

**Final
Business and Regulatory Impact Assessment
Court Fees Consultation 2017**

February 2018

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Purpose and intended effect

Fees for the Scottish Courts and the Office of the Public Guardian ("OPG") were consulted on in 2015 and Fees Orders for three years were implemented, the last of which were due to come into effect on 1 April 2017. As a result of severe pressure on public finances the Scottish Government consulted upon an ad-hoc order in 2016 that raised court fees by 24% on average in order to bring the civil courts to a position where costs are fully recovered after generous support has been provided to fund legal aid and a system of exemptions from court fees for those who cannot reasonably afford them.

The long standing policy position on court fees is that, where a dispute is between two private individuals or entities, the majority of the benefits of resolving that dispute are expected to flow to the parties rather than to the state. That is not to say that there are not benefits to wider society in areas of legal doubt being settled by the courts but on balance it is unreasonable to ask taxpayers to fully fund the civil courts. Consequently, fees are charged rather than the costs being funded entirely from general taxation. Of course, the state already provides substantial funding for the administration of the courts through the Scottish Courts and Tribunals Service ("SCTS") and continues to provide support through the legal aid and fee exemptions regimes

In terms of the cost to individuals of pursuing a legal action, court fees comprise a relatively small proportion of the total cost by comparison with the cost of legal representation. Individuals may apply to the Scottish Legal Aid Board ("SLAB") for Legal Aid in civil actions to fund the costs of legal representation if they are eligible. Litigants may also have other funding options, for example "no win no fee" agreements for personal injury litigation, or third party commercial funding for commercial actions. Funders would pay up-front outlays such as court fees.

• **Objective**

The Scottish Government policy is to ensure fees reflect the cost of the processes involved in administering the civil courts, whilst maintaining a well-targeted system of fee exemptions to protect access to justice. In line with that aim, the proposals contained within the recently closed consultation were for a modest increase of 2.3% from 1 April 2018, followed by increases of 2% in the following two years to allow for expected inflation (as projected by the Office of Budget Responsibility). In addition the proposals contained relatively minor amendments to fee narratives and levels which were aimed at improving consistency within the fee tables and efficiency within the courts system. For example, some amendments were proposed to fees in the Sheriff Appeal Court, having learnt from the experience of that court's first two years of operation.

As a result of responses to the consultation, the final proposals have been amended to extend the scheme of exemptions to provide additional protection for those on limited incomes by extending the qualification criteria to include those in receipt of emergency welfare funds and those applying for certain civil protective orders associated with domestic abuse. In addition, the minimum fee currently charged for simple procedure cases with a value of under £200 has been extended to cases under £300 (with effect from 1 April 2019) and the amount charged for the new permission to appeal fee in the Sheriff Appeal Court has been limited. In order to fund these amendments, a small increase of £4 to initiation fees under ordinary cause in the sheriff court has been imposed.

- **Rationale for Government intervention**

Both the Scottish Government and the SCTS are committed to delivering efficiencies and ensuring best value. In recognising the significant financial constraints being faced by all public bodies and the expectation of significant reform to the justice system, the SCTS has set out a clear vision to "build a stronger courts and tribunals service".

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.
- We live our lives safe from crime, disorder and danger.

Consultation

- **Within Government**

The Scottish Government worked closely with officials at the SCTS in drawing up the proposals. The SCTS is a non-ministerial public body providing the people, buildings, technology and administrative services to support the work of Scotland's courts and the judiciary and the OPG. The SCTS is led by a governing Board, chaired by the Lord President, with members drawn from the judiciary, the legal profession, and from outside the justice system. The SCTS, Scottish Legal Aid Board, and the Scottish Government participate in the Making Justice Work Programme 1 Board: Effective Courts and Tribunals Programme.

- **Public Consultation**

On 20 October 2017 the Scottish Government published a public consultation on *Scottish Court Fees*. The consultation ran until 12 January 2018 and drew 22 responses from the legal profession, insurers, consumer groups, government agencies, and private individuals. A consultation analysis paper has been published separately.

- **Business**

The public consultation afforded the opportunity for business stakeholders (bodies within the legal profession, legal advice suppliers), insurance

organisations, consumer groups and union representatives) to make their views known. The Law Society, Glasgow Bar Association, the Association of Personal Injury Lawyers, the Forum of Insurance Lawyers and the Faculty of Advocates were among the representative bodies who were respondents.

Options

Sectors and groups affected

Solicitors, Solicitor Advocates, advocates (counsel), trade unions and litigants all have an interest in the level of court fees.

Option 1: do nothing (which would mean existing fees continue in place)

Costs and benefits

Doing nothing is not an option. The Scottish Government's policy objective is that the fees set should recover the majority of the costs to public funds of providing those services which means that those who make use of the services of the courts should meet or contribute towards the associated costs to the public purse where they can afford so to do. If cost recovery is not maintained, this will increase the projected overspend on the justice portfolio budget or result in significant negative impact on the operation of the courts. This could even lead to a reduction of service with more delays to court cases and consequent additional expense for litigants.

Option 2: Impose increases to court fees to allow for expected inflation.

Benefits

The additional funds raised will ensure that cost recovery is maintained and that sufficient funding is raised in order to meet SCTS's operating requirements.

By ensuring that the civil courts are self-funding insofar as is possible whilst maintaining the important protections that support access to justice, the burden upon the taxpayer is reduced. In addition, funding for the courts is secured thereby ensuring that the SCTS can deliver a modern, quality service to court users. Following the consultation, improvements have been proposed to the system of exemptions to ensure additional protection for potentially vulnerable court users such as those who have perhaps suffered domestic abuse and those on low incomes.

One consultation response from the insurance industry noted that option 2 was the appropriate approach for the Scottish Government to take given the public interest in discouraging ill-founded claims and the burden they can impose on defenders and insurers.

Costs

The Scottish Government is mindful that the courts are vital in order to allow business and commerce to have confidence that the commercial arrangements they agree will be recognised and enforced by the courts. They also play an important role in settling disputes and allowing challenges to decisions made by public authorities.

Any increase in fees is unwelcome to those who have to pay them and runs the risk of disincentivising service use. It is therefore important that fees are not set at a level where that risk becomes an actuality, and the risk is clearly at it highest with regard to those of limited means whether a business or an individual.

Option 3: reduce or abolish court fees

A number of consultees suggested that the Scottish Government should reduce or even abolish court fees. Since the “do nothing” option would mean the existing fees Orders continue indefinitely, to reduce or abolish court fees the Government would have to actively bring forward new secondary legislation for scrutiny by the Scottish Parliament.

In the parliamentary process for the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill representatives of insurers and defenders have cautioned that there must be appropriate safeguards in place to discourage ill-founded claims which can be a burden on the courts as well as on defenders and insurers. A significant reduction in court fees would remove one barrier to the bringing of ill-founded claims and could therefore lead to a rise in such claims. This would disadvantage meritorious claimants because scarce court time and judicial resource would be taken up with weak claims. Insurance premiums might rise.

Scottish Firms Impact Test

A number of legal firms and their representatives responded to the consultation. It was raised that there is a possibility of a negative effect on the cash flow of legal firms who have to meet the fees of their clients and then recover them at the end of an action either from the client or the losing party. Some firms would like to see court fees move to a model of charging fees at the end of the case rather than on a ‘pay-as-you-go’ model.

The Scottish Government acknowledges the point, but believes that this should be a manageable cost for most firms which will be able to plan on the assumption that the outlay on fees will be recovered at the conclusion of the case in the event of success. Clearly it is a matter for each firm effected as to how and when they charge clients. Moving to a model of charging fees only at the end of a case, or only seeking to recover fees from the losing party makes the taxpayer, through the Scottish Courts and Tribunals Service, responsible for debt collection and possible losses through litigants unable to pay. It is acknowledged that heightened court fees equates to heightened risk for legal firms who take on the liability of paying court fees on behalf of their clients or claims management companies who choose to fund legal action on the basis of a ‘no-win, no-fee’ agreement.

As noted above, other businesses such as insurers may see an effect if legal action is encouraged by the absence of fees.

Competition Assessment

There is no obvious impact on the market either in terms of incentives to compete or upon the range of suppliers.

It is possible that there may be fewer persons bringing forward actions, although the Scottish Government considers the risk small.

It is also possible that the issue of an effect on cashflow identified by some firms may have a greater impact than anticipated.

Test run of business forms

There are no new forms contemplated.

Legal Aid Impact Test

An increase in court fees does not have a direct impact on the Legal Aid Fund (as there are exemptions in place in relation to a person being assisted from the Legal Aid Fund. However, in some circumstances an unassisted party may obtain an order of court allowing payment of expenses out of the Fund. More information on the payment of expenses for unassisted party can be found on the Scottish Legal Aid Board ('the Board') website (<http://www.slab.org.uk/providers/handbooks/Civil/part7chp3#3.12>).

In these cases, the unassisted party's court fees would be included in the payment of expenses from the Fund. An increase in court fees would increase the amount of money being paid from the Fund. The majority of these cases are from the Court of Session. Under current arrangements, information from the Board indicates that over the past 3 years less than £5,000 per annum has been paid from the Fund in court fees. However, this figure is likely to increase in the future as the Board is seeing an increase in the numbers of cases obtaining an order allowing the payment of expenses out of the Fund. This will, in turn, result in an increase in the payment of court fees from the Fund in any case. We anticipate that could be over £20,000 and possibly higher if the rate of increase of the number of applications under section 19 increases.

Enforcement, sanctions and monitoring

SCTS are responsible for the collection of fees and will gather statistical information

Implementation and delivery plan

The fees will be implemented on 25 April 2017

- **Post-implementation review**

A full fee review will be conducted as a prelude to new fees orders to come into effect on 1 April 2021. In the interim, ad hoc amendments may be required in light of intervening legal developments such as the implementation of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Summary and recommendation

Which option is being recommended and why? Refer to analysis of the costs and benefits in reaching the decision. Summarise, using the table below, the information gathered for each option.

• **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	<p>Do nothing</p> <ul style="list-style-type: none"> - Litigants and lawyers will benefit economically in that the present fees will remain in force - The Government would not need to lay Orders. - Litigants will not benefit from the improvements to the exemptions scheme and the extended low fee for low value claims. 	<ul style="list-style-type: none"> - There is no benefit to the SCTS or the Scottish Government in this option. Economically, it will lead to a shortfall of £500,000 each year. - The downside to this option is that litigants will not benefit from the continuing programme of improvements and modernisation of the court processes that SCTS plan. This could lead to more delays to court cases and consequent increased expense for litigants.
2	<p>Impose increases to court fees to allow for expected inflation</p> <ul style="list-style-type: none"> - Option expected to raise an additional £500k per annum. Additional funds raised will ensure cost recovery is maintained and that sufficient funding is raised to meet SCTS's operating requirements. - The burden upon the taxpayer is reduced. - The SCTS can deliver a modern quality service to court users. 	<ul style="list-style-type: none"> - All litigants other than those exempted will bear the increase based on the type of action and the level of court which they use. - Lawyers will bear the increase unless and until they are paid by clients or recover fees from the losing party. - Government has to prepare and lay amendment order.
3	<p>Reduce or abolish court fees</p> <p>Litigants and lawyers will benefit economically from the absence of fees.</p>	<ul style="list-style-type: none"> - The cost to the public purse of abolishing fees could be approaching £30m and potentially more if more speculative legal action is encouraged. - In all probability the reduction in funding would, in part, be met by reducing the standard of service provided to court users.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:**Date:****ANNABELLE EWING
MINISTER FOR COMMUNITY SAFETY & LEGAL AFFAIRS****Scottish Government Contact point:** Walter Drummond-Murray (x44222)



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