Response by the Faculty of Advocates

to

The Consultation (July 2016) on Scottish Court Fees

by
The Scottish Government
Riaghaltas na h-Alba

October 2016

The Faculty of Advocates responds to the Consultation Paper as follows:-

1. Should simple procedure fees be set at the same level as the fees for small claims and summary cause proceedings?

The Faculty of Advocates has no strong view on this. But if maintaining the existing fee levels in the new structure will assist the introduction of simple procedure by providing a degree of continuity, and given the low pecuniary limit for simple procedure cases, setting simple procedure fees at the same level as the fees for small claims and summary cause proceedings appears sensible.

In relation to the specific changes to the fee levels the Faculty of Advocates notes that the lodging fee for claims over £200 in the small claims/simple procedure is to rise from £78 to £97 or £100. This means that claims which are just above the £200 limit will have to pay a lodging fee worth nearly 50 per cent of the value of the claim which appears grossly disproportionate. The Faculty of Advocates suggests that, instead, the lodging fee for claims below £200 should apply to all claims up to £1,000 and the higher rate apply thereafter so that the lodging fee remains proportionate to the level of the claim.

2. **Which option to achieve full cost recovery, as set out in this paper, should be implemented?**

If either option is to be implemented, then it should be Option 1, not Option 2. In addition to having a fundamental concern about the principle of the civil justice system being funded by litigants rather than by general tax revenues, the Faculty of Advocates has serious concerns about whether there is a rational and fair justification for court fees as they are currently structured, and as they are proposed to be structured. The Faculty of Advocates believes that applying the proposed "targeted" increases (option 2) would magnify and add to these concerns. On all of this, see response 5 below.

3. In relation to option 1: Should any particular fees be exempt from increase, even if that necessitates additional increases to other fees?

The Faculty of Advocates sees no alterations which would alleviate the concerns it has (see response 5 below) about the existing structure of fees.

4. In relation to option 2: Should the fees that have been identified be increased? If not, what other fees should be increased instead?

The Faculty of Advocates does not have access to data to allow it to propose detailed adjustments to option 2, if that is to be implemented. But, for the reasons stated at response 5 below, it considers that the spectrum of court fees between the Sheriff Court, Sheriff Personal Injury Court, the Sheriff Appeal Court and the Court of Session should be narrower than it currently is, not made wider (as it will be) by the proposed increases in court fees. And the structure of court fees in these courts should be more or less replicated for each of the various courts. For example, in the Court of Session cancellation of a court

hearing before three or more judges within 28 days of a court hearing date results in a fee (shared equally between the parties) of 50% of that which would have been payable had the court hearing taken place as planned. There is no such equivalent charge in the Sheriff Court.

5. Are there any alternative options to achieve full cost recovery that should be considered?

Yes. The civil justice system should be funded by the state from general taxation, not by requiring litigants to pay court fees**.** That is because:-

- Our democratic society relies upon the rule of law and could not function without our civil law being maintained by the operation of our courts

- There is no warrant to shift the cost of the courts entirely onto litigants when the whole of society benefits from the civil justice system.

- Requiring litigants to pay court fees is likely to deter some individuals from pursuing legitimate actions

- The proper operation of the courts' supervisory powers depends upon individuals who wish to challenge unlawful acts by the legislature or the executive having access to the courts. Such access is likely to be impeded by having to pay substantial court fees. This is a matter of constitutional importance.

- The proposed system of court fees exemptions goes only a small way to protecting access to justice

- There are serious concerns about whether there is a rational and fair justification for court fees as they are currently structured, and as they are proposed to be structured. The Faculty of Advocates believes that applying the proposed "targeted" increases (option 2) would magnify and add to these concerns. These concerns will be avoided if it is accepted that the civil justice system should be funded by the state, not litigants.

THE PRINCIPLE THAT THE STATE, NOT LITIGANTS, SHOULD FUND THE CIVIL JUSTICE SYSTEM

1. The Consultation Paper states (at page 3) that "*A review is justified both by the need to end the cost to the public purse of subsidising the civil justice system, and by the introduction of the new simple procedure which replaces the current small claims and summary cause procedures*." The Faculty of Advocates rejects the suggestion that there is something regrettable in the state making access to justice available to all without requiring litigants to pay to use (or pay the whole cost of using) the civil justice system.

2. The Faculty of Advocates re-iterates the view it expressed in 2008, 2010 and 2013 in response to previous consultations on this issue: as a matter of principle the civil justice system should be funded by the state, not litigants. Proposals to increase court fees in England and Scotland in order to recover the cost of the civil justice system have met with

consistent opposition over the years from the consumer councils, the Citizens' Advice Bureau, JUSTICE, and others. The opposition has been that increasing court fees in this way will impede access to justice. The Faculty agrees that the proposed fee increases would be likely to impede access to justice.

3. Until 1994 litigants in Scotland did not pay for judicial time. The cost of that was met by the government and funded solely through taxation. Even when court fees for judicial time were first made payable (by The Court of Session etc. Fees Amendment Order 1994 (No. 3265 (S.185)) the fees were very much less than what is proposed now. For a Proof, Procedure Roll or Summar Roll hearing the fee payable by the unsuccessful litigant for every 30 minutes or part thereof was £24, or £240 per (5 hour) court day.

4. The civil justice system is a cornerstone of a democratic state. It is the duty of the state to provide an accessible civil justice system. It is wrong to assume that it is only those who litigate who benefit from the civil justice system. The civil justice system confers benefits on all citizens, not merely on litigants. Legal relations are entered into, and legal duties are fulfilled, in the knowledge that legal rights can be vindicated in the civil courts. To the benefit of society at large, the law is made, declared or clarified daily by the civil courts. Making the law certain avoids litigation. The civil justice system is vital to every citizen, whether or not he or she ever becomes a litigant. The benefits to society justify it being funded in full from general taxation.

5. Many state-provided services are funded from general revenue, on the basis that these services benefit the whole of society, and not just those in immediate need of them. Our society accepts that, without regard to their means to pay, individuals should have access to medical care, and that every sort of person should be served by the police and emergency services. The Scottish Government has recognised that charging tuition fees to students limits access to higher education for many and that charging for prescriptions might deter people from seeking getting medical assistance. The Faculty considers that access to the courts is of equal importance. No part of our democratic society, could function without our civil law being maintained by the operation of our courts. There is no warrant to shift the cost of the courts entirely onto litigants when the whole of society benefits from them.

THE PROPOSED COURT FEES WILL IMPAIR, RATHER THAN PROTECT ACCESS TO JUSTICE

6. The Consultation Paper states "*In looking at the options, we consider that it is fundamental that access to justice must be protected*. The Faculty of Advocates agrees. However, the funding of the civil justice system by litigants rather than the state *does not* protect access to justice, it hinders it. The Consultation Paper correctly notes (at pages 7 and 8) that court fees for using the civil justice system ("court fees") have the potential to deter individuals from pursuing legitimate actions. The Faculty of Advocates has two observations on this. Firstly, the Consultation Paper contemplates the effect of court fees only on people entitled to *raise* actions. It overlooks that court fees for using the civil justice system

have the potential to deter individuals from *defending* actions. This is obviously serious. Secondly, the SCTS appears to have done no research on the effect on potential litigants of the court fees currently charged, and on the effect of the court fees it proposes to charge. This is surprising, especially since a paper published in June 2007[1] by the Ministry of Justice found that the decision to proceed to court is highly price sensitive, and that even small increases will deter significant percentages of citizens from proceeding to court. Those who told the Ministry of Justice that they would not be deterred from proceeding to court were considering only modest increases to modest fees. The research concerned an increase of £300 at most to total fees for the whole case of between £450 and £640, depending on the type of case. The Ministry of Justice report cited in the consultation paper states *"..... it would be a breach of Article 6 of the European Convention on Human Rights (ECHR) if a person was effectively unable to have access to a court through being unable to afford these fees*." The Faculty agrees with this statement. Requiring a person to pay expensive court fees may be a disproportionate restriction on that person's right of access to the court, and so in breach of Article 6 ECHR, : see ***Kreuz v Poland*** (2001) 11 BHRC 456. In particular, fees imposed irrespective of the prospects of success, as a means of deriving income should be subject to strict scrutiny: see ***Podbielski v Poland*** (26 July 2005, App No 39199/98).

7. Further, the Scottish Government has recognised the deterrent effect fees have in limiting access to justice by the pledge in its Programme for

[1] "What's cost got to do with it? The impact of changing court fees on users" was published by the Ministry of Justice (Ministry of Justice Research Series 4/07 ISBN 978 1 84099 083 6/) in June 2007: see http://www.justice.gov.uk/publications/research280607.htm

Government 2015-16 to abolish fees for Employment Tribunals to ensure "that employees have a fair opportunity to have their case heard"[2]. The Faculty agrees with this pledge because of the importance of employees having access to Employment Tribunals in order to protect their rights at work. However, other legal rights which have to be vindicated through the ordinary courts are of equal importance, and the Faculty believes that to be consistent in supporting access to justice the Government should not charge fees for access to the ordinary courts. It may be noted that if these contradictory approaches are adopted it will lead to the situation where an employee unfairly dismissed will be free to sue his employer in the Employment Tribunal without incurring any fees, but an employee who loses his job as a result of an accident at work which is his employer's fault will have to pay substantial fees if he wishes to seek compensation for his injuries through the Sheriff Personal Injury Court. This inconsistent approach risks denying access to justice to those who have to rely upon the ordinary courts rather than specialist tribunals.

8. Substantial increases in court fees could have particularly serious implications for individuals seeking to challenge decisions taken by or on behalf of the legislature (UK Parliament or the Scottish Parliament) or by the executive (the UK Government or the Scottish Government). The proposed increases in court fees – particularly those proposed for the Court of Session – could result in a real impediment to such individuals bringing a challenge. The doctrine of the separation of powers is a

[2] "A Stronger Scotland: the Government's Programme for Scotland 2015-16", p3, see http://www.gov.scot/Resource/0048/00484439.pdf

fundamental principle of constitutional law. It is premised on the judiciary being able to strike down acts of the executive and the legislature which are outwith their powers. The proper operation of the courts' supervisory powers depends upon individuals who wish to challenge unlawful acts by the legislature or the executive having access to the courts. If by increasing court fees the executive impairs access to the courts the delicate constitutional system of checks and balances would be placed under threat. There is an issue related to this: the effect on protective costs orders of the proposed court fees. For more on this, see p18 below.

9. The Consultation Paper observes that "*the Scottish Government is also conscious that, in general, for many types of action, court fees are a much smaller component of the costs of taking legal action than the cost of paying for legal advice and representation*". This is unconvincing as a justification for making litigants, rather than the state, fund the civil justice system. The point is, litigation lawyers, who work in a highly competitive field, have no alternative to charging fees in order to fund the work they do. But there is an alternative to making litigants pay the whole cost of the civil justice system. The state can fund the functioning of the judicial system from general taxation. Another fundamental difference between court fees and lawyers' fees should be noted. It is very common for pursuers to be represented on a "no win, no fee" basis; and in some cases lawyers provide their services for free. If necessary a natural person can represent him or herself. But even those who pay no lawyer's fees will still have to bear the cost of court fees, and the level of fees necessary for full cost recovery may well deter would-be litigants from pursuing or defending their rights. In any event, the fact that many litigants have to pay

lawyers' fees does not justify adding a further substantial burden to the cost of litigating for those on modest incomes.

10. If they are implemented the new proposals will materially increase the cost of some litigations. There are already concerns that the cost of litigation may be impeding access to civil justice. Those concerns will intensify if the new proposals are implemented. It may be that wealthy citizens will be undeterred from litigation by this increased cost. However the Faculty of Advocates is concerned that less wealthy citizens, where they have a choice, may be deterred. Only the poorest citizens will be exempted from the proposed court fees. There are many others for whom litigation is already only marginally affordable: the Faculty of Advocates fears that citizens in that category may be being deterred from litigating a meritorious case because of increased court fees. Justice is denied to such citizens. For many litigants increased fees would be liable to shift the balance of power in litigation further in favour of their wealthier opponent. That is because the risk of the unsuccessful litigant incurring the whole cost of the parties' legal expenses has always been a motivation for settlement. If that cost is considerably increased, as is proposed, bargaining power in settlement negotiations will shift further to the litigant best able to bear the cost of the litigation. In that event, justice will be denied to the economically weaker citizen. That is not justice.

NO BASIS FOR SUGGESTION IN THE CONSULTATION PAPER THAT THE PROPOSED COURT FEES WILL NOT HAVE A DETERRENT EFFECT

11. The Consultation Paper states that "*We are aware that there will be a tipping point where fee increases may deter people from raising actions. We do not believe that the level of rises in either option 1 or 2 as proposed will have a deterrent effect as individual fees will still be relatively low, particularly when viewed against the total costs of taking legal action including the cost of legal advice*." The Consultation Paper cites no evidence to justify this belief. It is a reasonable assumption that the number of litigants or potential litigants adversely affected by having to pay court fees will rise in relation to rises in the fees themselves. Without research, the number involved is speculation. But if even a few people are deterred from litigating a good claim or defence, that is seriously damaging justice. There may be many more than a few who are so deterred, of course.

THE SYSTEM OF COURT FEES EXEMPTIONS IS INADEQUATE TO PROTECT ACCESS TO JUSTICE

12. The Faculty of Advocates has two observations about the system of court fees exemptions. It considers that the system is inadequate to protect access to justice. Firstly, the thresholds for exemptions are set very low. A very substantial proportion of Scots have modest income and capital but do not qualify for legal aid or fall within any of the other categories of persons entitled to claim fee exemption. The targeting of exemptions on these low income groups will mean that access to justice for those on modest means is likely to be impaired by court fees such as are proposed. The notion that people of modest means must be subject to "full-cost pricing" for the right to have resort to the courts is unjust.

13. Secondly, a recipient of court fees exemptions, if unsuccessful in the action, may still be required to reimburse court fees which his or her successful opponents have paid in the litigation. As well as causing undue hardship, this has the potential to deter litigation by a person who is him or herself exempt from paying court fees.

THE PROPOSED COURT FEES MAY BE SEEN AS RATIONING BY PRICE OR REGRESSIVE TAXATION

14. It is stated (at page 8 of the Consultation Paper) that one option is "*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*". The Faculty of Advocates has concerns about the reference to judicial time as a scarce resource in order to justify court fees. This smacks of rationing by price, which is anathema to justice. Even if the aim is, in fact, to allocate to the individual litigant "*a more realistic reflection of the cost of...judicial time*" in the particular litigation, there is still a difficulty. If that is done, it will make the individual litigant subsidise those many people (see above) who benefit, without litigating, from the maintenance of a proper civil justice system. It can be seen as a regressive tax: without regard to their means, one sector of society (litigants) subsidise (non-litigant) society at large.

CONCERNS ABOUT WHETHER THERE IS A RATIONAL AND FAIR JUSTIFICATION FOR COURT FEES AS CURRENTLY CHARGED AND AS PROPOSED

15. The Consultation Paper makes clear that the current and proposed court fees do *not* allocate to the individual litigant the actual cost to the judicial system of their particular litigation. It is stated (at page 7 of the Consultation Paper) that "*Our proposals look at the costs of the whole of the civil justice system rather than the specific fee covering the costs for that specific service. However, we have, over the previous reviews taken into account that fees should reflect the level of activity associated with that fee whenever possible. For example, a fee for a hearing with 3 judges will be a multiple of the fee for a hearing with one judge*". And it is stated (at page 8 of the Consultation Paper) that "[the targeted increase option includes] *increasing selected fees in the Court of Session and the sheriff court, whilst avoiding impacting upon small claims and other possible access to justice barriers. It is expected that this would raise approximately £4m.*" The implication from these two statements is that some litigants may be paying, or required to pay, materially more than the actual cost to the judicial system of their particular litigation, because (a) the assessment of this cost is arbitrary and made without an evidential basis; and (b) there is a conscious intention that one class of litigation should subsidise another. That is not justice at all.

16. There is another concern about the passage last above cited ("*increasing selected fees in the Court of Session and the sheriff court, whilst avoiding impacting upon small claims and other possible access to justice barriers*"). It is unclear why two litigants of identical means should pay differently for access to justice merely because one litigates in the Court of Session and the other litigates in an inferior court. The importance of access to the Court of Session is at least as important as access to an inferior court. The pecuniary value (if there is one) of the litigation is no measure of the value to be put upon access to justice. There may be some tension between recognising this, and a wish that the cost of court fees should be

proportionate to the pecuniary value of the litigation[3]. There is a cogent argument, however, that proportionality of cost should not be a factor in setting court fees. It may be argued that it is more important that higher value claims should have access to justice than that low value claims should have that access. If that is so, it is hard to see why the state should charge more for access to justice for higher value claims than for low value ones. Further, there is no link between the value of a claim and the ability of the litigant to pay the court fees. A litigant of very modest means may have a substantial personal injury claim, whereas a wealthy individual may have a much more modest claim for a different type of loss. The view of the Faculty is that the state should afford access to justice equally to all litigants, regardless of the value of their claims. And the best way to achieve that is for the state to fund the civil justice system from general revenue.

17. It is striking that the Consultation Paper does not (simple procedure cases apart) propose that court fees should be payable proportionately to the value of the particular litigation. But it does propose a fees variation by court. In the result, the same litigation will cost more in court fees if it is sued in the Court of Session rather than the Sheriff Court. This does rather reinforce the impression that the proposals for court fees, consciously or not, do involve rationing by price. And if this is effective rationing, it will deter some litigants from suing in the Court of Session as they would have otherwise have wished to do. That is not protecting

[3] It should be noted, however, that there is no indication of this wish in the Consultation Paper. See below for further observations on the proportionality of court fees to the pecuniary value of the case.

access to justice. It should also be noted that it is hard to see a rational basis for smaller court fees for access to the Sheriff Court, when access to the Court of Session is at least as important as access to the Sheriff Court.

18. There is a further concern about whether there is a rational and fair justification for court fees. There are seemingly inexplicable anomalies in the fees charged and proposed for judicial time, both within the Sheriff Court and when comparing the Sheriff Court to the Court of Session.

19. Within the Sheriff Court the current and proposed Sheriff Appeal Court hearing fee (per day) bench of 1 is £227/ £282/ £227. And the fee for a sheriff sitting alone is (per day) £227 (and £282 if subject to the flat rate increase of 24%). But the current and proposed Sheriff Personal Injury Court hearing fee (bench of 1) (per half hour) is £77/ £96/ £77. If one takes a (non-appellate) court day as five hours, the daily fee is £770/ £960/ £770. It cannot be that the cost of a sheriff sitting alone in the Personal Injury Court exceeds the cost of a sheriff sitting alone in the Sheriff Court or in the Sheriff Appeal Court by over £500 per day. When comparing the Sheriff Court to the Court of Session it is noteworthy that the current and proposed Sheriff Appeal Court hearing fee (per day) bench of 3 is £568/ £707/ £568, but the current and proposed Court of Session hearing fee (per half hour) bench of 3 is £239/ £297/ £500 - in other words £2,151/ £2,673/ £4,500 per day (if one takes an appellate court day as four and a half hours). The general public (and litigants) will take some persuading that the cost of three judges sitting in the Court of Session exceeds the cost of three sheriffs sitting in the Sheriff Court by about 280% (i.e. by about £2,000 per day) or by about 600% (i.e. by

about £4,000 per day) if the "targeted" increase goes ahead. The same seemingly inexplicable disparity is seen when comparing the court fees for a sheriff sitting alone in the Sheriff Court with those for a judge sitting alone in the Court of Session. All this gives the impression that the current court fees for using the civil justice system are arbitrary, and this impression will be considerably enhanced if the "targeted" increase goes ahead. It will also give the impression that there is a wish to deter litigants from suing in the Court of Session, given that the "targeted" increases will raise the existing cost of judicial time in Court of Session considerably (by about 110%) without raising the cost of judicial time in the Sheriff Court and the Sheriff Appeal Court at all. This apparent wish to deter litigants from suing in the Court of Session is of particular concern when one considers that some types of action, such as judicial review by which litigants may challenge the government's own actions, are restricted only to the Court of Session.

20. The Consultation Paper states at page 7 that "*the proposals [for both the flat and targeted increases] are based on data from 2014/15 as that is [sic] the most recent SCTS Annual Report and Accounts that is available*". That is wholly opaque. It is impossible to see how the Consultation Paper computes "the cost to public funds of providing those services [i.e. the civil justice system]" and how the proposals in the Consultation Paper would allocate amongst different litigants the burden of paying for the judicial system. The Consultation Paper sets out no rational explanation for the specific "targeted increases" it proposes. *Prima facie* their purpose is only to make money, and to subsidise one class of litigation by fees charged in another class of litigation. It is questionable whether such a measure, which is not designed to protect the court against unmeritorious litigation

nor simply to recover the costs of that particular case, is consistent with Article 6 of the European Convention on Human Rights: ***Podbielski v Poland*** (26 July 2005, App No 39199/98).

A DISCRETION TO REDUCE OR REMIT COURT FEES

21. In England, by the Civil Proceedings Fees Order 2008/1053 Schedule 2 paragraph 16, a fee may be remitted where the Lord Chancellor is satisfied that there are exceptional circumstances which justify doing so.. It is surprising that there is no equivalent provision in Scotland. The introduction of such a discretion would mitigate hardship in some cases. For example, the Consultation Paper has no proposals to exempt or modify court fees for those who have been granted a protective costs order. The court's purpose in granting the protective costs order may be thwarted if the litigant still has to pay the court fees proposed by the Consultation Paper, especially if Option 2 for raising court fees is adopted, since most protective costs orders will be granted in the Court of Session. The introduction of such a discretion would also allow there to be avoided the risk of court fees thwarting the court's purpose in granting a protective costs order.

LITIGANTS REQUIRED TO FUND THE CIVIL JUSTICE SYSTEM SHOULD HAVE A CHARTER OF RIGHTS

22. The Faculty of Advocates has some further observations on full cost recovery. If it is to go ahead, full cost recovery is to be achieved by requiring litigants to pay to use the civil justice system. In effect, the

state will become a supplier of services for payment. It is generally accepted in our society that those who provide services for payment should do so to a reasonable standard. The state should recognise that. It should confer on litigants the right to an adequate service. For example, there should be compensation in full should the Scottish Courts and Tribunals Service fail to provide (as currently happens from time to time) a judge for a fixed diet, or if a hearing is delayed by a judge having to attend to other business. By way of further example, there should be an appointment system for most motions in the Court of Session, to avoid the wasted cost of waiting time. There should be an entitlement to have a judgment soon after the conclusion of a hearing. That would expedite justice. And there should be an entitlement to fix hearings in the Sheriff Court for the whole duration reasonably estimated for them, rather than being fixed (as is the current practice) for only one or two days. That would expedite justice, and it would save much wasted cost. Of course, there should be no question of litigants indemnifying the state for compensation it pays out for because it has provided inadequate services. That would be absurd.

SUMMARY

23. As set out above, the Faculty of Advocates considers that the Consultation Paper raises, rather than resolves, concerns about access to justice. The Faculty of Advocates considers that these concerns illustrate and fortify the correctness of the general principle that the civil justice system should be funded by the state, not litigants. The Faculty of Advocates also believes the manner in which the fee increases are proposed to be implemented, without a proper evidential basis to examine the possibly deterrent effect on raising or resisting litigation, the

seemingly arbitrary differences in the fees imposed for different courts, and an absence of a discretion to waive fees, is likely to exacerbate the problems inherent in a system of full cost recovery.

6. Are any of the proposals likely to have a disproportionate effect on a particular group? If so, please specify the possible impact?

The Faculty of Advocates considers that there is insufficient evidence to enable it to address this issue.