

Justice Committee

Court Fees (Miscellaneous Amendments) (Scotland) Order 2016 (SSI 2016/332)

Written submission from the Law Society of Scotland

We understand that the Justice Committee will be considering the order on court fees at its committee meeting on 22 November 2016. We responded to the Scottish Government consultation on court fees in October, have attached a copy of this response and hope that our views around the proposed increases are helpful for the committee's deliberations.

We believe that plans to introduce the full recovery of civil court costs in Scotland would be damaging to access to justice, particularly for those bringing forward personal injury cases and more vulnerable people (as we articulate at page 2 of our consultation response). It is in the public interest that there is a robust and respected system for resolving judicial disputes and we have consistently opposed the move to full cost recovery at stages at which court fees have been increased previously.

The scale of the increase made through this Order, particularly hearings at the Court of Session, may have an impact on the number of cases brought. We suggest this on the experience of the introduction of employment tribunal fees (at page 3 of our consultation response). Over the period that the policy of full cost recovery from court users has been pursued, the number of cases brought has continued to decrease. Research around the correlation between court fee levels and the likelihood of bringing a case would be helpful.

We appreciate the challenging financial environment for courts and for the justice system overall. Subject to our general comments opposing the principle of full cost recovery and on access to justice, we considered that a targeted approach to court fee increases was the option which would have least deterrent effect (page 6 of our consultation response).

We hope that these views are helpful and if we can assist the Justice Committee further on this issue, please do contact me.

Kim Leslie
Convenor
Civil Justice Committee



**THE LAW SOCIETY
of SCOTLAND**
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Consultation Response

A Consultation on Scottish Court Fees

The Law Society of Scotland's Response

October 2016

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world class professional body, understanding and serving needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's legal profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective legal profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fair and just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We welcome the opportunity to respond to the Scottish Government's Consultation on the issue of Scottish Court Fees.

Background

This consultation response has been prepared the Society's Civil Justice and the Remuneration Committee ("the Committees").

The Civil Justice Committee is made up of many civil litigation practitioners who regularly represent pursuers, defenders, local authorities, banks and insurers appearing in all of the civil courts which operate throughout Scotland. The Remuneration Committee is made up of practicing solicitors and law accountants who deal regularly with litigation cases and the many issues that arise from running a civil litigation caseload.

The Committees have been polarised by this consultation and has been unable to reach a consensus. This response accordingly reflects the views of the solicitors who represent pursuers.

General Comments

The Committees of the Law Society of Scotland welcome the opportunity of commenting on the Scottish Government's paper on the issue of the charging of fees in the Scottish civil courts.

Over a period of many years, attempts by successive governments to move towards a position where courts costs are fully recovered has been opposed and it remains our view that as a matter of public policy, any attempt to move towards full cost recovery should be resisted. It is crucial that our courts are adequately funded, particularly at a stage at which court reforms and new technology are embedding and we recognise the difficult financial climate for the courts and for public services more generally. The Scottish Government has pursued a gradualist approach to court fees and full cost recovery previously, including its 2015 consultation which suggested a 2% 'top up' increase followed by 2% increases each year for the following three years. An increase of around 24%, as contemplated by the current consultation, makes more immediate issues around whether the state should subsidise courts.

The Committees submit that it is an essential element of the core values of any civilised Society that State sanctioned Courts paid from public funds should provide an independent and impartial forum for the resolution of disputes between people. The State has a duty to assist people in achieving equality of arms. The State has a responsibility to meet a significant part of the cost of doing so out of general taxation. It is in the public interest that there is a robust and respected system for resolving judicial disputes.

The proposed increase to civil court fees outlined in the Scottish Government's consultation paper will significantly increase the cost of civil litigation and, we believe, will limit access to justice. The experience of the introduction of employment tribunal fees, for instance, showed that there can be a reduction in the number of cases brought because of the rate of fees charged. The introduction of employment tribunal fees in 2013, aiming for full cost recovery from tribunal users, saw an immediate and dramatic reduction in the number of tribunal claims of at least 60%. The initial Ministry of Justice consultation on the introduction of fees suggested that there was limited price sensitivity around fees, on the basis of previous research around court fees:

"To the extent that the experience of civil court fee-charging is a guide, this MoJ research suggests that Tribunal users required to pay a fee would not be especially price sensitive and that other factors will be more influential in the decision to make a claim than a fee."¹

Before the introduction of fees, around two thirds of tribunal claims were successful. With the introduction of fees reducing claims by over 60%, it is clear that a number of meritorious claims were no longer being brought (and more details on the decline in claims are included at Annex A). It is acknowledged that the level of tribunal fees is far higher for claimants than proceedings at, for instance, the Sheriff Court and fall largely on the claimant rather than both parties. One of the potential challenges from increasing court fees to full cost recovery, is that as the fees increase, the number of cases may reduce. An aim of employment tribunal fees had been to move to full cost recovery. Fees of up to £1,200 were charged to claimants and the number of claims reduced dramatically. Maintaining a system of full cost recovery may risk a cycle where increasing fees lead to reducing cases, leading again to increasing fees and reducing cases.

¹ *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal*, Ministry of Justice, December 2011

As the Ministry of Justice suggested, other factors may be more influential in the decision to litigate than a fee, such as the costs of advice and representation, the availability of legal aid and any contributions or clawback required, the prospects of success or the likelihood of recovering if successful. Over the period that the policy of full cost recovery from court users has been pursued, there has been a continuing decline in the number of civil cases brought (and there does not appear to be any significant displacement into alternative dispute resolution). We believe that this may be an area for future research, to test the correlation between the likelihood of bringing action and the level of fees, as the evidence from the introduction of employment tribunal fees suggests that this is stronger than previously anticipated.

In most personal Injury cases the commercial reality in the current economic and business environment requires pursuers' solicitors to bear most of the cost of the court fees on a "pay as you go" basis until the point is reached where they can be recovered from the defender or insurer. This causes significant cash flow problems and is an extra hurdle for claimants to deal with. This is the point made by Sheriff Principal Taylor with his reference to them as victims of the "asymmetric relationship". A system of full cost recovery would increase that imbalance. One of the ways that this asymmetric relationship was proposed to be addressed by the Taylor Review was the introduction of qualified one way costs shifting, which we anticipate will be introduced through the announced Expenses and Funding of Civil Litigation Bill. Increased court fees may reduce the balancing effect of this provision.

In Legal Aid cases much depends on when the fees are payable as they can only be recovered from the Scottish Legal Aid Board (SLAB) when an account is submitted, that submission only happening after the case has concluded. If fees in a Legal Aid Case are payable at the commencement of a case, new increased fees would have a great impact on access to justice. In other cases, clients are normally asked to meet outlays as they are incurred during the conduct of a case. We have previously suggested, for instance, in our response to the Scottish Government's court fees consultation in 2015, that this may have an adverse effect on smaller firms in more rural locations. An approach to avoid this

outcome would be that a legal aid certificate exempted any outlay in court fees, avoiding cashflow issues for the firm and simplifying the process overall.

The legal aid scheme in Scotland also ensures that people eligible for the scheme do not have to pay their court fees. Also, if unsuccessful, people who are legally aided do not need to pay the court fees of their opponent. However, in either event, these fees are met by the Scottish Legal Aid Board, and an increase in court fees of the order suggested by the Scottish Government consultation will have a significant effect on legal aid expenditure (while offering no saving to the public purse as a transfer from one justice organisation to another).

It is recognised that the proportion of court costs paid by litigants has increased. A situation where the State funds a smaller percentage of the costs and the remaining balance is met by court users will increase the overall costs of litigation and will significantly impact on access to justice.

Specific Comments

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

While a proposal to have Simple Procedure fees at the same level as the current small claims and summary cause proceedings would avoid making the situation worse, there is a concern that the costs of those claims are already disproportionate. Reducing the costs of the Simple Procedure would be consistent with a proportional charge across the court system and the current review is an excellent opportunity to deal with the issue of party litigants pursuing low value claims and who are unable to instruct solicitors to represent them.

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

Whichever system is introduced, it is vital that the decision is underpinned by the principles of proportionality which have already been identified by Lord Gill in his Review of the Scottish Civil Courts. Subject to our general comments we support Option 2 – the targeted increase.

As we understand matters, the Scottish Government's proposal is to have full cost recovery, which ensures 100% of the cost of the courts would be covered by fees paid by the parties involved in the actions lodged. If that is implemented, it would be vital that fees are proportionate to the value and complexity of the action. In particular, fees for each type of case must be set at a level whereby those fees meet only the proportion of the overall cost of the civil justice system which that type of case incurs in the first place. Any other outcome would be unfair and disadvantage parties in those actions.

Any change to the current system needs to recognise that there is a completely uneven playing field already between personal injury claimants and the insurance companies who are the defenders in those claims, those companies having very significant and influential financial power which gives them an automatic advantage. If changes are made, which fail to recognise the current problem there is a significant risk that the current gulf will become wider.

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

If a flat rise of 24% in court fees were to be introduced it would amount to an unjust and unjustifiable increase which would create a very real barrier to access to justice

for claimants especially vulnerable people who have suffered life changing personal injuries. It would also contradict the Scottish Government's policy in other areas of civil justice and would represent a significant change in direction in policy terms. As well as impacting claimants it would also have a potentially damaging consequence on solicitors who would have to carry even greater financial outlays. This, in due course, could narrow the number of firms accepting instructions for claimants which would reduce access to justice.

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

Increases should only be introduced as identified in option 2. For reasons set out in responses 2 and 3 (above), it is important that personal injury claim fees are not increased given the wide impact they will have and the concerns identified in the existing system.

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

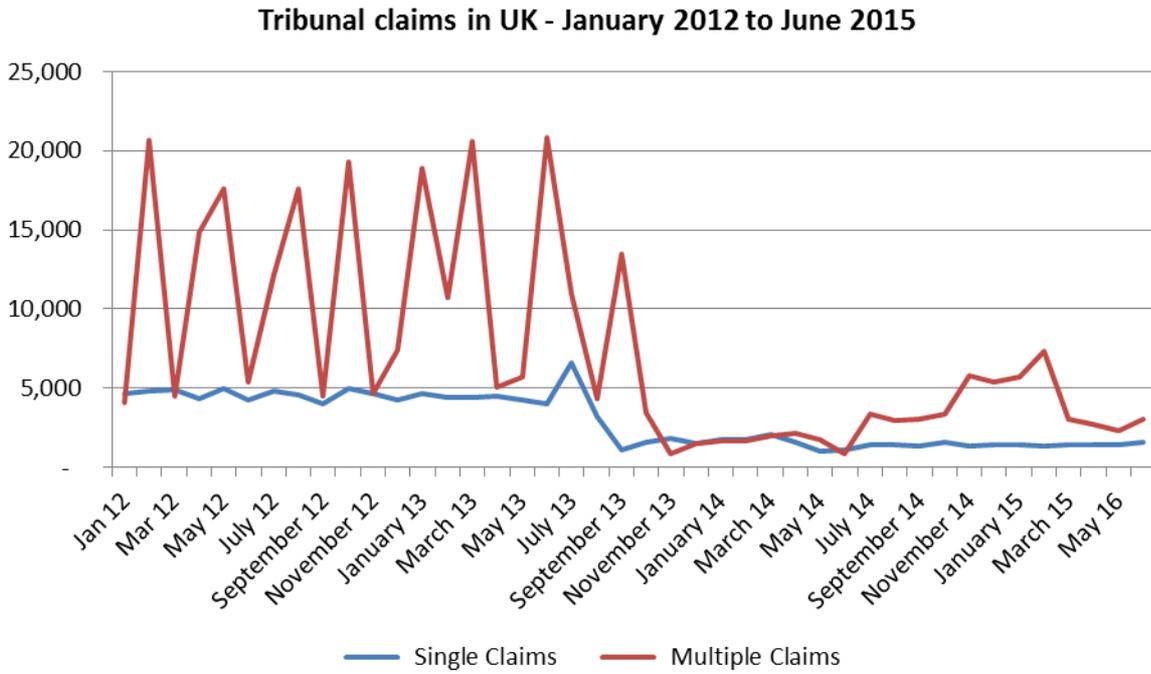
Sheriff Taylor (in his Review of Expenses and Funding of Civil Litigation in Scotland) has already made findings in this area and those responses have been accepted by the Scottish Government. As a result, the Scottish Government should be focusing any review of court fees on redressing the balance between claimants and defenders in personal injury cases by the introduction of Qualified One Way Costs Shifting.

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

We have suggested that further research could be conducted around court fees, price sensitivity and the likelihood of bringing a claim, which would help to establish which groups may be disproportionately affected. With the legal aid scheme in Scotland meeting the cost of court fees for those eligible, we suggest that there may be an impact on people who fall outside the scope of this protection. An increase in court fees is likely to impact litigants-in-person, lower value civil claims and also, for the reasons suggested above, claimants in personal injury cases. Even with the protection of the legal aid system, as suggested above, we suggest that the payment of outlays in advance of account submission will affect the cashflow of smaller firms and in more rural areas.

Annex A

Employment tribunal fee claims



For further information and alternative formats, please contact:

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