

Equality Impact Assessment Record

Consultation on Scottish Court Fees 2018-2021

**(Court of Session, High Court of Justiciary,
Sheriff Appeal Court, Sheriff Courts
including Sheriff Personal Injury Court,
Justice of the Peace Courts and Office
of the Public Guardian)**

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Riaghaltas na h-Alba
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Equality Impact Assessment Record

Title of policy/ practice/ strategy/ legislation etc	Consultation on Scottish Court Fees 2018-2021 (Court of Session, High Court of Justiciary, Sheriff Appeal Court, Sheriff Courts including Sheriff Personal Injury Court, Justice of the Peace Courts and Office of the Public Guardian)	
Minister	Annabelle Ewing	
Lead official	Walter Drummond-Murray	
Officials involved in the EQIA	Name	Team
	Gery McLaughlin Walter Drummond Murray	Courts Team
Directorate: Division: team	Justice: Civil Law and Legal System Division Courts Team	
Is this new or revision to an existing policy?	Revision to existing policy	

Screening

Policy Aim

The Scottish Government is publishing a Consultation on Court Fees on 20th October¹. The proposals consulted on are for increases of court fees resulting to take account of projected inflation for the next three years. In addition it departs from the inflation only rises in a few cases and makes relatively minor amendments to fee narratives in order to improve consistency and take account of the experience of a number of court reforms that have been introduced in the last year or two.

The policy contributes to the Scottish Government's Wealthier and Fairer and Safer and Stronger objectives, through the following national outcomes.

- Our public services are high quality, continually improving, efficient and responsive to local people's needs;
- We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others; and
- We live our lives safe from crime, disorder and danger.

Whom will it affect?

The fee proposals will have an impact on all court users not in receipt of exemptions. Currently, those persons in receipt of civil legal aid, passported benefits and Working Tax Credit (including child tax credit, or the disability element, or the severe disability element) with gross annual income of £16,642 or less are exempt from paying court fees.

In considering the impact of the inflationary fee increases on specific groups, the Scottish Government considers that affordability would be the main issue. If some groups identified by race, religion or belief, disability, age, caring responsibilities, gender or sexual orientation typically earn less than average, the Scottish Government considers that assistance from legal aid and the available exemptions ensure that these groups would be protected and so the Scottish Government consider that they would not be discriminated against as a result of inflationary court fee increases.

For persons who are not eligible for exemption from fees, if they are the successful party in civil litigation they will be entitled to have court fees and other outlays reimbursed to them by the losing party. In some cases, pursuers (claimants) may not in practice have to pay court fees because the law firm they are using or a trade union backing them may be in a position to pay the fees. Further, the Scottish Government proposes in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill² that a pursuer using a "success fee agreement" (broadly, a no-win-no-fee agreement) should

¹ The consultation can be viewed at <https://consult.scotland.gov.uk/courts/scottish-court-fees-2018-2021>
² <http://www.parliament.scot/parliamentarybusiness/Bills/104998.aspx>

not be liable to make any payment for court fees or other outlays and that the cost of these should be borne by the provider. The Bill also provides for a form of class action to be known as group procedure which would mean that in the case of multi-party litigation, instead of multiple claims each bearing court fees there would be a single action³.

Environmental

There is nothing to suggest that there would be a particular environmental impact from these proposals albeit many environmental groups are concerned about the cost of bringing actions to the courts and Scotland's compliance with its obligations under the Aarhus Convention to promote environmental justice.

Rural Impact

The proposals increase fees that would be charged by court services across Scotland and so do not impact disproportionately on rural communities.

Enforcement/Sanctions/Monitoring

Nearly all fees are paid for in advance of the service so the sanction for non-payment is that the service will not be performed. The proceedings may be struck out if the fee is not paid.

What might prevent the desired outcomes being achieved?

No factors that might prevent the desired outcomes being achieved have been identified. However, the projected income generated by the proposals is based on assumptions regarding case levels. If numbers and cases decrease this would affect the levels of cost recovery. The Scottish Government is mindful that court fees must be set in consideration of the impact upon access to justice. Put simply, it would be unwelcome if fees are set at a level that discourage potential litigants with meritorious claims from bringing their cases to court to vindicate their rights (although there are arguments that it may be desirable for some types of action e.g. low value claims to be determined by alternative dispute mechanisms or otherwise settled without court action).

³ The Equality and Human Rights Commission has commented that group procedure could be beneficial for equality and human rights claims http://www.parliament.scot/S5_JusticeCommittee/Inquiries/CL-EHRC.pdf. Court fees for group procedure are not being consulted on at this stage given that the Civil Litigation Bill has not yet been passed and the Scottish Civil Justice Council will require to draw up detailed group procedure rules in due course.

Stage 1: Framing

Results of framing exercise

This impact assessment is intended to accompany the proposals on which consultation took place. It takes into account the equality impact assessments published for the Courts Reform (Scotland) Bill¹ and the assessment conducted for the Court Fees (Miscellaneous Amendments) Order 2016.⁴ This is particularly pertinent to the fees orders relating to the new courts established by the 2014 Act:

“In relation to the civil court reforms (e.g. national personal injury court; Sheriff Appeal Court) these issues were considered when the Courts Reform Act was being developed. Overall, the Equality Impact Assessment on the Courts Reform (Scotland) Bill found that none of the groups with protected characteristics would suffer disproportionately as a result of the interaction of the measures in the Bill with their protected characteristic.”⁵

The Scottish Government fully considered access to justice issues such as affordability for court users when developing proposals to increase fees. Factors such as affordability and the level of fee in relation to the value of claim have historically been taken into account when setting fees.

A particular factor to be considered since court fees were raised is provided by the recent UK Supreme Court Judgement in *Unison v Lord Chancellor* [2017] UKSC 51 regarding fees charged for access to the Employment Tribunals. That judgment concluded that the particular fees charged in that tribunal were an unlawful barrier to access to justice but held that fees were in principle a permissible method of funding and operating the system of courts and tribunals.

The consultation notes that the Scottish Government is carefully considering the judgment and believes that maintaining access to justice must be a paramount consideration in developing and revising fee charging regimes such as the system for court fees.

Further, the Scottish Government considers it vital that the extensive system of exemptions is maintained and special consideration is given to the parts of the court system that might give rise to particular concerns about access to justice for vulnerable people.

These considerations have always played a part in the setting of court fees. For example the last fees order in 2016 largely protected fees for divorce from increases. Evidence suggests that divorce fees are more often paid by women and fees can be particularly onerous for women who are leaving abusive relationships. In addition the 2016 order protected fees in the Sheriff

⁴ Now the Courts Reform (Scotland) Act 2014.

⁵ <http://www.gov.scot/Publications/2016/11/3573> .

Personal Injury Court as the cases in that court may often involve vulnerable people.

Environmental

There is nothing to suggest that there would be an environmental impact from these proposals beyond the issue about the bringing of environmental actions noted above.

Rural Impact

As the proposals are to increase fees charged by court services across all of Scotland, both those living in urban and rural areas will be affected in the same way. There will be, therefore, no particular impact on rural communities. It is worth noting however that since the last fees order the Scottish Land Court has become part of the Scottish Courts and Tribunal Service and therefore falls under the current consultation. The Land Court deals with cases of particular impact on rural communities. The consultation recognises that the Land Court fees have not changed in a number of years but does not propose any changes at this time.

Enforcement/Sanctions/Monitoring

Nearly all fees are paid for in advance of the service so the sanction for non-payment is that the service will not be performed. The proceedings may be struck out if the fee is not paid.

Extent/Level of EQIA required

The consultation will be seen by range of consultees. Those who responded to previous consultations include those who are directly involved with the legal process such as legal professionals and organisations in the justice system. Additionally organisations with an interest in legal issues through their concern for the welfare of the public in general or specific groups of people have typically responded as have a number of individuals who with an interest.

The consultation asks:

Are any of the proposals likely to have a disproportionate effect on people or communities who face discrimination or social exclusion due to personal characteristics? If so, please specify the possible impact?

The Scottish Government is better informed on equality issues as a result of the previous consultation which concluded on 12 October 2016. In particular, a helpful response was received from the Equality and Human Rights Commission which highlighted the potential for decline in numbers of equality and human rights legal challenges as a result of higher court fees. Based on the responses to the 2016 consultation, the previous fee consultation entitled "Consultation on Proposals for Fees Charged by the Court of Session, Accountant of Court, Sheriff & Justice of the Peace Courts, High Court, Office

of the Public Guardian, Personal Injury Court and the Sheriff Appeal Court”, which ran from 23 February 2015 to 15 May 2015, the group that is most likely to be affected by the proposals is that of those on incomes just above the level that would qualify for exemption. There are no data to suggest that any of the protected groups would appear to be disproportionately affected.

However, the issue of court fees as part of the cost of court actions needs to be taken in context. In most cases the court fees form a small proportion of the cost of legal proceedings and, as mentioned, a successful party in civil litigation will be entitled to have court fees paid by them reimbursed by the unsuccessful party. Further, through the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill the Scottish Government hopes to increase the availability and attractiveness of success fee agreements so that many pursuers will not have to pay up front court fees in practice.

No further impact assessment is considered necessary. However, the Scottish Courts and Tribunals Service (SCTS) will continually monitor cost recovery from the courts. In addition, there will require to be a comprehensive review of court fees in in the years to come. This will be informed by the data available from the newly operating Integrated Case Management System recently launched by SCTS and by an assessment of the impact of the court reforms such as the new Simple Procedure.

Stage 2: Data and evidence gathering, involvement and consultation

Characteristic	Evidence gathered and strength/quality of evidence	Source	Gaps identified and action taken
Age	<p>Neither the Scottish Government nor the SCTS collect specific information about the age profile of people who make use of the civil courts. However, results from the Scottish Crime and Justice Survey (SCJS)suggest that 21% of adults said that they had experienced at least one civil law problem in the last three years for which data is available. The SCJS gives a breakdown of these adults experiencing a civil law problem by age band: 16-24 (18%), 25-44 (29%), 45-59 (24%), and 60+(11%). This is a reflection of the numbers in each age band taking such action.</p> <p>In addition, there are a significant number of cases proceeding through the civil courts each year involving families and children, giving some insight into the number of children which might be affected by civil law issues.</p> <p>Age evidence The following statistics are from the Scottish Government Civil Justice Statistics in Scotland, 2015-16 and are the most recent available. They give a breakdown for the sheriff courts and the Court of Session.</p> <p>Sheriff courts</p> <ul style="list-style-type: none"> • there were 12,892 ordinary cause family procedure cases initiated, three quarters of which were for divorce or the dissolution of a civil partnership; • the majority of the remaining family cases related to parental responsibilities and rights, with 2,240 such cases initiated. Within this category, contact cases were the most common, with residence and other parental responsibilities and rights making up most of the remainder; 	<p>Scottish Crime and Justice Survey 2014-15 (section 9.3, p.93) is the main section relating to civil law in the main findings report)⁷</p> <p>The Scottish Government Civil Justice Statistics in Scotland, 2015-16⁸</p>	<p>Persons of any age can be affected by civil law issues and people of all ages benefit either directly or indirectly from efficient and fair access to the civil courts.</p> <p>No specific gaps have been identified.</p>

⁷ <http://www.gov.scot/Resource/0049/00496532.pdf>

⁸ <http://www.gov.scot/Publications/2017/03/5915>

Characteristic	Evidence gathered and strength/quality of evidence	Source	Gaps identified and action taken
	<ul style="list-style-type: none"> there were 3,315 applications for a referral to the sheriff where the result of a Children's Hearing is not understood or denied by the child or relevant person involved; and there were 496 Adoption Petitions and 365 applications for Permanence Orders with Authority to Adopt. <p>Court of Session</p> <ul style="list-style-type: none"> in 2015-16 there were 137 family cases initiated in the General Department of the Court of Session. Of those, 122 related to divorce and dissolution of a civil partnership. <p>The report "Is Scotland Fairer"⁶ produced by the Equality and Human Rights Commission in 2015 stated that "some groups – including children, disabled people and ethnic minorities – were significantly more likely to live in relative poverty AHC [after housing costs] than others. 'Relative poverty' was defined as "households who are living on less than 60% of the median income for Scotland, after housing costs".</p>	<p>The Scottish Government Civil Justice Statistics in Scotland, 2015-16</p>	

⁶

<https://www.equalityhumanrights.com/en/britain-fairer/scotland-fairer-introduction/scotland-fairer-report>, p43

<p>Disability</p>	<p>The Scottish Household Survey 2014⁹ shows that about one-fifth (22%) of households in Scotland contain at least one person with a physical or mental health condition or illness lasting or expected to last 12 months or more. This figure covers all members of the household including children. As would be expected, households comprised of older people are more likely to contain someone with a long-term condition compared to other types of households.</p> <p>The Scottish Government does not hold information on the proportion of people involved in civil litigation who have disabilities. The Scottish Court and Tribunals Service (SCTS) Court User Satisfaction Survey 2015¹⁰, indicated that only 2% of court users self-reported as having a long-term illness or disability. However, prevalence of civil legal problems and disputes is higher for disabled people at 30% as opposed to 21% in the general population. In addition, only 39% of disabled people had solved their most important/only problem whereas 52% without a disability had succeeded in resolving their most important/only problem.</p> <p>The report “Is Scotland Fairer”¹¹ produced by the Equality and Human Rights Commission in 2015 stated that “some groups – including children, disabled people and ethnic minorities – were significantly more likely to live in relative poverty AHC [after housing costs] than others. ‘Relative poverty’ was defined as “households who are living on less than 60% of the median income for Scotland, after housing costs”.</p>	<p>Scottish Household Survey 2016</p> <p>The Scottish Courts and Tribunals Service Court User Satisfaction Survey 2015</p> <p>Scottish Crime and Justice Survey 2014-15</p>	<p>In 2012, the Welfare Reform Act and the Welfare Reform (Further Provision) (Scotland) Act 2012 gave the Scottish Ministers powers to manage some of the changes arising out of the UK Government’s legislative changes, such as preserving Scots’ entitlements to “passport benefits” such as legal aid and court fee exemptions.</p> <p>UK benefits are widely used in Scotland to inform decisions about exemptions from court fees and to passport people onto eligibility for free legal aid. For example, if a person is in receipt of income support then they are automatically eligible to be exempt from paying court fees.</p> <p>The introduction of Universal Credit - the key feature of the UK Government’s welfare reform - will see the abolition of all the UK benefits currently used to passport people onto other Scottish benefits.</p> <p>Universal Credit is a new single benefit will replace a range of existing means-tested benefits and tax credits for working age people and bring together different forms of income-related support to provide a simple, integrated, benefit for people in or out of work. It will consist of a basic personal amount with additional amounts dependent on personal circumstances.</p>
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⁹ <http://www.gov.scot/Publications/2017/09/9979>

¹⁰ http://www.scotcourts.gov.uk/docs/default-source/scs---court-users/20151203_court-satisfaction-survey-report_final-report.pdf?sfvrsn=2

¹¹ <https://www.equalityhumanrights.com/en/britain-fairer/scotland-fairer-introduction/scotland-fairer-report>, p43

			<p>Universal Credit started is being rolled out gradually across the United Kingdom and it is expected that Universal Credit will cover all benefit claims by 2021.</p> <p>Scottish Ministers recognise the importance of entitlements for those persons receiving benefits such as Court Fee exemptions and are seeking to maintain similar access to them under the new arrangements. It is not our policy intention to restrict access by narrowing the eligibility criteria.</p> <p>Many local services in Scotland including both Court Fee exemptions and legal aid are affected by the forthcoming changes to “passporting” benefits and the Scottish Government is considering its options in the longer term for determining eligibility for help and support.</p> <p>The current consultation seeks views on the operation of the exemption system.</p>
Sex	The SCJS indicates that 21% of males and 21% of females had experienced at least one civil law problem in the last three years.		The statistics relating to the sex of those experiencing a civil law problem suggest that gender is not an issue although there is some evidence that divorce fees are borne more often by women.
Gender reassignment	The Scottish Government does not hold this information in relation to the proposals.		Although there is no information available on either of these categories, all types of person can be affected by problems which would require resolution in the courts.
Sexual orientation	The Scottish Government does not hold this information in relation to the proposals.		

Race	Respondents to the Scottish Courts and Tribunals Service 2015 Court User Satisfaction Survey identified their ethnicity as below:			Scottish Courts and Tribunals Service 2015 Court User Satisfaction Survey	Persons of any race or ethnicity can be affected by civil law issues and, similarly, benefit either directly or indirectly from efficient and fair access to the civil courts.
Ethnicity of Respondents	Number	%			
White					
Scottish	2401	85			
Other British	259	9			
Irish	14	<1			
Gypsy/ Traveller	-	-			
Polish	46	2			
Other	26	1			
Mixed or Multiple Ethnic Groups					
Any mixed or multiple ethnic groups	2	<1			
Asian, Asian Scottish or Asian British					
Pakistani, Pakistani Scottish/British	26	1			
Indian, Indian Scottish/British	4	<1			
Bangladeshi, Bangladeshi Scottish/British	3	<1			
Chinese, Chinese Scottish/British	4	<1			
Other	3	<1			
African					
African, African Scottish/British	4	<1			
Caribbean or Black					
Caribbean, Caribbean Scottish/British	1	<1			
Black, Black Scottish/British	1	<1			
Other Ethnic Group					
Arab	1	<1			
Other	2	<1			
Not Disclosed	44	2			
Total	2,841	100			

	The report “Is Scotland Fairer” ¹² produced by the Equality and Human Rights Commission in 2015 stated that “some groups – including children, disabled people and ethnic minorities – were significantly more likely to live in relative poverty AHC [after housing costs] than others. ‘Relative poverty’ was defined as “households who are living on less than 60% of the median income for Scotland, after housing costs”.		
Religion or belief	The Scottish Government is not aware of any specific information on the faith or religious belief of users in relation to the proposals.		Although there is no information available on this category, all types of person can be affected by problems which would require resolution in the courts.

¹²

<https://www.equalityhumanrights.com/en/britain-fairer/scotland-fairer-introduction/scotland-fairer-report>, p43

Stage 3: Assessing the impacts and identifying opportunities to promote equality

Do you think that the policy impacts on people because of their age?

Age	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination, harassment and victimisation			X	In considering the impact of the fees increases on specific groups, the Scottish Government considers that affordability would be the main issue. If some groups identified by age typically earn less than average, the Scottish Government considers that assistance from legal aid and the available exemptions ensure that these groups would be protected from the proposed fee increase.
Advancing equality of opportunity			X	
Promoting good relations among and between different age groups			X	

Do you think that the policy impacts disabled people?

Disability	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination, harassment and victimisation			X	In considering the impact of the fees increases on specific groups, the Scottish Government considers that affordability would be the main issue. If some groups identified by disability typically earn less than average, the Scottish Government considers that assistance from legal aid and the available exemptions ensure that these groups would be protected from the proposed fee increase.
Advancing equality of opportunity			X	
Promoting good relations among and between disabled and able bodied people			X	

Do you think that the policy impacts on men and women in different ways?

Gender	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			X	In considering the impact of the fees increases on specific groups, the Scottish Government considers that affordability would be the main issue. If some groups identified by gender typically earn less than average, the Scottish Government considers that assistance from legal aid and the available exemptions ensure that these groups would be protected from the proposed fee increase. The Scottish Government's notes that the last round of fee increases largely protected fees for divorce from increases. Evidence suggests that divorce fees are more often paid by women and fees can be particularly onerous for women who are leaving abusive relationships.
Advancing equality of opportunity			X	
Promoting good relations between men and women			X	

Do you think your policy impacts on trans people?

Gender reassignment	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			X	In considering the impact of the fees increases on specific groups the Scottish Government considers that affordability would be the main issue. If some groups identified by gender typically earn less than average, the Scottish Government considers that assistance from legal aid and the available exemptions ensure that these groups would be protected from the proposed fee increase.
Advancing equality of opportunity			X	
Promoting good relations			X	

Do you think that the policy impacts on people because if they are lesbian, gay or bisexual?

Sexual orientation	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			X	In considering the impact of the fees increases on specific groups, the Scottish Government considers that affordability would be the main issue. If some groups identified by sexual orientation typically earn less than average, the Scottish Government considers that assistance from legal aid and the available exemptions ensure that these groups would be protected from the proposed fee increase.
Advancing equality of opportunity			X	
Promoting good relations			X	

Do you think the policy impacts on people on the grounds of their race?

Race	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			X	In considering the impact of the fees increases on specific groups, the Scottish Government considers that affordability would be the main issue. If some groups identified by race typically earn less than average, the Scottish Government considers that assistance from legal aid and the available exemptions ensure that these groups would be protected from the proposed fee increase.
Advancing equality of opportunity			X	
Promoting good race relations			X	

Do you think the policy impacts on people because of their religion or belief?

Religion and Belief	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			X	In considering the impact of the fees increases on specific groups, the Scottish Government considers that affordability would be the main issue. If some groups identified by religion or belief typically earn less than average, the Scottish Government considers that assistance from legal aid and the available exemptions ensure that these groups would be protected from the proposed fee increase.
Advancing equality of opportunity			X	
Promoting good relations			X	

Stage 4: Decision making and monitoring

Identifying and establishing any required mitigating action

Have positive or negative impacts been identified for any of the equality groups?	No. However, the inflationary increase in fees will safeguard income to maintain service levels and finance future improvement, and an effective and accessible justice system benefits, either directly or indirectly, all sections of society.
Is the policy directly or indirectly discriminatory under the Equality Act 2010¹³?	No
If the policy is indirectly discriminatory, how is it justified under the relevant legislation?	N/A
If not justified, what mitigating action will be undertaken?	N/A

Describing how Equality Impact analysis has shaped the policy making process

Careful consideration has been given to any potential impact on different equality groups arising from the fee proposals. No negative impacts have been identified in relation to these proposals. Therefore, no changes were made to the policy as a result of the EQIA.

Monitoring and Review

The SCTS will continually monitor cost recovery from the courts and the OPG. A further equality impact assessment will be completed as part of any fee review, for example if group procedure is introduced as proposed by the Scottish Government in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill.

¹³ See EQIA – Setting the Scene for further information on the legislation.

Stage 5 - Authorisation of EQIA

Please confirm that:

- ◆ This Equality Impact Assessment has informed the development of this policy:

Yes No

- ◆ Opportunities to promote equality in respect of age, disability, gender, gender identity/transgender, sexual orientation, race and religion and belief have been considered, i.e:
 - Eliminating unlawful discrimination, harassment, victimisation;
 - Removing or minimising any barriers and/or disadvantages;
 - Taking steps which assist with promoting equality and meeting people's different needs;
 - Encouraging participation (e.g. in public life)
 - Fostering good relations, tackling prejudice and promoting understanding.

Yes No

Declaration

I am satisfied with the equality impact assessment that has been undertaken for the Consultation on Scottish Court Fees and give my authorisation for the results of this assessment to be published on the Scottish Government's website.

Name: **Jan Marshall**
Position: Deputy Director, Civil Law and Legal System
Authorisation date:



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