

# Final Business and Regulatory Impact Assessment

## The Court Fees (Miscellaneous Amendments) (Scotland) Order 2016

### **Purpose and intended effect**

Fees for the Courts and the Office of the Public Guardian ("OPG") were last consulted on in 2015 and three years of Fees Orders were implemented, the last of which were to come into effect on 1 April 2017. As a result of severe pressure on public finances the Scottish Government has decided to return to the topic of court fees (but not those of the OPG) sooner than anticipated.

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. Therefore, it is unreasonable to ask taxpayers to pay for this. Consequently, fees are charged rather than the costs being funded 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").

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. In addition a system of targeted fees exemptions protects those on low incomes from paying court fees.

Full cost recovery has been the eventual target for the Scottish Government for some time. Over a number of years the rate of recovery has increased to its current level of around 83%. Owing to the financial constraints of the UK Government Spending Review, the Scottish Government now considers that the last step to full cost recovery is required. There will continue to be a focus on charging fees for those who make use of the civil courts where they can afford to pay them, but with systems in place to protect access to justice for those who cannot. Therefore, the main proposals within the consultation on the 2016 fees orders were two options to move towards full cost recovery by either imposing a flat rise of 24% or by increasing particular fees by a greater amount whilst holding others in order to protect access to justice.

In addition, the opportunity has been taken to clarify some of the fees chargeable in the newly operating Sheriff Appeal Court.

### **• Objective**

The Scottish Government policy is to move towards fees which reflect the full cost of the processes involved with a well-targeted system of fee exemptions to protect access to justice. In line with that aim, the set of fees instruments laid in June 2015

and which came into force on 22 September 2015 (with a further 2% rise on 1 April 2016) moved cost recovery levels slightly closer to full-cost pricing, i.e. upwards from the 80% level in the financial year 2013-14. A further rise of 2% was planned for 1 April 2017. In addition to inflationary increases and the realigning of minor fees to provide consistency across the courts, any above inflationary increases were directed towards the costs of delivering improvements to the civil courts system such as investment in a new civil IT system.

The larger fee increases now proposed seek to raise a further £6m in fee income and will move the recovery rate to one of full-cost recovery. However, the Scottish Government will continue to fund the fees of those who receive legal aid or who are otherwise exempt from fees.

- **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, SLAB, and the Scottish Government participate in the Making Justice Work Programme 1 Board: Effective Courts and Tribunals Programme.

- **Public Consultation**

On 20 July 2016 the Scottish Government published a public consultation on *Scottish Court Fees*. The consultation ran until 12 October 2016 and drew 36 responses from the legal profession, insurers, trade unions, consumer groups, government agencies, and private individuals.

- **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, ICAS, Glasgow Bar Association, the Society of Solicitor Advocates, the Association of Personal Injury Lawyers, the Forum of Insurance Lawyers and the Faculty of Advocates were among the representative bodies who were respondents. The Minister for Community Safety and Legal Affairs and officials also met with the Law Society during the consultation period.

## **Options**

### **Sectors and groups affected**

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

### ***Option 1: do nothing***

#### **Costs and benefits**

Doing nothing is not an option. A fees amendment order is required in order to ensure that fees will be chargeable when, on 28 November 2016, the first phase of the new Simple Procedure is introduced replacing Small Claim and Summary Cause. This consideration to one side, the Scottish Government's policy objective is that the fees set should recover 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 improved considerably, 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 a 24% flat rise to court fees**

#### **Benefits**

The additional funds raised will ensure that full-cost recovery is achieved and that sufficient funding is raised in order to meet SCTS's operating requirements. It could be seen as more straightforward to impose a level increase upon all fees rather than identify particular fees for either protecting or substantially increasing. This will mean that all litigants other than those exempted will bear the increase based on the type of action and the level of court which they use.

By ensuring that the civil courts are self-funding, 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.

#### **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. Finally, the courts also play a fundamental role in the settling of vital matters affecting families, from protecting children at risk of harm to making arrangements for couples who are separating.

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.

### **Option 3: Targeted rise to fees with some fees rising by more than 24% whilst others are protected**

This option would involve fees being raised for some of the most common services to help achieve full cost recovery without the requirement to amend all the fees. This can be achieved whilst adhering to the overarching principles of:

- fees should move towards full cost recovery but should not over-recover
- access to justice must be protected: fees should not be set at levels, which deter individuals from pursuing meritorious actions,
- the fees structure should be robust and simple,
- rounded fee points are more coherent to service users,
- fees should reflect the level of activity/service associated with them wherever possible.

This option includes:

- increasing selected fees in the Court of Session and the sheriff court, whilst avoiding impacting upon simple procedure cases and other possible access to justice barriers. It is expected that this would raise approximately £4m;
- increasing hearing fees in the Court of Session to be a more realistic reflection of the cost of one of our most scarce resources—judicial time. It is expected that this would raise approximately £1m; and
- introducing a tiered Commissary fees structure. It is expected that this would raise approximately £1.6m.

\*the figures above would reduce by approximately 10% due to anticipated levels of exemptions.

### **Benefits**

This option achieves full-cost recovery and ensures that SCTS remains appropriately funded. By freezing particular fees this option better protects potentially vulnerable court users such as those seeking divorce or those who have suffered personal injuries. This option ensures that fees for personal injury cases in the new Sheriff Personal Injury Court have been protected which was a specific concern of many of the respondents to the consultation. It also ensures the simple procedure and summary cause claims, whilst increasing, remain lower than ordinary cause claims.

It also focusses other fee increases on the element of court process that is currently most undervalued; a judges time. This undervaluation is accentuated when consideration is given to work undertaken out of court e.g preparation, reading or writing time

The Scottish Government notes that the overwhelming majority of cases are settled at an early stage without getting to a court room and therefore some of the targeted rises that have been increased to more properly reflect the cost of judicial time will not bite. In 2014/15 there were 5,121 actions or petitions registered in the Court of Session with only 114 proofs, jury trials or hearings held. In the sheriff courts there were 23,628 ordinary cases registered and only 990 proofs or debates held; and for summary cause and small claims there were 47,977 cases registered with only 509 proofs or hearings held.

### **Costs**

Whilst some fees are protected, others are going up significantly (albeit from low levels). The balance was to ensure fees could remain at a comparatively low level (the vast majority of fees are still £100 or less) whilst not increasing other fees to levels which we believed would discourage those with legitimate court case from taking action. The Scottish Government will monitor the effect of fee rises on the numbers of cases being taken forward.

### **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. One firm identified this as 'significant sums found from their capital'. That firm suggested even under the existing fee structure the amount of their outlay on fees will have increased by 14% in 2016.

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. Clearly it is a matter for each firm as to how and when they charge clients.

### **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 an 'assisted person' - 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 Legal Aid Fund ('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, which would see the highest level of increase in court fees under the preferred option. 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.

A doubling of Court of Session fees could therefore have an additional impact on the Fund e.g. of £20,000 per year in future years.

### **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 28 November 2016

- **Post-implementation review**

A full fee review will be conducted as a prelude to new fees orders to come into effect on 1 April 2018. That review will benefit from SCTS new IT system that will better monitor costs and fees.

### **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
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1	<p><b>Do nothing</b></p> <ul style="list-style-type: none"> <li>- Litigants and lawyers will benefit economically in that the present fees will remain in force with modest increases of 2% on 01:04:17 and 01:04:18.</li> <li>- The Government would not need to lay Orders.</li> </ul>	<ul style="list-style-type: none"> <li>- There is no benefit to the SCTS or the Scottish Government in this option. Economically, it will lead to a shortfall of approximately £6.2M each year.</li> <li>- The downside to this option is that litigants will not benefit from the 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.</li> </ul>
2	<p><b>Impose a 24% flat rise to court fees</b></p> <ul style="list-style-type: none"> <li>- Option expected to raise an additional £4.9M per annum.</li> </ul> <p>Additional funds raised will ensure that almost full-cost recovery and that sufficient funding is raised to meet SCTS's operating requirements.</p> <ul style="list-style-type: none"> <li>- The burden upon the taxpayer is reduced.</li> <li>- The SCTS can deliver a modern quality service to court users.</li> </ul>	<ul style="list-style-type: none"> <li>- All litigants other than those exempted will bear the increase based on the type of action and the level of court which they use.</li> <li>- Lawyers will bear the increase unless and until they are paid by clients or recover fees from the losing party.</li> <li>- Government has to prepare and lay amendment order.</li> </ul>
3	<p><b>Targeted rise to fees with some fees rising by more than 24% whilst others are protected</b></p> <ul style="list-style-type: none"> <li>- Option would to raise an additional £6 per annum.</li> <li>- Additional funds raised will ensure full-cost recovery and that sufficient funding is raised to meet SCTS's operating requirements.</li> <li>- Better protects potentially vulnerable court users such as those seeking divorce or those who have suffered personal injuries..</li> <li>- Increases Court of Session fees to be a more realistic reflection of the cost of one of our most scarce resources—judicial time.</li> </ul>	<ul style="list-style-type: none"> <li>- Some litigants will be faced with significantly higher court fees.</li> <li>- Lawyers in those cases will bear the increase unless and until they are paid by clients or recover fees from the losing party.</li> <li>- Government has to prepare and lay amendment order.</li> </ul>

**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)