

Court Fees 2022-2025

Court of Session

High Court of Justiciary

Sheriff Appeal Court

Sheriff Courts

(including Sheriff Personal Injury Court)

Justice of the Peace Courts

Office of the Public Guardian

**Business and Regulatory
Impact Assessment**



Scottish Government
Riaghaltas na h-Alba
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Title of Proposal

Court Fees 2022-2025

Purpose and intended effect

- **Background**

Fees for the Scottish Courts and the Office of the Public Guardian ("OPG") were consulted on in 2018 and Fees Orders for three years were implemented, the last of which were due to come into effect on 1 April 2020. However, owing to the COVID 19 pandemic, the Scottish Government postponed the Court Fees Review due in the autumn of 2020 and fees for the financial year 2021/22 remained the same as those in 2020/21.

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. The state 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% in 2022, followed by increases of 2% in the following two years to allow for expected inflation (as projected by the Office of Budget Responsibility (OBR)). 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 having learnt from the experience

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 Personal Independence Payment (PIP) with an income of less than £20,592.

- **Rationale for Government intervention**

Both the Scottish Government and the SCTS are committed to delivering efficiencies and ensuring best value.

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 Office of the Public Guardian (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 participates in the Making Justice Work Programme 1 Board: Effective Courts and Tribunals Programme.

- **Public Consultation**

On 10 December 2021, the Scottish Government published a public consultation on 'Scottish Court Fees 2022-2025'. The consultation ran until 4 March 2022 and drew 15 responses from the legal profession, insurers, consumer groups, government agencies, and private individuals. A consultation analysis and Scottish Government response 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, the Association of Personal Injury Lawyers, the Forum of Insurance Lawyers and the Faculty of Advocates were among the representative bodies which responded.

Scottish Firms Impact Test

None of the legal firms or their representatives which responded to the 2021 consultation raised any issues suggesting that the 2% increase for inflation would impact on their business.

Previously, legal firms have raised the issue 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. A 'pay-as-you-go' model has been suggested.

The Scottish Government considers 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 SCTS, responsible for debt collection and possible losses through litigants being 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 success fee agreement.

As noted above, other businesses such as insurers may see an increase in frivolous claims 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.

Consumer Assessment

Court users may arguably be described as consumers as they use the services of the public sector, however they are not consumers in the traditional sense as they have often no other option but use the services of the court.

At the time of the Court Fees Review in October 2021, the Scottish Government proposed a 2% rise in fees to cover inflation. This was despite the Consumer Price Index indicating inflation would be 3.5% in November 2021 rising to 5% in 2022 before falling to 2.8% in 2024. According to the Office of Budget Responsibility in its 'Economic and fiscal outlook - March 2022'¹, the Consumer Price Index was at 5.5% in January 2022, and is expected to rise to 9% in the fourth quarter of this year and fall back to 4% in 2023. In effect, the 2% increase is a reduction in court fees in real terms. Added to this, owing to the COVID 19 pandemic, there was no change to court fees in the fiscal year 2021/2.

In addition, changes to some of the court fee exemptions will benefit some court users with limited income. It will be noted that the threshold for those on benefits has been increased from £18,000 to £20,592, in line with the current living wage. The Government has also introduced an exemption for those who have been awarded the personal independence payment (PIP) for those with a gross annual income of £20,592 or less.

The proposal of an exemption for Aarhus environmental cases in the Court of Session will assist those challenging decisions of public authorities either by judicial review or statutory planning appeal. The Aarhus Convention Compliance Committee in its report in 2021 found that Scotland was in breach of Article 9(4) of the Aarhus Convention which states that “review procedure shall provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive”. This proposal will assist such litigants though in many cases, they will still have to pay for their legal representation.

Test run of business forms

There are no new forms contemplated.

Digital Impact Test

No digital impact test is required.

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 SLAB 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, though with an increase of only 2% in a time of high inflation, this will be a reduction in real terms. In addition, it’s possible that making Aarhus environmental cases in the Court of Session exempt will reduce the burden on legal aid.

SLAB has indicated the number and value of payments to opponents under Section 19 of the Legal Aid (Scotland) Act 1986 are as in the following table.

Financial year	Number of cases	Total paid (Inc VAT)
2017/18	32	£202,000
2018/19	17	£158,000
2019/20	15	£155,000
2020/21	12	£98,000 ²
2021/22	10	£184,000

The majority of these cases are from the Court of Session.

Enforcement, sanctions and monitoring

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

How will the proposal be implemented and in what timescale?

The fees will be implemented on 1 July 2022

Post-implementation review

A full fee review will be conducted as a prelude to new fees orders to come into effect on 1 April 2025. In the interim, ad hoc amendments may be required in light of intervening legal developments such as continuing high inflation, though nothing is planned at present.

Summary and recommendation

The Scottish Government is of the view that Court Fees Orders should be introduced for 3 years and commits to consider, and gather evidence of, whether any reasonable adjustments can be made in the provision of this policy and how these should be carried out.

Summary costs and benefits table

Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social policy and administrative
Option 1: Do nothing	
Litigants and lawyers will benefit economically in that the present fees will remain in force - The Government would	There is no benefit to the SCTS or the Scottish Government in this option. Economically, it would lead to a shortfall of approximately £623,000 in 2022-23 if

² The drop in the number of cases and the total paid in 2020/21 is presumably owing to the COVID 19 pandemic.

<p>not need to lay Orders.</p> <p>Litigants will not benefit from the improvements to the exemptions scheme and the extended low fee for low value claims.</p>	<p>the number of civil cases remained the same as in 2021-22³.</p> <p>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.</p>
<p>Option 2: Impose increases to court fees to allow for expected inflation</p>	
<ul style="list-style-type: none"> - Option expected to raise an additional £623,000 per annum if the number of civil cases remains constant. - Fee income ensures that a reasonable cost recovery is maintained and that sufficient funding is raised to meet SCTS's operating requirements. - The burden upon the taxpayer is not increased. - 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.
<p>Option 3: Reduce or abolish court fees</p>	
<ul style="list-style-type: none"> - Litigants and lawyers will benefit economically from the absence of fees. 	<ul style="list-style-type: none"> - The cost to the public purse of abolishing fees would be approaching £31,142,000 per annum based on the 2020-21 figures . - 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: Ash Regan

Date: 24 May 2022

Ash Regan

Minister for Community Safety

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