



RECOVERY OF LITIGATION EXPENSES POLICY

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Tel: 0141 270 7030

info@sccrc.org.uk

1.0 Introduction and Context

1.1 For most of its period of operation, the Commission has faced a small litigation caseload, primarily in the form of judicial reviews of Commission decisions. As one would expect in such a small organisation, there is a high degree of variance in the Commission's ongoing litigation caseload. It is nonetheless the case that on a secular level the trend appears to be towards increase. In spite of the increase in judicial review workload, the Commission has been almost invariably successful in defending its decisions. It has never received an adverse decision in contested proceedings

1.2 As a matter of general principle, the expenses of litigation follow success. In other words, the successful party is, in theory at least, entitled to recover many of their outlays. In practice, recovery of expenses is complex and frequently unsuccessful. It is constrained by the ability of the unsuccessful party to pay the successful party. Moreover, in cases in which an award of Legal Aid has been granted, the court may modify the liability of the assisted party¹. Judicial modification of expenses is based upon the ability of the assisted party to pay. Standing the stringent financial eligibility requirements for a grant of civil Legal Aid, the most frequent modification is to a nil contribution. It is thus the case that in practice the Commission (or indeed any public

¹ Legal Aid (Scotland) Act 1986 section 18(2)

body) can expect to recover expenses only where the unsuccessful party is: (i) not impecunious and (ii) not legally aided.

1.3 In the first fifteen years of its operation, every individual who brought a legal action against it was in receipt of Legal Aid. As a result, although the Commission was successful in every case brought against it, it received no awards of expenses. In recent years, however, there has been a trend towards legal challenges brought by self-funding litigants and party litigants. The Commission has, accordingly, found itself in receipt of numerous awards of expenses. This requires the Commission to decide whether, and to what extent, it is to pursue the recovery of these expenses by way of further legal action.

2.0 Purpose

2.1 This policy establishes a decision-making framework for recovery in cases in which the Commission has been awarded expenses.

3.0 Policy authorisation

3.1 The Board of the Commission approved this version of this policy on 28 January 2022

4.0 Governance

4.1 The Commission is a non-departmental public body, wholly reliant upon the Scottish Government for its funding. The Commission is accountable to the Scottish Ministers, and to the Scottish Parliament, for its outlays.² The Commission operates under the auspices of its Framework Agreement with the Scottish Government. The framework agreement provides the Commission with four broad corporate goals. It goes on to provide that the Commission's Board is responsible for ensuring that the Commission meets "high standards of corporate governance at all times including openness and transparency in its decision making." The Board is also charged with "promoting the efficient, economic and effective use of...resources by the Commission consistent with the principles of Best Value".

4.2 The Commission considers that it is obliged under the Framework Agreement to protect the public purse by taking the following actions:

- a. Minimise expenses on ongoing actions
- b. Maximise recovery where the court has awarded expenses
- c. Take reasonable steps to dissuade individuals who have brought unsuccessful legal actions against it from raising further such actions
- d. Adopt a consistent decision-making approach designed to achieve the foregoing

4.3 The Commission recognises that judicial review of administrative action is an important safeguard in the decision-making process. One of the Commission's corporate goals is to strengthen public confidence in the ability of the justice system to address miscarriages of justice. The existence of a robust system of judicial review of Commission

² Criminal Procedure (Scotland) Act 1995, Schedule 9A, sections 8-11

decisions as an ultimate safeguard is essential, in the Commission's view, to maintaining public confidence in the criminal justice system to correct miscarriages of justice.

5.0 General Principle

5.1 In order to discharge its responsibilities as outlined in the foregoing section, the Commission has adopted the following as a general statement of principle:

Unless the expenses of the other party are likely to be modified to nil, the Commission will *always* seek an award of expenses. The Commission will *always* seek to recover expenses insofar as it is practicable to do so.

6.0 Recovery Proceedings

6.1 In every case in which the Commission has been awarded expenses, the Board will decide whether or not to initiate recovery proceedings.

6.2 In taking such a decision, the Board will have regard to the following factors:

- a. Sum Recoverable
- b. Probability of Recovery
- c. Future Actions from Unsuccessful Party

6.3 The Board will not initiate recovery proceedings if it considers that doing so would have a significantly negative impact upon any of the Commission's corporate goals.

7.0 Sum Recoverable

7.1 The Board will consider the potential sum that may be recovered by way of recovery proceedings. The size of the sum recoverable will vary considerably depending on the nature of the proceedings and the point at which they concluded. It may be easier to justify bringing proceedings in cases in which the potential benefit, in the form of a large award, is greater.

7.2 In cases in which the account has not yet been sent for taxation, it will not be possible to quantify exactly the sum recoverable. In such a case the Senior Legal Officer (Legal Adviser) will provide the Chief Executive with an estimate of the sum likely to be recoverable. The Chief Executive will communicate this to the Board.

8.0 Probability of Recovery

8.1 The Board will consider the likelihood that the other party has the necessary funds to satisfy the award of expenses. In so doing, it will consider the personal circumstances of the other party insofar as the Commission is aware of them. Where the Commission has reason to suspect that the other party may have an interest in a sizeable asset it will take reasonable steps to ascertain whether or not this is the case.

8.2 As a matter of course, the Commission will not pursue recovery proceedings where the Board assesses the probability of recovery as low. In such a situation, the Commission will generally avoid incurring further expenditure.

9.0 Future Actions from Unsuccessful Party

9.1 The Board will consider whether it has reason to suspect that the other party is especially litigious or vexatious, and the probability that any decision to pursue recovery proceedings will discourage the other party from raising unmeritorious actions against the Commission in the future.

10.0 Review of Ongoing Recovery Proceedings

10.1 The Chief Executive will deliver regular reports to the Board on any ongoing recovery proceedings and update it with any pertinent information that becomes available. The Board will keep any decision to bring recovery proceedings under review. If at any stage it becomes apparent that the probable benefit of the proceedings is likely to be outweighed by the cost, the Board will instruct the Chief Executive to discontinue the proceedings.

11.0 Review

11.1 This policy should be reviewed every two years.

Date first approved	27 January 2022
Date of last review	December 2024
Date of next review	December 2026