



Law Society
of Scotland

Consultation Response

Consultation on Scottish Court Fees 2018-2021

January 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Access to Justice Committee and Mental Health and Disability Sub-committee welcome the opportunity to consider and respond to the Scottish Government's consultation: Scottish Court Fees 2018-2021. The committees have the following comments to put forward for consideration.

General Comments

The current policy of the Scottish Government is that litigants should meet the cost of the court service, and therefore court fees should move to a position of seeking full cost recovery. We do not support this aim, and it remains our view that moves towards full cost recovery should be resisted.¹ A properly funded court system is an essential part of our civilised society and respect for the rule of law, and it is in the public interest to maintain a robust and respected system for resolving disputes. It is the proper responsibility of the state to fund that system. Specific comments provided on the proposals are made notwithstanding our continuing objection to the policy of full cost recovery.

¹ See also [our response to the 2016 consultation on Scottish Court Fees](#)

Specific Comments

Do you agree that court fees should have a general uplift of 2.3% on 1 April 2018 followed by 2% rises in the subsequent 2 years?

No. We do not agree that there should be a general uplift to court fees of 2.3% on 1 April 2018, or that there should be further uplifts of court fees in the two subsequent years.

As previously stated, we object to the principle of full cost recovery in the court system, and do not support any move towards this position.

Do you have any comments on the variations from the general uplift detailed in section 2?

Sheriff Appeal Court

The Committee considers that the complete removal of an exemption for the first 30 minutes of a hearing in the Sheriff Appeal Court in all circumstances is not justified or proportionate. There has been a significant shift in business from the Court of Session to the Sheriff Court as a consequence of Courts Reform (Scotland) Act 2014. The Committee believes that short hearings (lasting less than 30 minutes) in the Sheriff Appeal Court ought to continue to exempt from fee charging. The payment of a daily fee charge of £227 or £568 for a short hearing is excessive. The Committee considers that it would be more appropriate to modify the wording of the exemption than to remove it.

It is proposed that there should be a fee introduced when a party wishes to appeal from the Sheriff Appeal Court to the Court of Session “so that unmeritorious appeals should be discouraged, to allow the Sheriff Appeal Court more time to deal with meritorious permission applications”. An application for permission to appeal can be meritorious but still not be successful. We are not aware of any evidence that unmeritorious applications for permission to appeal the Sheriff Appeal Court are affecting consideration of meritorious applications, or are otherwise damaging the operation of the Sheriff Appeal Court. Payment of a fee at the permission stage would be unlikely to have any impact on any potential difficulty of reconstituting a bench for a permission hearing which is caused by the diverse location of appeal sheriffs. The Committee do not consider that this proposal is justified.

Election Court

The Committee considers that it is particularly important that the oversight of the democratic electoral system is not undermined by any risk that a litigant would be discouraged from applying to the court for that oversight. The public interest in this important safeguard cannot be understated. In our view the introduction of such a fee risks infringing this important constitutional right.

Appeals

Paragraph 16 of the Consultation refers to a possibility whereby in appellate courts non-refundable fees would become payable for substantive appeal hearings at the time that the hearing is applied for. The justification for that proposal is that it “might discourage unmeritorious appeals from progressing as far through the system and reduce the waste of large numbers of hearing being scheduled.” Our view is that to consider that possibility it would be necessary to know the correlation between the number of appeals raised, the numbers of appeals that pass through each stage of the appeal process to the point of final determination, the results of any research as to why appeals do not proceed as they proceed through the appeal process, and how appeals are classified as unmeritorious. The Committee believes that it would also be relevant to consider whether there is any distinction between types of litigation, and whether one or other party in an appeal is a party litigant or is legally aided.

Do you have any comment on the changes to fee narratives in section 2?

We have no specific comments on the proposed changes to fee narratives.

Do you have any other comments on the paper or on the future direction of court fees?

We reiterate our concern over the move towards full cost recovery, and note the terms of paragraph 96 and 102 of the judgement of the Supreme Court in the Unison case:

“[96] .. it is not only where fees are unaffordable that they can prevent access to justice. They can equally have that effect if they render it futile or irrational to bring a claim. As explained earlier, many claims which can be brought in ETs do not seek any financial award: for example, claims to enforce the right to regular work breaks or to written particulars of employment. Many claims which do seek a financial award are for modest amounts, as explained earlier. If, for example, fees of £390 have to be paid in order to pursue a claim worth £500 (such as the median award in claims for unlawful deductions from wages), no sensible person will pursue the claim unless he can be virtually certain that he will succeed in his claim, that the award will include the reimbursement of the fees, and that the award will be satisfied in full. If those conditions are not met, the fee will in reality prevent the claim from being pursued, whether or not it can be

afforded. In practice, however, success can rarely be guaranteed. In addition, on the evidence before the court, only half of the claimants who succeed in obtaining an award receive payment in full, and around a third of them receive nothing at all.”

“[102] There is a further matter, which was not relied on as a separate ground of challenge, but should not be overlooked. That is the failure, in setting the fees, to consider the public benefits flowing from the enforcement of rights which Parliament had conferred, either by direct enactment, or indirectly via the European Communities Act 1972. Fundamentally, it was because of that failure that the system of fees introduced in 2013 was, from the outset, destined to infringe constitutional rights.”

The Scottish Government’s rationale for full cost recovery is that is only those who directly use the courts who benefit from them, and that public funding of the courts therefore constitutes a burden on the taxpayer. However, the courts and tribunal services support a wider public good, and thereby provide a wider benefit to society, including as a fundamental element of upholding the rule of law. Whilst we support measures for proportionate dispute resolution, and encourage alternative processes for dispute resolution such as mediation where appropriate, the public resolution of disputes by litigation is sometimes necessary. It can also be helpful to have a body of case law to determine a dispute which sets a public precedent for others. This process can therefore avoid other people in similar circumstances bringing forward multiple dispute resolution processes, and help bring about consistency of outcomes.

In relation to OPG fees, consideration should also be given to the savings made to public funds as a result of taking measures through the OPG (which trigger these fees). This is particularly so in relation to fees for powers of attorney. Encouraging use of powers of attorney has positive knock on effects generating savings for legal aid, health and social work authorities, in particular by avoiding the costs and disadvantages of delayed discharge from hospital and requirements for guardianship applications upon subsequent incapacity. Research generated by the My Power of Attorney campaign highlights the cost effectiveness of raising awareness of and increasing use of powers of attorney.² In addition, the Council of Europe has recommended giving priority to powers of attorney and advance directives over other methods of protection for adults with incapacities.³ This would support the reduction of cost barriers to the granting of powers of attorney, not an increase. That the proper stewardship of public funds requires, in particular in relation to powers of attorney, a broad rather than compartmentalised assessment is objectively demonstrated in findings such as those discussed in the evaluation of the My Power of Attorney campaign.⁴

² K A Levin et al, *Measuring the impact of a public awareness campaign to increase Welfare Power of Attorney registrations in Scotland*, Age & Aging 2017; 46: 659-664

³ Council of Europe [Recommendation CM/Rec\(2009\)11 on principles concerning continuing powers of attorney and advance directives for incapacity](#) (2009)

⁴ K A Levin et al, *Measuring the impact of a public awareness campaign to increase Welfare Power of Attorney registrations in Scotland*, Age & Aging 2017; 46: 659-664

The OPG must be adequately resourced to be able to properly discharge its functions, but the approach of seeking to recover costs from service users at point of delivery is flawed. If fees relating to the OPG, in particular for powers of attorney, cannot be removed immediately, they should be substantially reduced year on year, having regard to international obligations and the positive evidence of the My Power of Attorney campaign. We note that the fees associated with lasting powers of attorney in England and Wales were reduced in April 2017 as a result of high numbers of applications, OPG efficiencies, and to encourage more people to take out a lasting power of attorney.⁵

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?

We note that an EQIA has been carried out in relation to the proposals in this Consultation, although there is no discussion of the EQIA in the consultation document. We would be interested in seeing any EQIA of the effect of the change in policy to full cost recovery access to justice in Scotland.

Page 4 of the EQIA states “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.” The Aarhus Convention’s Meeting of the Parties and the Aarhus Convention Compliance Committee have each made two findings (i.e. four in total) that Scotland is non-compliant with the Article 9(4) requirement of the Aarhus Convention that access to environmental justice should not be “prohibitively expensive”.⁶ Environmental groups are concerned,⁷ but there should also be an acknowledgement that Scotland is non-compliant (as per the findings of the official Convention bodies) and an attempt to offset the effects of further raising court fees on non-compliance.

Fees for the Office of the Public Guardian require some different considerations to court fees. Fees for the OPG generally arise not because of any choice to initiate or contest proceedings, but because of the fact that someone suffers, or may in future suffer, from an intellectual disability.

⁵ Office of the Public Guardian, [Lasting and enduring power of attorney fees are changing](#) (31 March 2017)

⁶ Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, fifth session, [Decision V/9n on compliance by the UK](#) (2014); Compliance Committee to the Aarhus Convention, [First progress review of the implementation of decision V/9n on compliance by the UK with its obligations under the Convention](#) (2015); Compliance Committee to the Aarhus Convention, [Second progress review of the implementation of decision V/9n on compliance by the UK with its obligations under the Convention](#) (2017); Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, sixth session, [Decision VI/8K concerning compliance by the UK with its obligations under the Convention](#) (2017)

⁷ See, for example, [Friends of the Earth Scotland and the Environmental Law Centre Scotland’s response to the Defra consultation on the UK’s implementation report to the Meeting of Parties to the Aarhus Convention](#) (2013); [RSPB comment on environmental justice consultation](#) (2017); and [Scottish Environment LINK response to Consultation on Draft Court Rules in Relation to Protective Expenses Orders](#) (2017)

The UK has by ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD) obliged all of the UK jurisdictions, including Scotland, to comply with the requirement of CRPD Article 12 to provide people with the support which they require to enable exercise of their legal capacity. All appointments under the Adults with Incapacity (Scotland) Act 2000 fulfil that role, by providing for the exercise of legal capacity by people who – without such measures in place – would not be able to exercise and safeguard all of the rights and interests comprised within the concept of legal capacity. It should be borne in mind that the UK has also ratified the First Protocol to CRPD, providing a remedy through complaint to the UN Committee established under CRPD for breaches of obligations under CRPD.

Do you have any views on the operation of the fee exemptions system?

We recognise that the Scottish Government provides for a system of fee exemptions in respect of litigants with low incomes. Whilst that is welcome as an amelioration of the effects of the policy, we maintain that a policy of full cost recovery is a barrier to access to justice by substantially increasing the cost of litigation. We note that the Scottish Government states that it “believes maintaining access to justice must be a paramount consideration in developing and revising fee charging regimes such as the system of court fees” (paragraph 19). In that regard, we would refer to paragraph 91 of the judgment of the Supreme Court in *Unison v Lord Chancellor*, [2017] UKSC 51 where it was said that:

“In order for the fees to be lawful, they have to be set at a level that everyone can afford, taking into account the availability of full or partial remission.”

Whilst that statement was made in connection with the charging regime for employment tribunal fees, we believe that it should be considered to be a general statement of principle. It has been a longstanding cliché that litigation is a privilege that can only be enjoyed by the very rich or the very poor. A policy of full cost recovery only exacerbates that problem. Fee exemptions for the poorest only address one aspect of affordability. For many the cost of litigation is already a significant burden.



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