



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

1 April 2023 to 31 March 2024

June 2024

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Chair's Foreword

I am pleased to present the thirteenth 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. Messengers-at-Arms and Sheriff Officers are to be thanked for their continuing role in the justice system.

The public must have confidence in Messengers-at-Arms as a profession. It is right that they are properly regulated both by the courts they serve and by their professional association. Equally, it is appropriate that the system of regulation to which they are subject, and other matters affecting officers of court, are kept under review, so that appropriate recommendations may be made to the Lord President. I thank my colleagues on the Advisory Council for their assistance with this task.

The Hon. Lady Poole
(Chair)

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. The Advisory Council has had five Chairs, Lord Prosser (1987-2001); Lord McEwan (2001-2009); Lord Uist (2009-2015), Lady Wolffe (2015-2019) and Lady Poole (February 2020 to date).

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 The provisions concerning the Scottish Civil Enforcement Commission were repealed, with the majority of its proposed functions being placed instead on the Advisory Council or on the Lord President and the sheriffs principal or on the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 thirteenth annual report and is for the period 1 April 2023 to 31 March 2024.
- 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 chair);
 - (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. The current secretary is Edward McHugh, solicitor.

2.3 As at 1 April 2023 the membership of the Advisory Council was as follows:

The Hon. Lady Poole (Chair)

The Right Hon. the Lord Lyon (Dr Joseph Morrow)

Sheriff Principal Murphy KC

Sheriff Principal Ross

Alex Irvine - officer of court

David Walker - officer of court

Walter Drummond-Murray- Scottish Government

Ged Mulvey - Money Advice Scotland

Tom Hempleman – solicitor member

Fergus Thomson– solicitor member

3. Meetings and work of the Advisory Council

3.1 The Advisory Council met on 16 May 2023. The minutes of the meeting are attached as appendix A to this report.

3.2 SMASO submitted its annual memorandum to the Advisory Council. It is attached as appendix B to this report.

3.3 SMASO proposed to the Advisory Council that changes be made to the *Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991* (i) to reduce the training period for a candidate for sheriff officer from 3 years to 2 years and (ii) to reduce from 2 years to 1 year the period during which a sheriff officer requires to practice before becoming a messenger-at-arms. SMASO indicated that reduction of the training period might have the effect of attracting more new entrants to a profession which had been retracting. SMASO advised that standards would be maintained because the examination requirements remained and there was still a considerable training period. The Advisory

Council agreed that it was appropriate to seek wider views and a consultation was published on the ACMASO website inviting consultation responses. The responses were unanimously in favour of the proposed change. The Lord President's Private Office provided briefing to the Lord President. The Lord President instructed his Private Office to prepare the necessary amending instrument. A draft of the instrument is to be considered at the next meeting of the Advisory Council.

3.4 Following the meeting of 16 May 2023, the Chair of the Advisory Council wrote to the Chair of the Scottish Law Commission, to suggest that an area of law worthy of the attention of the Commission was the diligence of arrestment in an increasingly digital age, particularly issues of effectiveness given the rise of banks operating in Scotland with no local branch network. Unfortunately, the Commission's Eleventh Programme to cover the five year period between 2023 to 2027 has already been fixed, so there is little scope in the medium term for the Commission to consider the issues raised. The Commission suggested that meantime the issue might be raised with the Scottish Civil Justice Council, and this suggestion was referred to SMASO for any action it wished to take.

3.5 Also following that meeting, the Chair wrote to the Lord President about the effect on the profession of tenders for services of officers of court. A response was received from the Chief Executive of SCTS, it being an operational matter.

3.6 The Advisory Council is scheduled to meet in May 2024.

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. This takes 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. The report for 2022-2023 (published in September 2023) can be accessed here:

<https://aib.gov.uk/publications/scottish-diligence-statistics-2022-23>

APPENDIX A

ADVISORY COUNCIL ON MESSENGERS-AT-ARMS AND SHERIFF OFFICERS

Meeting 16 May 2023 at 4.15pm by webex

Present:

The Hon Lady Poole (Chair)
Sheriff Principal Ross
The Rt Hon the Lord Lyon (Dr Joseph Morrow)
Mr Alex Irvine – Officer of Court
Mr David Walker - Officer of Court
Mr Fergus Thomson - Solicitor
Mr Ged Mulvey - Money Advice Scotland
Mr Walter Drummond-Murray - Scottish Government

Secretariat:

Mr Edward McHugh – Senior Deputy Secretary to the Lord President

Apologies:

Tom Hempleman, Solicitor
Sheriff Principal Murphy

Item 1: Welcome and apologies

1. The Chair welcomed members to the meeting and, in particular, welcomed Alex Irvine to his first meeting. Apologies were noted from Sheriff Principal Murphy and Tom Hempleman.

Item 2: Membership of Council: update

2. The Chair noted the retirement of Sheriff Principal Turnbull and Mr Roderick Macpherson. She thanked them for serving on the Council. She informed members that the Chartered Accountant member position remained vacant and noted that it is not mandatory for that position to be filled. The Chair

advised members that the Lord President's Private Office will keep the matter under review.

Item 3: SCTS tender for sheriff officer services

3. Mr McPherson, a former member of the Advisory Council, had written to the Lord President on 7 July 2022 about the SCTS's tender for sheriff officer services. He had resigned from the Advisory Council because of his concerns about the issues arising.
4. The Advisory Council had a full discussion about these issues. There are differing views within the profession of sheriff officers and messengers-at-arms. The Council noted that, irrespective of who employs sheriff officers or messengers-at-arms, as individuals they are subject to a regulatory regime. The Council considered that if there was evidence of a reduction in standards of service to the courts, then that would be a matter for concern to it. However, because only a limited amount of time has elapsed since the SCTS tendering exercises, there is no cogent evidence currently before the Advisory Council of a reduction in standards.
5. The Advisory Council agreed that no immediate further action was necessary in the light of the information currently before it. However, the Council would keep the matter under review, particularly if a problem with service levels became apparent. Meantime, in the course of the Council's discussion, it had become apparent that a further tendering exercise may be imminent. The Chair requested the Council's SMASO members make the wider membership aware, so that they could make a decision whether or not to participate.

Item 4: Annual Report 2022-2023

6. Members considered the terms of the draft Annual Report. The Chair asked that the Report reflect that members were in email contact in October 2022 rather than formally meeting and decided to hold a meeting in May 2023. The Chair also requested that the Report be updated to reflect the date for the

appointment of Sheriff Principal Ross. Members approved the draft Annual Report, subject to those changes.

Item 5: Scottish Government Update

7. Mr Drummond-Murray provided a short oral update of relevant matters for the Council's attention as follows:

- The Cost of Living (Tenant Protection) (Scotland) Act 2022 has been enacted since the last meeting.
- The Moveable Transactions (Scotland) Bill has passed and awaits Royal Assent. It would not be in force for at least another year as further work is ongoing.
- Work on legal aid reform and expenses of civil proceedings is ongoing.
- Central Authority functions have seen some change post-Brexit.
- Review of the Civil Litigation and Group Proceedings (Scotland) Act 2018 is underway.

Item 6: SMASO Memorandum (2022).

8. Examination and training

Mr Walker spoke to the Memorandum. Members' views were sought on the proposal that changes be made to the Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991 (i) to reduce the training period for a candidate for sheriff officer from 3 years to 2 years and (ii) to reduce from 2 years to 1 year the period during which a sheriff officer requires to practice before becoming a messenger-at-arms. Reduction of the training period might have the effect of attracting more new entrants to a profession which had been retracting. Standards would be maintained because the examination requirements remained and there was still a considerable training period. The Chair indicated that she was sympathetic to the proposal. Members were agreed that it would be appropriate to seek wider views. The Chair instructed

LPPO to draft a consultation document, and subject to approval upload it to the ACMASO website inviting consultation responses.

9. **Accountant in Bankruptcy**

Mr Drummond-Murray undertook to find out what the Scottish Government's position is regarding secondary legislation relating to the Bankruptcy and Diligence (Scotland) Act 2007.

10. **Legacy Royal Mail Covid Policy**

Mr Walker queried whether the Sheriffs Principal have encountered any problems as a result of the change in Royal Mail policy in relation to the delivery of postal citation envelopes. Sheriff Principal Ross advised that the Sheriffs Principal are aware of a general problem with postal service and are discussing the matter.

11. **Challenger Banks – Cross Border Arrestment**

Members noted the issue highlighted concerning the effectiveness of the diligence of arrestment in an increasingly digital age and online banks. The Chair undertook to write to the Scottish Law Commission as a matter the Commission might put on its law reform agenda.

12. A number of other issues were discussed, including challenges to the profession, and ACMASO's digital strategy. The Chair recorded her thanks to SMASO for the work that has gone into the preparation of the Memorandum.

Item 7: AOCB

13. No AOCB.

Item 8: Date of next meeting

14. The Chair wishes to aim for one meeting per year. She will suggest a date for next year's meeting when the draft minutes are circulated.
15. The Chair thanked members for attending and closed the meeting.

APPENDIX B: SMASO Memorandum

MEMORANDUM ON THE YEAR 2023

FROM THE SOCIETY OF MESSENGERS-AT-ARMS AND SHERIFF OFFICERS TO THE ADVISORY COUNCIL

The most recent SMASO AGM, was held on 2nd December 2023, within the Dunblane Hydro Hotel. This was an exclusively in person event, resulting in a very strong turn out from our members. The meeting was preceded by two excellent CPD sessions, on the following subjects:

What next for Diligence? The Bankruptcy and Diligence Bill - Richard Dennis, The Accountant in Bankruptcy and Agency Chief Executive

Followed by

Arrestment – An overview of the key points in McKenzie v The City of Edinburgh Council, Emma Boffey, Advocate

This was the second AGM chaired by Andrew Fraser President. A notable highlight being a guest delegation from The South African Board of Sheriffs, including a very interesting presentation by their Chairman, ADV M Morgan who reflected upon the very similar challenges faced by Judicial Officers in his own country, in terms of respect of our public office and professional fee structure.

Membership of the Society

At the time of preparing this report, membership stands at: 132

Continuing Professional Development

SMASO has continued to provide regular CPD seminars and been fortunate to engage relevant, high-quality speakers. We are delighted to report we have once again obtained 100% compliance with our CPD requirements.

Following on from the in person event prior to our AGM, the first online session took place on 12th March 2024. On this occasion, our members benefited from a fascinating insight from a Belgian Judicial Officer, who explained their use of electronic signatures, by demonstrating all the features of their National Chamber's digital platform, used for registering attachments, accessing vehicle and land registers, serving claims electronically and an innovative process for recovering non-contested claims.

Our second speaker was Edmond Miles from GlobalSign, who provided an excellent explanation of the technology sitting behind electronic signatures, and the different levels of security authentication. This event produced a record turnout of over 80 members.

In addition, our members have been able to access CPD through various webinars provided by the International Union of Judicial Officers (UIHJ), the details of which are regularly circulated to members.

Examination and Training

The Executive Council is continuing to review all aspects of the current examination and training structure, with a view to modernising and encouraging new entrants to the profession.

We look forward to hearing from the Advisory Council in relation to the online consultation, in respect of reducing the period of training for a Sheriff Officer to two years and for a Messenger-at-Arms to one year. SMASO remains convinced that such a change will significantly improve recruitment opportunities and the retention of suitably motivated trainee personnel.

Another recent innovation has been facilitating online access to the Parliament House Books, for reference purposes, for candidates sitting the professional examination.

Accountant in Bankruptcy

SMASO continues to have constructive dialogue and collaboration with the Accountant in Bankruptcy.

Following on from the AiB's Diligence Working Group, which contributed to the Bankruptcy and Diligence (Scotland) Bill, SMASO delegates were appointed to the Ministerial Working Group on Statutory Debt Solutions. This Working Group has contributed to the progress of the current Bill and will also consider the following anticipated secondary legislation.

During the past year we have also been involved in a Working Group looking at the Statistics collected by AiB. Finally, as previously mentioned above, we were delighted

to welcome Richard Dennis, Accountant in Bankruptcy and Chief Executive of AiB, to deliver a keynote address at our meeting in Dunblane last December.

Statutory Fee Review

As reported in the course of the last Advisory Council meeting, supported by our external advisors, Johnston and Carmichael, we made an application for a 11.9% increase in the statutory table of fees on the 9th November 2022. For the first time, this application was accompanied by a report explaining the rationale for our application and a summary of the various measures taken by members to improve operational efficiency and reduce cost.

This application was duly considered by the Scottish Civil Justice Council's, Cost and Funding Committee, in the course of their meeting on 27th March 2023. Sometime later we were advised that the application had been approved, however due to resource issues and other work in hand, ultimately, this revision to our statutory table of fees, was delayed until the 22nd March 2024. In effect, a full year after being advised that the application had been approved.

Our members have expressed their dissatisfaction and frustration at the lack of commitment and engagement from the Scottish Civil Justice Council. In particular, the Cost and Funding Committee, resulting in SMASO writing directly to the chair of the committee on two separate occasions to express our concerns. Despite our best efforts, and many years of dialogue with this body, it seems that we are still unclear, in terms of the appropriate methodology and timing for future fee review applications.

SMASO Digital Strategy

The sub-committee set up to deliver SMASO's digital transformation strategy, has been able to deliver some positive results.

Our members were pleased to learn that the Scottish Government has moved an amendment at Stage 2, Of the Bankruptcy and Diligence Bill, to the effect that both Arrestment (typically banks), and Earnings Arrestment, can be served electronically, where the arrestee/employer agrees to this method of service. This is a key component of our digital strategy which will improve communication and effect cost savings.

In respect of the deployment of electronic signatures, we have continued to undertake research and consultation with other stakeholders, including the aforementioned online CPD event, focusing on the technical and practical application of this technology.

We are now considering how the application of digital signatures might aid our members in their day-to-day activities. Of specific note, is the requirement for certain

statutory forms, which currently require to be signed by both an officer and witness. We anticipate that we may need to seek changes to current rules to achieve this outcome.

Regarding access to the Civil-on-Line platform for SMASO members. Following contact with Scottish Courts and Tribunal Service's Civil Lab - Change & Digital Innovation (CDI) team, we now understand that in accordance with their ongoing development programme, there will be no scope to involve Sheriff Officers in this financial year. However, we are advised that there are plans for specific development in the 2025/26 financial year, which will include the electronic lodging of Sheriff Officer applications, such as inhibition and charge for payment walls of court service.

The sub-committee will carry forward these works and also embark on a new project, focusing on arrestment of accounts managed by challenger banks, with no physical address and arrestees such as online third-party intermediaries, such as Uber, Just Eat etc who process funds on behalf of debtor companies.

International Business

SMASO continues to be an active supporter of the International Union of Judicial Officers (UIHJ). There was strong representation from Scotland at the Spring Permanent Council meeting in Luxembourg in May 2023, and more recently, the November AGM in Paris.

Of significant note, the forthcoming triannual World Congress which will take place in Rio De Janeiro, 7th to 10th May 2024. The theme of the Congress is: *The judicial officer - the trusted third party*.

There will be three days of workshops and seminars, focusing on the key attributes and development opportunities, for the modern Judicial Officer, redefining our critical role in terms of balancing the interests of all parties, to ensure justice and fair treatment. In addition, there will be a cultural and social program, which provides a wonderful opportunity for like-minded Judicial Officers to meet, network and share best practice.

Bankruptcy and Diligence (Scotland) Bill

SMASO welcomes the opportunity to engage with the Scottish Government regarding amendments proposed to the Bankruptcy and Diligence (Scotland) Bill.

Whilst we are encouraged by some of the amendments agreed at Stage 2, particularly regarding the electronic service of Arrestments and Earnings Arrestments, we have remaining concerns regarding some of the amendments meantime withdrawn, but which we understand will receive further scrutiny prior to Stage 3 of the Bill.

Earnings Arrestments - We believe the amendment to increase the Protected Minimum Balance (PMB) applicable to Earnings Arrestments to £1000.00 (monthly equivalent), would significantly negate the effectiveness of this diligence, restricting the enforcement measures available to Court users in Scotland. Earnings Arrestments are the second most used diligence process in Scotland and are generally recognised as being the only efficient diligence, by facilitating a fair and efficient recovery process.

This issue is amplified in respect of the high volumes of Local Authority Earnings Arrestments, where contractual arrangements dictate that the statutory service fee is retained only from successful diligence. For the avoidance of doubt, all ineffective or abortive diligence fees are not added to the debtor's balance, nor are these billed to the Local Authority client. In effect our members are obliged to absorb all costs associated with ineffective diligence, under current contractual arrangements.

Therefore, the proposed increase to the PMB will delay vital income where the Earnings Arrestment can still be operated. Equally concerning, there will be many instances where Earnings Arrestment will not be operated, due to the increased PMB, thereby negating the impact of the only efficient diligence currently available to creditors.

Bank Arrestments - Historically, Bank Arrestments have been used as a speculative diligence, often because there is simply no other option available to a creditor. Following the decisions to increase the PMB on a Bank Arrestment to £1000.00, our members are now beginning to assess the impact of this enhanced protective measure. Early indications are that an already, rather ineffective diligence, is now less effective.

Our members were intrigued to watch coverage of Bill, during the televised Economy and Fair Working Committee meeting of 20th March 2024. There was a statement made by one contributor to the effect that creditors have several diligence options, in addition to Earnings Arrestment. This is not our members' experience. Our experience is that a great many decrees are now unenforceable.

Since the establishment of the Scottish Parliament, there have been several reviews of diligence which have sought to strike the correct balance between the rights of the creditor and debtor. The Bankruptcy and Diligence (Scotland) Act 2007 was intended to deliver on the concept of "universal attachability", by introducing Residual Attachment, Land Attachment and Information Disclosure. Seventeen years later, none of the foregoing diligence procedures have been enacted.

During the same period, there have been numerous enhancements in terms of debtor protection legislation. We must stress that SMASO fully supports all measures which will prevent undue hardship to any citizen. Our concern is that many individuals who can pay are effectively shielded by legislation intended for those in genuine hardship.

In terms of the wider impact on our profession, the reality is that major creditors, apart from Local Authorities, no longer use the courts to recover outstanding debt. This disparity is clearly demonstrated by the annual statics published by the AiB, noting that the vast majority of diligence executed is at the instances of Local Authorities.

In respect of Local Authority Debt, the levels of ineffective diligence, clearly demonstrates, just how easily non-complaint debtors can evade payment to Scotland's cash strapped Local Authorities. Given that the recovery of statutory diligence fees, effectively funds the operation of such contracts, as diligence becomes less effective, the recovery of statutory fees becomes more problematic. Aligned with increased operating costs, the financial burden of more ineffective diligence and a lack of financial support from Local Authorities, our members find themselves in a very challenging position.

In light of the foregoing, SMASO are very concerned about the overall effectiveness of the current enforcement measures in Scotland. Within our profession, there is a growing sense that the repayment of debt is becoming entirely optional and that the issue of an order to pay, be it a court decree or summary warrant, is no longer of any real concern to many of the citizens whom we encounter.

In light of the foregoing, we are actively seeking an audience with the relevant Scottish Minister, to highlight our members genuine concerns as to the efficacy of current diligence procedures. We have engaged the services of Johnston Carmichael to assist in collating relevant statistics which we hope will help demonstrate the potential impact of the proposed increase of the PMB and the current effectiveness of other enforcement procedures. We would be happy to share this analysis with the Advisory Council if deemed appropriate.