Response by the Faculty of Advocates

to

Consultation (October 2017)
on
Scottish Court Fees 2018-2021

by
The Scottish Government
Riaghaltas na h-Alba

January 2018

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

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?

The Faculty of Advocates does not agree with this proposal. The fees which it is proposed to increase are ones which the Faculty of Advocates considers unjustified in principle, and which appear to be set without proper evidence as to their effect: see the (appended) response of The Faculty of Advocates to the Scottish Government Consultation *(July 2016)* on *Scottish Court Fees*, and see the response at 4 below. Increasing those fees by a percentage only compounds the concern the Faculty of Advocates has about them.

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

The Faculty of Advocates has comments only on the proposed fee for the permission stage of a further appeal to the Court of Session. These are as follows.

In ***Unison v Lord Chancellor*** the UK Supreme Court observed that "*the right of access to justice, both under domestic law and under EU law, is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication.*" It has been suggested that a fee for the permission stage of a further appeal to the Court of Session might deter unmeritorious appeals. This appears to be speculation. Even if it does have the

effect of deterring unmeritorious appeals there appears to have been no assessment of the *number* of unmeritorious appeals it will deter, and of the number of arguable and meritorious appeals it will deter, or risks deterring.

At any rate, charging the fee for the permission stage of a further appeal will have no effect at all on litigants who have the benefit of a fee exemption or on those who are wealthy. A measure which is aimed only at those of moderate means is unfair. While the UK Supreme Court held that measures which deter the bringing of frivolous and vexatious cases may be legal, their use requires a degree of sophistication if they are not to be struck down as illegal or *ultra vires* for one reason or another.

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

The Faculty of Advocates has no comments on the proposed 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?

The Faculty of Advocates reiterates the view it expressed in 2008, 2010, 2013 and 2016 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. 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 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 medical assistance. The Faculty considers that access to the courts is of at least 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. 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. Even more concerningly, the (current and proposed) fees regime in Scotland may deter some people with an arguable or even meritorious claim from litigating at all. The Consultation Paper proceeds explicitly on the basis that court fees will inhibit litigation in some cases, and may do so in others: see paras 16 and 38.

It is explicitly stated in the Consultation Paper that the purpose of the proposed revisions to Court Fees is to "*ensure that the fees raised in our courts ....continue to cover the cost of the business undertaken in those courts*" and that "*the Scottish Government believes that the costs of the civil courts should be borne by court users rather than by the taxpayer.*" In other words, the purpose of the fees regime is to avoid paying for the courts from general taxation. The principle underlying the fees regime is that the user pays. The moral and philosophical justification for this has never been explained. The Faculty of Advocates considers that it cannot be explained. In ***Unison v Lord Chancellor*** [2017] UKSC 51 the UK Supreme Court set out in the clearest of terms why unimpeded access to justice is of vital importance to society at large,

not just those who have resort to the courts. This is why the view of the Scottish Government that the cost of the courts should not be "*a burden on the taxpayer*" is not one shared by the Faculty of Advocates. The whole of society benefits from the maintenance of the court system and there is no reason why only those who use the court system should pay for it. To describe the cost of the courts as a "burden" is extraordinary.

The Consultation Paper notes that the UK Supreme Court held that 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. That is no justification for a regime aimed at recovering the whole cost of the courts, or as much of the cost as possible, from litigants rather than the taxpayer. In fact, one can infer from the judgements in ***Unison v Lord Chancellor*** that the UK Supreme Court would be likely to find such a fees regime illegal and *ultra vires*.

In addition to the issue of principle (or legitimacy of aim) referred to above, there needs to be a rational basis in evidence for the level of fees actually set. In ***Unison v Lord Chancellor*** the UK Supreme Court observed that in order for the fees in that case to be lawful, they had to be "*set at a level that everyone can afford, taking into account the availability of full or partial remission*." It went on to observe that *"the evidence now before the court, considered realistically and as a whole, leads to the conclusion that that requirement is not met.*" It should be noted that in ***Unison v Lord Chancellor*** there was no requirement for conclusive evidence that the fees in question had prevented people from bringing claims. It was enough to make a fees regime unlawful that there was a real risk that persons would effectively be prevented from having access to

justice. It appears that the Scottish Government has done no research into the affordability of the fees regime now in force, either prior to its introduction or subsequently. *Prima facie*, then, the fees regime may be illegal and *ultra vires* because of its aim; and even if that is not so, there appears to be no way of demonstrating that the fees in the regime are "*set at a level that everyone can afford, taking into account the availability of full or partial remission*." And there is reason to suppose that there may be, or may well be, such a risk that the fees regime denies access to justice in some cases. See further on this at 6 below.

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)

Beyond the following observations, the Faculty of Advocates considers that there is insufficient evidence to enable it to address this issue.

It is stated in the accompanying EQIA that the Scottish Government considers that affordability would be the main issue in considering the impact of the fees increases on specific groups. The Faculty of Advocates agrees with that. The EQIA goes on to note that, insofar as any of these groups typically earns less than average, the Scottish Government considers that assistance from legal aid and the available exemptions ensure that these groups would be protected from the proposed fee increase. For the following reasons the Faculty of Advocates does not agree with that. The EQIA recognises that groups with the protected characteristics may earn less than average. In fact, this must almost certainly be the case. The Faculty of Advocates considers that there is a real risk that such groups will suffer disproportionately from being charged the proposed fees. The risk is to those who, as a result of having the protected characteristics, have

modest income and capital but are financially ineligible for legal aid or any other right to fee exemption. The Faculty of Advocates considers (see 6 below) that the system of court fees exemptions is inadequate to protect access to justice for such people.

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

The Faculty of Advocates considers that the system of court fees exemptions is inadequate to protect access to justice. In its 2016 response to the Scottish Government Consultation (July 2016) on Scottish Court Fees the Faculty of Advocates made the same observation. It observed that 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.*" That observation is entirely in accord with the subsequent judgments of the UK Supreme Court in ***Unison v Lord Chancellor***. A comparison with the hypothetical claimants in ***Unison v Lord Chancellor*** is one illustration of this. In that case the Court had regard to two hypothetical claimants in low to middle income households. That was to test whether the right of access to courts and tribunals had been made (unacceptably) subject to impositions which low to middle income households could only meet by sacrificing ordinary and reasonable expenditure for substantial periods of time. By reference to these two hypothetical claimants the UK Supreme Court concluded that the right of access to courts and tribunals *had* been made subject to such unacceptable impositions.

It appears to the Faculty of Advocates that the hypothetical claimants in ***Unison v Lord Chancellor*** would be financially ineligible for legal aid or any other right to fee exemption in Scotland. For this reason alone, it appears quite likely that the reasoning of the UK Supreme Court would apply to the (current and proposed) fees regime in Scotland as it did in ***Unison v Lord Chancellor***: the right of access to the courts and tribunals *has* been made subject to such unacceptable impositions.

In the 2016 response by the Faculty of Advocates it was stated that

"*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 for 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.*" The Faculty of Advocates considers it desirable that there should be a discretion to remit court fees where there is a real risk that without remission access to justice will be impeded.

In summary:-

- 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 increasing those fees 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.