

Consultation on Scottish Court Fees 2018-2021

**(Court of Session, High Court of Justiciary,
Sheriff Appeal Court, Sheriff Courts
including Sheriff Personal Injury Court,
Justice of the Peace Courts and Office of
the Public Guardian)**

October 2017

Section 1: Background and proposals

Introduction

1. The purpose of this consultation is to seek views on revisions to Court Fees that will ensure that the fees raised in our courts (Court of Session, High Court of Justiciary, Sheriff Appeal Court, Sheriff Courts including Sheriff Personal Injury Court, Justice of the Peace Courts and Office of the Public Guardian) continues to cover the cost of the business undertaken in those courts.
2. The Scottish Government is committed to ensuring that the courts are funded to deliver a justice system that is affordable and which provides a high-quality service to those who have cause to use it. It is also committed to ensuring that access to justice is protected through a well-funded system of exemptions and legal aid.
3. Despite significant financial pressures the legal aid system in Scotland maintains a wide scope of access to legal aid for both criminal and civil cases. Legal aid in Scotland is a demand led system and all those who are entitled will receive it.
4. The Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill currently before the Scottish Parliament will increase access to justice by making the costs of civil action more predictable and by increasing the funding options for pursuers of civil actions through greater availability of “no win, no fee” success fee agreements.
5. It will also protect pursuers from the risk of having to pay their opponent's costs in personal injury cases if the case is lost, provided they have acted properly. In both cases, the proposals will mean that the pursuer in personal injury actions will not in practice be liable to pay court fees even if they lose.
6. Beyond this overriding objective the Scottish Government believes that those who make use of the services of the courts should meet, or contribute towards, the associated cost to the public purse where they can afford so to do, thus reducing the burden upon the taxpayer.
7. The responsibility for setting court fees is a matter that lies with the Scottish Ministers and is put into effect by statutory instruments laid before the Scottish Parliament. Those instruments establish statutory fee-charging regimes, which the Scottish Courts and Tribunals Service (SCTS) administer, therefore the Scottish Government works closely with the SCTS on its fees policy. The current statutory instruments are as follows:
 - a. The Court of Session etc. Fees Order 2015
 - b. The High Court of Justiciary Fees Order 2015
 - c. The Sheriff Appeal Court Fees Order 2015
 - d. The Sheriff Court Fees Order 2015
 - e. The Justice of the Peace Court Fees (Scotland) Order 2015
 - f. The Adults with Incapacity (Public Guardian's Fees) (Scotland) Regulations 2015

8. In each of these instruments, schedule 3 currently applies. Except in the case of the Public Guardian's fees, schedule 3 was substituted by the 2016 Amendment Order referred to below.
9. The instruments can be found on the website of the Scottish Courts and Tribunals Service. <https://www.scotcourts.gov.uk/taking-action/court-fees>

Court fees review

10. Court fees have generally been reviewed every three years, with the last full round being implemented in 2015. The wider context of pressure on public finances, brought about by significant reductions to the funding Scotland receives from the UK Government, meant that in 2016 the Scottish Government concluded that it was necessary to move further towards full-cost recovery in the courts, which has been the policy of the current and previous governments for some time. As a result an ad-hoc Fees Order (the Court Fees (Miscellaneous Amendments) (Scotland) Order 2016) was laid before the Parliament and came into force on 28 November 2016. This order raised the level of fees significantly, although certain fees, such as those in the Sheriff Personal Injury Court, were frozen in order to protect access to justice. The overall effect was intended to bring the level of fees to the point at which they cover the costs of the civil justice system.
11. However inflationary pressures in the wider economy mean that the three yearly review is still required in order to set fees for the three year period commencing on 1 April 2018 (by which point it will be 17 months since the last fees increase).
12. It is not intended that court fees should move beyond cost-recovery to a point where a profit is made (that could be used to subsidise other parts of the justice system). It is intended that the current review should do no more than take account of inflationary pressures and address some inconsistencies and anomalies that exist in the current fees structure.
13. Each year the total costs attributable to civil business in the sheriff courts, Court of Session and Office of the Public Guardian are set out in the SCTS Annual Report and Accounts along with the income derived from fees. The following table shows the overall figures for the last 7 years available and the recovery rate achieved:

Table 1: Recovery rate 2010-11 to 2016-17

Year	Income (£m)			Costs (£m)			Deficit	
	Fee income (net)	Fee exemptions	Total fees	Total costs allocated	Planned subsidy	Net costs	Deficit/surplus (£m)	Recovery rate
2010-11	22.8	2.3	25.1	41.7	6.5	35.2	-10.1	71%
2011-12	22.1	2.0	24.0	41.2	7.4	33.8	-9.8	71%
2012-13	21.9	2.2	24.1	38.8	6.5	32.2	-8.2	75%
2013-14	24.2	2.4	26.6	39.5	6.2	33.3	-6.7	80%
2014-15	24.7	2.3	27.0	38.4	6.1	32.3	-5.4	83%
2015-16	26.7	2.5	29.2	42.6	6.8	35.8	-6.6	82%
2016-17	28.9	2.6	31.5	43.1	6.9	36.2	-4.7	87%

14. The Scottish Government believes that further reforms to the fee charging system will be desirable as a result of the modernisation arising from measures within the Courts Reform (Scotland) Act 2014 and the introduction of the new Integrated Case Management System (ICMS) in the SCTS. It is clear however that further time is required to allow the most recent changes, such as the introduction of the new Simple Procedure (replacing small claims and summary cause) to bed in, and for more a complete picture to be produced by the new ICMS system as only eleven months data is currently available. It will therefore be for future fees instruments to consider whether wider changes to the system may be desirable.
15. Opportunities to be further explored in future would include a simpler structure of single 'front-loaded' fees to replace a complex system of staged, small fees being triggered throughout a case. In addition it is clear that the fee charging system will need to take account of other changes such as the new group procedure (a proposed class action procedure) that is currently being considered by the Parliament as part of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill.
16. A further possibility would be to consider a system where, in the appellate courts only, the fees for substantive appeal hearings would be charged on the basis that the fee is payable at the time that the hearing is applied for. The fee would not be refundable if the hearing does not then take place. Such a system might discourage unmeritorious appeals from progressing as far through the system and reduce the waste of large numbers of hearing being scheduled that do not take place.

17. Whilst more substantial reform is a possibility for the future, this review needs to address some anomalies and to learn from the experience of the first couple of years of some of the court reforms that have already taken place, such as the introduction of the new Sheriff Appeal Court. These are discussed further below.
18. The current fees review is also informed by the recent UK Supreme Court Judgement in *Unison v Lord Chancellor* [2017] UKSC 51 regarding fees charged for access to the Employment Tribunals. The judgment concluded that the particular fees charged in that tribunal were an unlawful barrier to access to justice but held that fees were in principle a permissible method of funding and operating the system of courts and tribunals. It stated:

‘Fees paid by litigants can, in principle, reasonably be considered to be a justifiable way of making resources available for the justice system and so securing access to justice. Measures that deter the bringing of frivolous and vexatious cases can also increase the efficiency of the justice system and overall access to justice.’
19. The Scottish Government is carefully considering the judgment and believes that maintaining access to justice must be a paramount consideration in developing and revising fee charging regimes such as the system for court fees.
20. Further, the Scottish Government considers it vital that the extensive system of exemptions is maintained and special consideration is given to the parts of the court system that might give rise to particular concerns about access to justice for vulnerable people.
21. For persons ineligible for exemption, a successful party in court litigation will be entitled to recover their outlays including all court fees paid from the outset – in other words if they win their case they will be entitled to have court fees paid back to them. In some cases a pursuer (claimant) will not have to pay court fees direct, even if they lose their case, because their law firm, a funding company or a trade union is in a financial position to pay court fees for them. As mentioned, the Scottish Government proposes to build on these protections in personal injury actions in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill in that a pursuer entering into a success fee agreement (broadly, a “no win no fee” agreement) will not have to themselves pay court fees; and in the event they lose their case they will have the benefit of qualified one way cost shifting (QOCS) which means they will not have to pay the defender’s court fees.

Exemptions

22. Whilst the Scottish Government believes that the costs of the civil courts should be borne by court users rather than by the taxpayer, we are committed to ensuring that there is protection for those who are unable to pay court fees. This protection is provided for by a generous, extensive and easy to access range of exemptions that are offered to those on lower incomes. The exemptions regime ensures that court users with limited means are not being denied access to justice.
23. In practice, in the majority of those who qualify for exemption do so because they qualify for legal aid. The current full range of exemptions is listed below.

You may be entitled to exemption from paying court fees in the following circumstances:

You or your spouse/civil partner are in receipt of:

income support;

income-based employment and support allowance;

pension credit guarantee credit;

working tax credit, including child tax credit and gross annual income used for calculation of tax credit is £16,642 or less;

working tax credit, including a disability element and gross annual income used for calculation of tax credit is £16,642 or less; or

working tax credit, including a severe disability element and gross annual income used for calculation of tax credit is £16,642 or less.

You are in receipt of:

income-based jobseeker's allowance; or

Universal Credit

You may also be entitled to exemption from paying court fees if:

you are receiving civil legal aid in respect of the matter for which the fee is payable (Section 13(2) of the Legal Aid (Scotland) Act 1986 refers);

the fee is payable in connection with a simplified divorce or dissolution of civil partnership application and you are receiving advice and assistance from a solicitor in respect of that application (Legal Aid (Scotland) Act 1986 refers); or

the fee is payable in connection with work being undertaken by your solicitor which qualifies for civil legal aid as matter of 'special urgency' (Section 36 of the Legal Aid (Scotland) Act 1986 refers).

24. We are aware of the continuing roll-out of the new system of Universal Credit and the powers over welfare which are being devolved to the Scottish Government. In order to ensure that the fee exemptions remain appropriately designed and fit-for-purpose we will consider if some amendment of the system is required in order to take account of the roll-out of Universal Credit. Any

amendments will ensure that the exemptions system is maintained so that access to justice is protected.

25. **The Scottish Government would welcome views on the system of exemptions.**

Section 2: Fee proposals

26. Except as referenced in this section, the Scottish Government proposes that **fees narratives** should remain as they are set out in the Adults with Incapacity (Public Guardian's Fees) (Scotland) Regulations 2015 and the Court Fees (Miscellaneous Amendments) (Scotland) Order 2016 respectively.

Adjusting for Inflation

27. The Scottish Government considers that underpinning the fee proposals should be an increase to fee levels of 2.3% with effect from 1 April 2018 to reflect inflationary pressures. This would be followed by further increases of 2% with effect from 1 April 2019 and 1 April 2020.
28. In general this should be achieved by raising each individual fee point by 2.3%, 2% and then 2% again. The arithmetical outcomes for individual fee points will be rounded up or down to the nearest pound, where appropriate. Those proposed inflation adjustments are based on the forecasts issued by the Office of Budget Responsibility in March 2017 (table 1.1).
29. A different approach for some specific fees is justified, as discussed above, by a rationale for greater consistency or to drive improved efficiency within the courts system.

Fee Proposals for Courts

30. Specific proposed departures from the flat rises are:

Hearing Fees

31. The fee narratives for hearing fees in the Court of Session (at line items B16, B18, C12 and C14) currently read as covering a hearing "before a single judge" but that leaves what happens when the court sits with two judges open to conjecture and misinterpretation. To provide greater clarity on the policy intent we think that issue should be put beyond doubt by ensuring court users understand this fee is intended to cover a bench of either one or two judges.
32. **The Scottish Government proposes that:**

The fee narratives are changed: from "before a single judge" to read "before a bench of one or two judges"

Caveats

33. A caveat is a legal document lodged in court by a party so that no order or ruling affecting them passes in their absence or without receiving prior notice and an opportunity to be heard by the court before any order is made. The fee within the Sheriff Court is £36 and in the Court of Session it is £48. As part of the digitisation of services within ICMS there is a shift to adopting a more generic process for managing caveats within the courts and there appears little justification for continuing with a differentiated fee.

34. **We propose to align the fee within the two courts (line item C6 in the Court of Session and line 20 in the Sheriff Court) and set the fee level at £43 subject to the outcome of consultation (including inflation adjustment proposed by the consultation).**

Sheriff Appeal Court Hearing Fees

35. Following practice in the Court of Session, the Sheriff Appeal Court currently allows for a fee not to be applied for the first thirty minutes of a hearing. Now that the Court has been operational for two years it has been identified that working practices within the two courts are fundamentally different and the practice of not charging for the first thirty minutes has given rise to the unintended consequence of substantive hearings not being chargeable. Whilst a short period without a fee is justifiable in the Court of Session in order to encourage procedural hearings at the start of the day not to overrun and displace other scheduled business, it was never the intention that substantive business should be conducted without a fee.
36. **The Scottish Government therefore proposes that the exemption from fees (line item 4) for the first 30 minutes of the hearing in the Sheriff Appeal Court should be removed. This means that a daily fee of £227 or £568 would be applicable from the start of the hearing, for a bench of one or three respectively.**

Sheriff Appeal Court Permission Fees

37. A further proposal in relation to hearing fees in the Sheriff Appeal Court relates to the introduction of permission to appeal fee - *the permission stage*. The Sheriff Appeal Court hears civil appeals against decisions of the sheriff courts, including the Sheriff Personal Injury Court – permission is not required for first appeals of this nature. Where a party wishes to further appeal to the Inner House of the Court of Session, having already had their case heard before both the sheriff and the Sheriff Appeal Court, this is exceptional and the appeal must satisfy the strict “second appeals test” in section 113 of the Courts Reform (Scotland) Act 2014¹.
38. It has been suggested to the Scottish Government that it would be appropriate to have a fee for the permission stage – i.e. a fee payable when an application to the Sheriff Appeal Court for permission to appeal further to the Inner House has been lodged. It was noted that there were many applications for permission and it could be difficult to reconstitute the bench which had heard the original appeal given the diverse location of appeal sheriffs. Many litigants appealed, however, permission had been granted in only 2 cases. This implied that permission was being sought, more often than not, for unmeritorious appeals, and that the imposition of a fee might modify that behaviour. Clearly where the litigant concerned had the benefit of a fee exemption, then charging

¹ The Sheriff Appeal Court or the Court of Session may only grant permission if the Court considers that (a) the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court of Session to hear the appeal. For a recent example of where this test was not met by a proposed second appeal see *Mitchell v Somerville* [2017] CSIH 60.

a permissions fee would have no effect, but it is considered it is important to seek to modify behaviours in those cases where that can be done.

39. **The Scottish Government proposes that a new fee of £246 (including inflation adjustment proposed by the consultation) for permission to appeal should be introduced so that unmeritorious appeals should be discouraged, to allow the Sheriff Appeal Court more time to deal with meritorious permission applications i.e. appeals where there is an important point of principle or practice or some other compelling reason for the Court of Session to hear the appeal.**

Bankruptcy (Composition Fee)

40. Applications to a Sheriff arose under the Bankruptcy (Scotland) Act 1985 which has now been repealed. Other than potentially for a tiny minority of cases which possibly continue to operate under the old regime because the discharge of bankruptcy has been delayed, the composition fee is redundant. **The Scottish Government proposes that the fee (line item 13) be removed.**

Election Court

41. The Election Court sat for the first time in two decades during 2016. No fees could be charged for any of the motions that were lodged or for the hearing itself when it proceeded as they are not separately specified under the cross heading for the Election Court in the Court of Session etc. Fees Order 2015.
42. **The Scottish Government propose that:**
A new line item to cover motion fees of £102 (subject to the result of the consultation) is added to section E of the Court of Session fees table.
A new line item to cover hearing fees of £204 (subject to the result of the consultation) is added to section E of the Court of Session fees table.

Scottish Land Court Fees

43. The Scottish Land Court has operated as a stand-alone body since it was established and has only recently been brought within SCTS by virtue of the Judiciary and Courts (Scotland) Act 2008 (Scottish Land Court) Order 2017. The time therefore seems right to look closely at the fee charging arrangements, as the fees charged within that Court have remained unchanged since 1996 (the Scottish Land Court (Fees) Order 1996). That said, there are other pieces of work underway that effect the work of the Land Court such as the consultation on crofting law that is currently on-going <http://www.gov.scot/Publications/2017/08/8632/downloads#res523679>.
44. The Scottish Government therefore does not propose changes to fees in the Land Court in this consultation but will continue to monitor the situation with a view to possible action in the future.

Fee proposals for the Office of the Public Guardian

45. Specific departures from the flat rises are:

Audit of Accounts – Office of Public Guardian (OPG)

46. With guardianships there is a need to avoid taking a “one size fits all” approach and, to comply with the *United Nations Convention on the Rights of Persons with Disabilities*, the OPG need to demonstrate a tailored approach to the safeguarding measures they take in Scotland. As part of that supervisory role the burden of reporting has been reviewed and a more flexible procedure is being implemented. That operational change would be assisted if line item 19 (Audit of Accounts) was now split into two component parts: a first review, and an intermediate review.

47. **The Scottish Government proposes:**

in the existing line 19 the words *Audit (except Final Audit)* should be replaced with the words *First Review*

a new line should then be inserted that reads

- a. **Intermediate Review – in accordance with paragraph 7 of schedule 2 to the Act –**
 - i. **Where the Public Guardian has specified limited supervision - £80 (including inflation adjustment proposed by the consultation)**
 - ii. **Where the Public Guardian has requested formal accounting then the fees as specified for a first review will apply (refer 19)**

Office of Public Guardian Fee Narratives

48. In addition to changes to the fee levels there are proposed changes to the terminology within the fee table for the OPG to improve clarity.

Initiation fees in the OPG

49. In relation to these fees (at line item 1) **we propose to refer to “processing” rather than “submission” to remove operational confusion about whether the fee is payable on lodging or after a subsequent decision has been made.**

The revised fee line would therefore be ‘Processing of a document conferring a continuing and / or welfare power of attorney under section 19 of the Act’ (the Act being the Adults with Incapacity (Scotland) Act 2000).

Section 3: How to respond

Where to send your response

The closing date for comments is Friday 12th January 2018. Please email your response to courtfeeconsultation@gov.scot. **We regret that it will not be possible to grant any extensions.**

Respondent information form

Please complete the attached Respondent Information Form at Annex B which contains the consultation questions and sets out how your response will be handled.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us to reach a decision on the way forward. We will issue a report on this consultation process and this will be made available on our website.

Questions:

1. **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?**

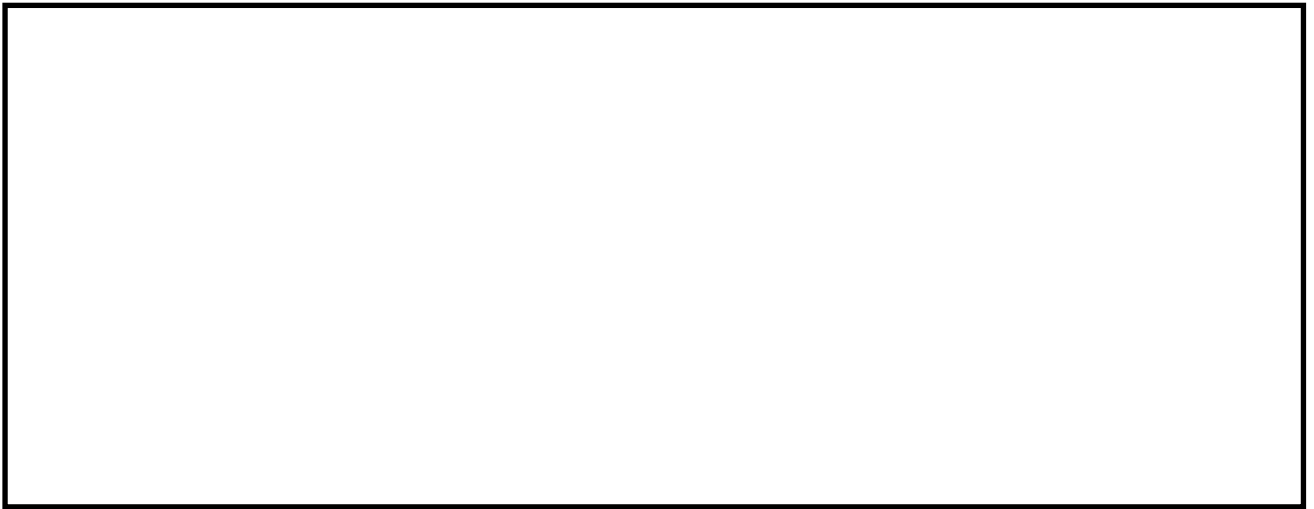
2. **Do you have any comments on the variations from the general uplift detailed in section 2?**

- 3. Do you have any comment on the changes to fee narratives detailed in section 2?**

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

- 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? If so, please specify the possible impact? (Please see accompanying EQIA)**

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

A large, empty rectangular box with a black border, intended for the respondent to provide their views on the operation of the fee exemptions system.



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