to the Lord President
Mrs Elise McIntyre – Deputy Legal Secretary to the Lord President

Apologies

Sheriff Principal Scott QC

Item 1: Welcome and apologies

1. Lord Uist opened the meeting and noted apologies. It was noted that this was likely to be the last meeting attended by the current Lord Lyon. Lord Uist welcomed those who were in attendance for the first time: Ms Angela McCracken, Solicitor, who had filled the vacancy on the Council for a solicitor member, Shelagh MacKay, Chartered Accountant, who had replaced Charlotte Barbour, and Kay McCorquodale from the Scottish Government. Lord Uist also welcomed Roddy Flinn, who was the new Legal Secretary to the Lord President.

2. Lord Uist asked, and members agreed, that the Secretariat write to Charlotte Barbour thanking her for her contribution to the work of the Council.

Item 2: Minutes of the meeting on 18 March 2013 and matters arising

3. The minutes of the meeting on 18 March 2013 were approved subject to several minor revisions on page 2 and the substitution of the word 'oral' for 'verbal' in paragraph 13.
4. There was one matter arising from the previous minutes: the issue of business associations between solicitors and officers of court. At paragraph 9 of the previous minutes, the council agreed that it would be a disproportionate response, in ECHR terms, to ban outright the ownership of firms of Sheriff Officers by solicitors. Members of the Council considered that nevertheless some action might be taken by way of amendment of the 1991 Rules to deal with a perceived conflict of interest: paragraphs 11 and 12 of the previous minutes refer. It was suggested that a rule could be enacted to deal with the potential for conflict on a case by case basis.
5. The Council was advised, in Paper 2A, that the Lord President had considered its recommendation carefully. However, he was not persuaded, in the absence of evidence of actual conflict, that it was necessary or appropriate to take any legislative action at this stage. The theoretical conflict which had been identified might arise where a sheriff officer was asked to carry out diligence either for or against a client of a solicitor-owning firm. A second example is where he or she is asked to subordinate work according to the wishes of a solicitor owner. There was no evidence that actual conflict was arising in practice.
6. The Lord President was not persuaded that such a conflict could effectively be prevented by way of making a rule stopping an officer of court from acting

in such a case. The potential for conflict seemed to exist more on the solicitor side of the arrangement than that of the officer of court. The Lord President was not in a position to make rules governing solicitors. In any event, Solicitors' Practice Rules would already provide sufficient protection. Ms McCracken confirmed that this was the case. It was noted that Officers of Court were of course already bound by the SMASO code of conduct. It was a matter for SMASO to decide whether the code ought to be further amended, although again this could not be used to prevent conflict on the solicitor side.

7. This matter was also raised in the SMASO update under item 6 on the agenda, but Mr Macpherson confirmed that no new issues had been raised over and above what was contained in paper 2A.
8. The Council noted the Lord President's decision on the matter.

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

9. The Council noted that two Acts of Sederunt had been made since the meeting on 18 March 2013. Act of Sederunt (Fees of Messengers-at-Arms) 2013 and Act of Sederunt (Fees of Sheriff Officers) 2013 were made on 10 December 2013 and were due to come into force on 27 January 2014.
10. The Acts of Sederunt substitute new Tables of Fees for the Tables in Schedule 1 to the Act of Sederunt (Fees of Messengers-at-Arms) (No. 2) 2002 and Act of Sederunt (Fees of Messengers-at-Arms) (No. 2) 2002. The fee levels in the new Tables represent an increase of 2.15% on the existing fees.

Item 4: Review of fees of Sheriff Officers and Messengers at Arms

11. The Council was aware from previous meetings that SMASO had been asked to carry out a review of its fees a number of years ago by the previous Lord

President. There had been difficulties with this process in terms of ingathering sufficient reliable data to enable a robust unit cost analysis to be undertaken in relation to particular pieces of work.

12. In July 2013, the Society wrote to the Lord President indicating that, following initial advice from Johnston Carmichael, it was facing some difficulties in proceeding with a detailed unit costing exercise as had been previously requested. The principal difficulty seemed to be in utilising a methodology unfamiliar to the profession, namely time recording. Various other options were posed, none of which seemed to be able to get to the bottom of the costs involved in carrying out particular types of work. SMASO asked the Lord President to continue with the annual indexation model, but this would require acceptance of the current table as a valid starting point.
13. The Council was advised that the Lord President was concerned that the fee structure and levels were determined some 25 years ago, having been uplifted in line with inflation in the intervening years. It was not possible to determine whether the fee levels, and the manner in which fees are set, remain appropriate. The Lord President has a duty to ensure that any decision he makes in relation to fees is fully supported by evidence and is fair to all of those who are affected. It was noted that, while there might be difficulties with time recording, these may not be insurmountable and it may be that some form of that would require to be instituted.
14. In recognition of the burden on the Society of pursuing a further review at the request of the Lord President, and the necessity of arriving at a transparent and robust method for setting fees, the Lord President intended to commission an independent team to assist him in conducting a comprehensive review of the structure and level of fees. It was noted that the Lord President would ask SMASO and the Advisory Council to assist in this process in due course. Mr Hamilton pointed out that much of the

groundwork had already been done, and that previous reports could be provided to the review team.

15. The Council noted the Lord President's decision and enquired as to the likely timescale for the review. The secretariat confirmed that it was not possible at this stage to give a precise indication; budget issues required to be resolved. In light of the inevitable delay, the Lord President had, however, agreed to authorise the Society's application for an inflationary increase for 2014. It was noted that no further amendments would be made to the Table of Fees or the general regulations in the meantime. The Council agreed to note the item.

Item 5: Update from the Scottish Government

16. There was an oral update from the representative of the Scottish Government, which focused on a meeting she had attended with members of the Society and Fergus Ewing, MSP. The meeting had been helpful and Mr Ewing had since written to the Society indicating that several matters were being under consideration. The officer of court members indicated that the Society had been encouraged by Mr Ewing's assistance and that of the Cabinet Secretary.

Item 6: Memorandum from the Society of Messengers-at-Arms and Sheriff Officers

17. The memorandum informed the Council about several areas of interest. Mr Macpherson highlighted several issues.
18. An issue of particular concern arose in relation to the compulsory retirement age of 70 which was contained in the 1991 Rules. The Council noted that a letter had been received from the Equality and Human Rights Commission raising the same issue. Members of the profession, though performing a public function, were in private practice, and could more readily be

compared to solicitors working in a firm rather than a holder of a public office or a police officer. Their pension arrangements were entirely different. Consumers had a choice as to which officer to use and conduct amounting to misconduct could lead to disciplinary action and ultimately removal of a commission by the Sheriff Principal. The Council was advised that legal advice had been taken from the private office. The view had been taken that the restrictions would be difficult to justify objectively and may be disproportionate because of the blanket nature of the prohibition. The same difficulty arose with the minimum age of 20 which was required for entry into the profession.

20. The Council agreed to recommend to the Lord President that the restrictions in relation to age be removed from the 1991 Rules. The Secretariat would write to the Equality and Human Rights Commission advising them of the outcome. It was for members of the profession to decide whether individual arrangements about retirement and competency could be instituted for their own firms. There may also be employers' insurance issues to consider.
21. The next item was the apparent confusion over fees which had arisen as a result of the decision of the Court of Session in *McEntegart v Fishman* [2012] CSIH 72. This issue had been raised in a letter received by the Council from Walker Love, Sheriff Officers. The Council discussed the letter and agreed that it was not for the Advisory Council to provide clarity on the interpretation of the Regulations contained in the 2002 Act of Sederunt: rather, it was for the Lord President to take any decision on that matter.
22. The position was that the Lord President had considered representations from SMASO in the autumn of 2013 about the *McEntegart* decision. The Lord President had replied that it was not necessary or appropriate to amend the general regulations at this time in light of the decision in *McEntegart*. The current practice of Officers of Court absorbing non-recoverable diligence fees

is consequently not prohibited by the Regulations. Neither was it set out anywhere in the regulations that this practice must always be followed in relation to local authority work; the officer of court has a discretion in this regard.

23. It was confirmed, for the avoidance of doubt, that the regulations provided that any restriction or modification to fees set out in the table are to be passed on only to the person from whom the fee is ultimately recoverable. There is, accordingly, no scope for “sharing discounts” with creditors as a form of commission.
24. It was noted that in terms of section 247 of the Local Government (Scotland) Act 1947 local authorities may apply to the sheriff for a summary warrant for recovery of outstanding rates with the addition in each case of a surcharge of 10% of the sum due and unpaid. The Council understands that there has been a long-standing practice whereby a proportion of this 10% surcharge is passed on to sheriff officers as a form of commission. This is not an arrangement which is regulated by the Table of Fees prescribed by Act of Sederunt. There was a suggestion that the market was becoming so competitive in the area of local authority work (with “commission” rates sometimes less than 1%) that it was becoming uneconomical to undertake this type of work. There were real concerns that if local authorities were to discontinue the practice of collection by way of summary warrant the profession may go out of business completely.
25. The Council noted that there were very grave concerns about the sustainability of carrying out local authority work at these levels of remuneration. It was noted that this was something which Fergus Ewing, MSP, had undertaken to discuss with local government colleagues. In the meantime, the Council agreed to reply to the letter from Walker Love and advise them that no changes were to be made to the regulations following the

McEntegart decision but a recommendation would be made to the Lord President that the matter of local authority arrangements be considered in the round in the context of the review of fees which was to be instituted in due course.

26. Finally, in relation to the SMASO update, a suggestion was made about service by recorded delivery or registered post. It was becoming increasingly common for proof of delivery to be readily available as well as proof of posting. The rules currently required only that the proof of posting be submitted to the court. Having both types of confirmation could only be of assistance to the court, and might remove the confusion and delay which can result from the clerk of court having to check whether a letter has been returned as undeliverable. The Council agreed that this seemed like a sensible idea and to recommend to the Lord President that the practice be changed. It was noted that this would require a change to the civil procedure rules and, as such, would require to be considered by the Scottish Civil Justice Council.

Item 7: A. O. C. B.

27. It was noted that Sheriff Principal Kerr was due to retire in the course of 2014. This was likely to be his last meeting and a successor would be appointed in due course. Members thanked the Sheriff Principal for his commitment to the Council.

Item 8: Date of next meeting

28. The date of the next meeting was provisionally fixed for 27 October 2014 at a time to be confirmed.