

**From:** Swanson DA (Denise)  
**Sent:** 25 October 2017 15:08  
**To:** [REDACTED].uk  
**Subject:** ACA REVISED SCHEME

[REDACTED]

I am now in a position to come back to you on the revisions to the ACA scheme. As you know, we agreed to consider revisions to the ACA scheme agreed at our meeting on 6 June and you submitted these revisions on 12 September. Subsequently, 1 October, you resubmitted the more substantial revisions which had been withdrawn with the request that this be the scheme that was reviewed for approval.

I have set out below our collective response to each of the submissions sent in by you and the options you may wish to consider in moving forward.

### **The September 2017 changes**

The Lord President has indicated his approval to press ahead with most of the changes that were discussed following our meeting in June (i.e. the track change document that was submitted on 12 September 2017). Overall, Lord President is very supportive of the changes and has indicated he has no difficulty with members of the ACA having rights of audience in all ordinary cause procedural hearings in litigation relating to “construction matters”. However, as with most changes in court practice, he considers that a degree of consultation should be carried out before the changes are made. In this case, it is proposed that the Sheriffs Principal should be consulted, along with the Law Society of Scotland. The consultation would not need to be too formal and the consultation period could be fairly brief. Assuming the consultation responses did not throw up any major issues, we should be able to proceed with drafting the amending Act of Sederunt.

### **The October 2016 changes**

You have since indicated that you wish to revert to the revisions submitted in October 2016 and, as set out in my email of 10 May, this raised a number of areas on which we need more information, and that position remains, as set out below

You have reinstated the request to conduct construction-related litigation in the Court of Session. Can you provide information to support such an extension, including:

- what requests you have had from members in relation to providing services in the Court of Session, and how many members would seek to do Court of Session work.
- what steps would be taken to extend members’ professional requirements, and what training courses would be put in place covering Court of Session practice and procedure.
- what existing experience members have of dealing with high value construction disputes in other forums, such as arbitration and adjudication (recognising that the Court of Session has jurisdiction over higher value disputes, particularly in light of the sheriff court privative limit post court reforms).
- what exactly the ACA would like its members’ role to be in the Court of Session – in particular, would they intend to instruct counsel in *all* matters (including any appearances in vacation, which can be covered by solicitors)?

- Clarity about whether you propose that members would be open to a finding of personal liability in expenses, in the same way as solicitors.
- Confirmation of whether members would need to extend their PI insurance cover for cases in the Court of Session.

We had previous discussions around the different layers of membership which were quite confusing and you seemed to accept that. However, these different member categories feature in the resubmitted scheme. Do you wish to proceed on that basis or on the basis of the simpler system?

You have also reverted to the definition of “construction matter” to include oil and gas matters. Is that intentional?

Finally, can you confirm whether you are seeking rights of audience in all hearings in ordinary actions, rather than procedural hearings?

These changes would require a much wider consultation exercise to include, for example the Law Society of Scotland and the CMA as it would entail a significant extension of ACA members’ rights. We would need this further information, which formed part of a comprehensive proposal, before we could do so.

In moving forward, it would take some time to reach a conclusion on revisions to the Scheme set out in both versions; as I indicated in my email of May, we have a very full workplan and it may take some time to allocate the necessary time to this work. We could take this in two stages; dealing with those revisions set out in the September revisions with a view to progressing these early in the New Year if we can. Thereafter, taking forward the more substantial revisions when time allows. This could allow ACA members time to gain a higher profile by appearing in ordinary actions and further build the reputation of the ACA. This could be helpful in any subsequent consultation.

Please let me have your views on how you would wish to progress.

On a separate point, you emailed on 19 October with a suggestion that we discuss the following two options for the ACA:

“1 I can proceed with my petition for an independent enquiry, on the basis of the written views of the Lord President and the Sheriffs Principal, that there is institutionalised bias within the Scottish courts and the Scottish Government in favour of solicitors which distorts competition, and prejudices the right to a fair hearing.

Alternatively

2 We now have to reluctantly recognise that the ACA are never going to be included in the legal system of Scotland in the same manner as solicitors and advocates, and we therefore need to operate in isolation going forward. To do this we have to be self-sufficient, and not dependent on solicitors to provide any aspect of our services. There has to be desire within the Scottish government to try and attain a fair and level playing field, and at the very least, an attempt at recognising that solicitors have the dominant position in the market place, which may distort competition. Support will be required from the Scottish government in a similar philosophy to that of the energy markets, albeit to a much lesser extent. Where there are situations on which we currently rely on solicitors to provide some parts of our court rights, this

now has to be removed. The recent revised scheme with rights of audience in the sheriff court and the right to instruct counsel in the Court of Session will effectively address this aspect. With the restrictions on practice removed, it will then be up to the ACA to demonstrate in the marketplace that we can provide a cost effective alternative to solicitors, and that the views of the Lord President and the Sheriffs Principal are inappropriate and unfounded.”

I don't think a meeting to discuss either of these options would be appropriate as this is a decision for you to take.

Regards,

Denise