

Analysis of Consultation Responses on Fees Charged by The Court of Session, Accountant of Court, Sheriff & Justice of The Peace Courts, High Court, Office of The Public Guardian, Personal Injury Court and The Sheriff Appeal Court

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ACKNOWLEDGEMENTS

1. The Scottish Government would like to thank all individuals and organisations who took the time to consider and respond to the proposals contained in the consultation paper for Fees Charged by the Court of Session, Accountant of Court, Sheriff & Justice of the Peace Courts, High Court, Office of the Public Guardian, Personal Injury Court and the Sheriff Appeal Court .

INTRODUCTION

Background to Consultation

2. The consultation on *'Fees Charged by the Court of Session, Accountant of Court, Sheriff & Justice of the Peace Courts, High Court, Office of the Public Guardian, Personal Injury Court and the Sheriff Appeal Court'*¹, was published on 23 February 2015 and asked four questions on which views were specifically sought. The 12 week consultation period ended on 15 May 2015.

Proposals

3. The consultation sought views on the proposals for changes to the level of fees charged by the Scottish courts and the Office of the Public Guardian with the intention of obtaining the views of the general public and court users before the finalisation of the fees instruments, laid in June 2015.
4. Those fees instruments relate to the fees for 2015-2018 to be charged by the Court of Session², Sheriff & Justice of the Peace Courts³, High Court of Justiciary⁴, and Sheriff Personal Injury Court, and by the Accountant of Court⁵. They also include regulations for fees in relation to the Office of the Public Guardian⁶.
5. Proposals in the consultation paper also related to tables of court fees for the Sheriff Appeal Court (civil). Instruments pertaining to those court fees are due to be laid before the establishment of that court in early 2016.
6. The consultation paper explained that a further court fees instrument would be laid before the commencement of the new simple procedure in Spring

¹ <http://www.gov.scot/Publications/2015/02/2080>

² [The Court of Session etc. Fees Order 2015](#)

³ [The Justice of the Peace Court Fees \(Scotland\) Order 2015](#)

⁴ [The High Court of Justiciary Fees Order 2015](#)

⁵ [The Sheriff Court Fees Order 2015](#)

⁶ [The Adults with Incapacity \(Public Guardian's Fees\) \(Scotland\) Regulations 2015](#)

2016. It is likely that there will be a formal consultation on simple procedure by the Scottish Civil Justice Council before implementation.

7. The main proposal in the consultation paper was that court fees should be increased by 2% to account for inflation (Consumer Price Index (CPI)) for each year 2015/16 to 2017/18. In addition there would be an extra 2% increase in some court fees in 2015/16 to assist with further digitalisation of the courts.
8. In addition to the general increase some minor amendments to certain fees were proposed to ensure consistency and to simplify the fees in order to meet our objective of making fees easier to understand and administer.
9. Since the consultation, further adjustments have been made to fees orders in relation to the following points:
 - Small claims – Currently to lodge a summons in actions for sums of money less than £200 (or 250 Euros for a European small claim) costs £17 and to lodge a summons in all other small claims or summary cause actions costs £73 (i.e. claims of £200 up to the £5,000 ceiling for summary cause). There is currently an anomalous situation where those with a claim worth £200 have had to pay the higher fee. The proposal is to align a claim worth £200 with the £17 fee.
 - Deaths on active service – extending the existing exemption from inheritance tax by virtue of section 154 of the Inheritance Tax Act 1984 for an inventory of estate to those who work in the emergency services, armed forces, and constables and service personnel.
 - Commissary – adjusting the threshold for sheriff court fees in relation to receiving and examining an inventory of estate. The threshold will be raised so that fees will only be chargeable when the amount of the estate belonging to the deceased does not exceed £10,000 rather than the current threshold of £5000, which has not been updated since 1996. This means that beneficiaries should be able to receive sufficient money from the estate to cover the average cost of a funeral and retain something for themselves before court fees of £200 or more are chargeable.
10. In relation to small claims, the Scottish Government has previously received representations about the discrepancy highlighted above.
11. In relation to extending the deaths on active service exemption, changes have recently been made by the UK Government through the Finance Act 2015 to extend the exemption.
12. The Scottish Government considers that it is reasonable to lift the threshold on fees chargeable for receiving and examining an inventory of estate from the 1996 estate threshold.

Consultees

13. The consultation paper was circulated to 140 consultees. These included those who are directly involved with the legal process such as legal professionals, organisations in the justice system and the judiciary as well as local authorities and organisations with an interest in legal issues (through their concern for the welfare of the public in general or their concern for specific groups of people).
14. The consultation was promoted through social media and interested parties were afforded the opportunity to feed back their opinions by downloading the consultation paper from the Scottish Government website or responding online through the Scottish Government consultation hub, Citizen Space⁷.
15. Consultation exercises like this are not numerically representative; rather they aim to elicit the views and experiences of a range of stakeholders. Owing to the quantity and relatively narrow range of respondent types, it is considered that it would not be appropriate to present the results in percentage form. The small number of responses is thought to be indicative of the specialised nature of the consultation.

Overview of Responses

16. A total of 17 response were received; 8 from individuals and 9 from organisations from a range of stakeholders including the judiciary, the legal sector, and local government.
17. Where respondents gave permission, their responses have been published on the Scottish Government website at <http://www.gov.scot/Publications/2015/06/8835>
18. Not all of the respondents answered all of the questions set out in the consultation questionnaire. Some respondents provided comments that could not be categorised under a particular question, although they have been where it has been possible to do so. Some respondents commented on matters that were only indirectly relevant to the consultation. Those comments have also been summarised where appropriate.

⁷ Citizen Space <https://consult.scotland.gov.uk/>

19. A table detailing the category of respondents and the number of responses received is provided below:

Category	Number of responses received
Individuals	9
Legal organisations (including legal firms)	5
Local authorities	1
Independent organisations	1
Insurers / insurance organisations	1

FINDINGS

This report includes an analysis of the responses for the Scottish Government Consultation on *'Fees Charged by the Court of Session, Accountant of Court, Sheriff & Justice of the Peace Courts, High Court, Office of the Public Guardian, Personal Injury Court and the Sheriff Appeal Court'*. Individual responses are not repeated verbatim in the report. We have set out the questions posed in the consultation questionnaire and have provided examples of comments from respondents as well as the Scottish Government response to those comments.

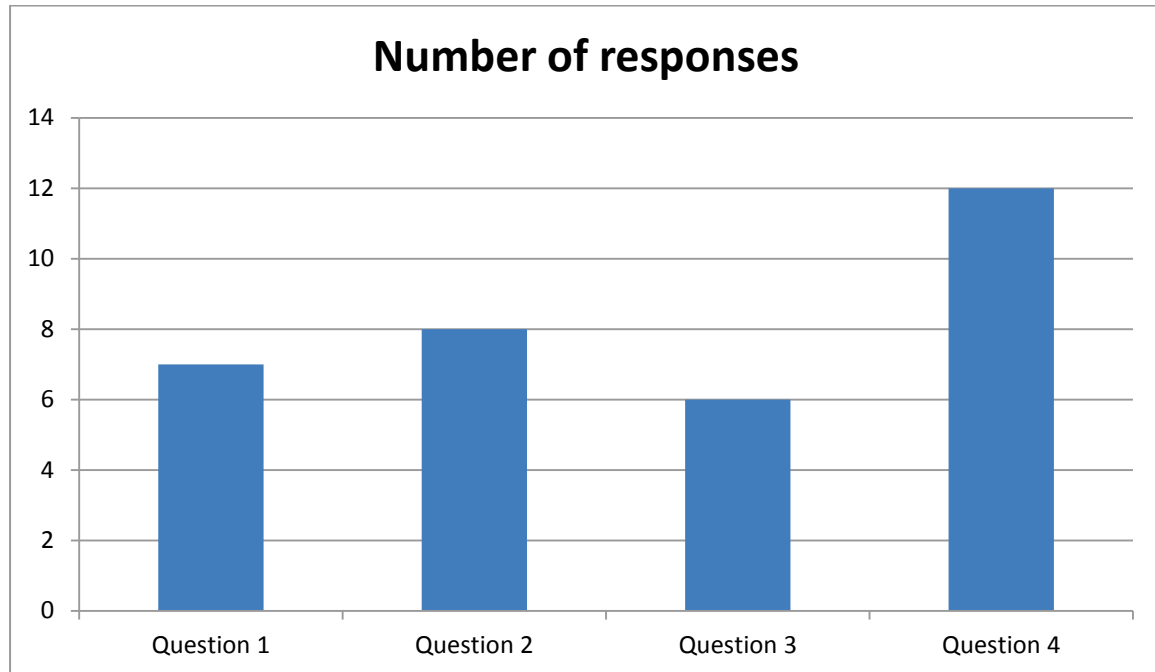
CONCLUSION

Having fully considered the views of those who responded to the consultation, the Scottish Government is to make provision for increases to fees in the Scottish courts and the Office of the Public Guardian over a three year period as set out in the consultation document. The current set of fee proposals are expected to move cost recovery levels slightly closer to full-cost recovery and will, in addition, make provision for the new Sheriff Personal Injury Court. Further orders in 2015-2016 will make provision for the Sheriff Appeal Court (civil) and for simple procedure. In addition there will be some realignment of minor fees to provide consistency across the courts, and some expansions to those who qualify for exemptions from certain fees. The above inflation increases for some courts will generate investment for further digitalisation of the courts. The next review of court fees will take place in 2017-2018 in preparation for court fees orders for 2018-2021.

ANNEX 1: ANALYSIS OF RESPONSES TO CONSULTATION

Responses to questions

1. Respondents supplied answers to the questions as follows:



Question 1

Do you have any comments on any of the miscellaneous amended fees as set out in paragraphs 30 to 39?

2. Two respondents were against the proposal to raise court fees by 2% to cover the rate of inflation (CPI) whilst two supported them. Further comments were made on individual proposals to amend specific fees.

3. Examples of responses received to question 1 regarding inflationary increases:

Inflationary increases

“It is interesting to note the huge gap that exists between the fees charged in England & Wales compared with these proposals. If SCS is going to raise sufficient funds to run an efficient court service in the years ahead then this will need to be addressed.” (Member of the judiciary)

“Though much of the work carried out by members of FOIL (Forum of Insurance Lawyers) may be restricted in terms of applicable jurisdiction, the proposed increase in fees of 2%, overall, continues to keep Scotland a relatively attractive jurisdiction in which to litigate. In comparison, it has now become exorbitantly expensive to raise actions in England and Wales. In addition, the extra 2% increase during 2015/16 to

assist with the on-going costs of reforming the justice system do not appear to be prohibitive or untoward, especially considering the overall aim of expediting and streamlining the court process.” (Insurer)

4. Two views were expressed on the fee increases for the Office of the Public Guardian. One respondent thought that they were minimal and would not deter people from putting in place powers of attorney. Another thought that the process, particularly auditing, should be reviewed in terms of value for money for the individual and family involved as well as for the Government.

Other proposals

5. In relation to other proposals, the following points were made:

- One respondent agreed that the reduction in Commissary fees for "Deaths on Active Service" should include those in the emergency services and humanitarian workers. The same respondent suggested that the fee for lodging an Inventory should be removed.
- One respondent thought that the rate of fees payable for removal of disqualification from driving should be increased to £189 to offset fees from another area which they did not specify.

6. The consultation paper set out proposals that could be developed in the future in relation to simplified divorce fees for marriages and simplified dissolution fees for civil partnerships.

7. The proposal was for the simplified procedure for divorce and dissolution to be available where there are children under 16.

8. One comment was received from a respondent who thought that there was no reason to allow a section of litigants to have a total exemption for paying a fee for a simplified undefended divorce.

9. The Scottish Government and the Scottish Courts and Tribunals Service plan to carry out consultations later in 2016 on extending simplified divorce and dissolution.

Scottish Government Response

10. The Scottish Government considers that a 2% increase in each of the years 2015-2018 to cover the rate of inflation is a reasonable and proportionate rate by which to aim to improve the rate of recovery of the costs to the public purse. This is a relatively modest increase and court fees will therefore continue, at this time, to be subsidised. The legal aid system in Scotland provides for free or subsidised legal assistance in certain circumstances for those who cannot afford to pay for it themselves. There is also a well-targeted system of fee exemptions available to those who are unable to afford the costs of using the courts including those who are

legally aided and those who are in receipt of other passported⁸ benefits. These proposals do nothing to impair access to fee exemptions for these litigants.

Question 2

Do you have any comments on any of the fees related to the civil court reforms as set out in paragraphs 40 to 52?

11. There were concerns from some respondents including legal organisations and solicitors' firms that the court fees in the Sheriff Personal Injury Court could be set too high and that this could discourage litigation in the court.

12. A summary of the views expressed in response to question 2 relating to the Sheriff Personal Injury Court:

Sheriff Personal Injury Court

- Four respondents considered that the fees in the Sheriff Personal Injury Court should not be the same as in the Court of Session and that this could discourage litigation in the Sheriff Personal Injury Court. One went further and suggested that the fees in the Sheriff Personal Injury Court should be the same as in local sheriff courts.
- One respondent thought that all the fees in the Sheriff Personal Injury Court should be set at a percentage of the fees in the Court of Session e.g. 80% and suggested that this be subject to a further reduction to reflect the fact that specialists on the bench may be able to deal with the court business more expediently.
- One respondent considered that despite the lower hearing fee, there would be more interlocutory hearings in the new court which will cause an increase in fee funding.
- Two respondents noted that evidence given at the Justice Committee, during the passage of the Courts Reform Bill, suggested that court reform could result in an income gap for the Scottish Courts & Tribunals Service due to less cases proceeding in the Court of Session. They consider that setting the fees at the same level as the Court of Session shows that a financial burden is being transferred to users of the Sheriff Personal Injury Court to resolve this funding gap.
- One respondent encouraged the Scottish Government to ensure that fees tables are made available at the earliest possible date in order that practitioners may familiarise themselves as soon as possible.
- Two respondents mentioned the need for a bespoke table of expenses/the need to ensure that expenses would not be restricted to sheriff court expenses.
- Two respondents considered that the service provided by the Sheriff Personal Injury Court was unlikely to "meet or exceed" that provided by the Court of Session especially in the early days.

⁸ Passport benefits are those benefits and entitlements (including court fee exemptions) that claimants may be entitled to when they are awarded tax credits.

- Two respondents stated that specialist sheriffs should be available outside the Sheriff Personal Injury Court.

Scottish Government Response

13. The commencement of section 39 of the 2014 Act (the raising of the exclusive competence of the sheriff court to £100,000) on 22 September 2015 will result in approximately 70% of the PI caseload of the Court of Session⁹ being transferred to the sheriff court including the Sheriff Personal Injury Court.

14. Modelling in the financial memorandum for the Courts Reform (Scotland) Bill 2014 suggested that the majority of personal injury cases that would no longer be raised in the Court of Session would be raised in the Sheriff Personal Injury Court. It is important to emphasise that litigants will be able to choose to where to pursue their personal injury claims:

- Local sheriff court – Claims of any value
- Specialist Personal Injury Court – Claims above £5,000 (or £1,000 if it is a work-related personal injury claim) and below £1,000 for work-related personal injury claims where a local sheriff agrees that they pass a test of sufficient “importance or difficulty”.
- Court of Session – Claims above £100,000.

15. Where litigants raise claims in a local sheriff court rather than in the Sheriff Personal Injury Court or in the Sheriff Personal Injury Court rather than in the Court of Session there will be a reduction in court fees payable (hearing fees only in the Sheriff Personal Injury Court). There is also likely to be a saving for litigants in not having to meet other legal costs including for counsel or solicitor advocates, unless sanction for their employment has been granted. Where cases are dealt with more efficiently there should also be a proportionate reduction in court/legal costs.

16. The Scottish Government believes that it is right to set the level of court fees in the Sheriff Personal Injury Court in line with those for personal injury cases in the Court of Session, with the exception of the hearing fee which reflects the difference in the judicial officer dealing with the case.

17. We do not agree with the suggestion that an income gap will be created by moving personal injury cases out of the Court of Session and that maintaining the fee levels at the same level in the Sheriff Personal Injury Court is aimed at filling that gap. One of the fundamental drivers of courts reform was to redistribute cases in the system in order to ensure proportionate costs. Whilst fee levels have been maintained in the new court, service levels will likewise be maintained. We do not agree with comments that the Sheriff Personal Injury Court will not be capable of offering the same service levels as the Court of Session or that achieving the same standards will take time. Arrangements are already in hand for the Sheriff Personal Injury Court upon its establishment to provide:

- specialist PI sheriffs
- specialist PI procedures;

⁹ Modelling from SCTS statistics and presented in a letter from the Cabinet Secretary for Justice to the Justice Committee of 23 September 2014 in relation to the Courts Reform (Scotland) Bill 2014.

- civil jury trials in certain cases; and
- E-motions and the court rolls to be available on the SCTS website

18. In relation to specialists, the Lord President is able, under section 34 of the Courts Reform (Scotland) 2014 Act to designate specific categories of sheriff court case as suited to being dealt with by specialist judicial officers. Sheriffs Principal are able to designate specific sheriffs or summary sheriffs in their sheriffdoms in the categories of cases that the Lord President has so designated.

19. Regarding solicitors' expenses, the Scottish Civil Justice Council has laid an Act of Sederunt making provision for solicitors' expenses in the Sheriff Personal Injury Court (SSI 2015/246 - Act of Sederunt (Rules of the Court of Session 1994 and Fees of Solicitors in the Sheriff Court Amendment) (Courts Reform (Scotland) Act 2014) 2015. This can be found here - <http://www.legislation.gov.uk/ssi/2015/246/contents/made>

Sheriff Appeal Court (civil)

- Two respondents agreed that the hearing fees proposed in the Sheriff Appeal Court are appropriate.
- One respondent thought that the hearing fee should be fixed at the same rate for all appeals regardless of the number of judges sitting.
- One respondent encouraged the Scottish Government to ensure that fee tables are made available at the earliest possible date in order that practitioners may familiarise themselves as soon as possible.

Scottish Government Response

20. As discussed in the consultation paper, the approach being taken is to mirror the comparable fees that would have been charged previously for appeals to Sheriffs Principal from the sheriff court.

21. The Sheriff Appeal Court will be able to vary the quorum where appropriate, for example there can be a bench of three for complex appeals. The one new fee point being added is therefore a Hearing Fee (Bench of three). This provision is required as such a fee does not currently exist within sheriff court practice. Rather than being set at a ratio of 3:1, the Scottish Government believes that setting the fee at 2.5 times the standard sheriff court hearing fee is reasonable.

22. The Scottish Government will progress plans to lay an order relating to the court fees to be charged in the Sheriff Appeal Court (civil). The court will be established early in 2016.

Judicial Review

- One respondent commented on the proposal for judicial review fees, fully agreeing with it.

Scottish Government Response

23. The proposal is for fee C1 in the Court of Session fees table to be adopted for the new permission stage which is being introduced for judicial review applications. Fee C9 in the same table would be applied to any subsequent Reclaiming Motion in relation to that judicial review.

Simple Procedure

- One respondent commented that they considered that there had been little opportunity to comment on the fees for simple procedure before the ad hoc order was due to be laid.
- One respondent thought that the proposal to make an ad hoc order for simple procedure fees appeared to be reasonable.

Scottish Government response

24. The consultation paper set out that the Scottish Civil Justice Council is currently developing the new procedure and that fees cannot be determined until new rules have been drafted. It is likely that there will be a formal consultation by the SCJC before implementation. We would expect the fees, when set, to carry a significant subsidy element so that the fees charged do not exceed the value of the claim being made.

Question 3

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

25. The majority of those responding to this question advised that there would be no disproportionate impacts on any particular group. One respondent believed that only inflationary rises should be applied in order that it did not become progressively more expensive to litigate. Another respondent thought that the proposals would have a positive effect. One respondent thought that the increased costs would have a disproportionate effect on small legal practices who would have to fund significant court outlays during the course of the action.

Scottish Government response

26. The Scottish Government considers that no specific group or user is likely to be affected more significantly than another one. No significant impacts were identified in the Equality Impact Assessment accompanying the fees instruments.

27. Factors such as affordability and the level of fee in relation to the value of the claim have been taken into account when setting fees. So, for example, even with an inflationary increase applied, the figure for a summary cause summons is still relatively low at £17 rising to £18. Where concerns have been raised around affordability for court users, funding is available for those who are eligible in the form

of legal aid. There is also a well-targeted system of fee exemptions in place that are available to those who are unable to afford the costs associated with taking a case to court under either passported benefits or Universal Credit.

Question 4

Do you have any other comments on any of the proposals in the consultation?

28. There were a number of responses to this question:

- Four respondents including legal firms disagreed that the court system should be self-financing. Three of these respondents thought that the system should be funded by taxation.
- One respondent considered that it was imperative for access to justice that court fees be deferred to the end of the case to be met by the unsuccessful party.
- One individual wondered why the courts could be said to be subsidising court fees where a person is legally aided and the court does not collect the fees from the losing party when the case is completed.
- One respondent thought that the choice of taking discrimination claims to the sheriff court or the Sheriff Personal Injury Court should be preserved.
- One respondent thought that provision should be made in fees tables and in Rule 58A of the Court of Session (Protective Expenses Orders in Environment Appeals and Judicial Reviews) to take into account the cost of court fees in cases subject to the Public Participation Directive (Directive 2011/92/EU).

29. Examples of responses received to question 4:

Cost of litigation

“It may be correct to say that court fees are, by some distance, less than the cost of counsel and expert evidence. It is, however, not correct to suggest that the cost is “small”. Court fees cannot reasonably be described as small and that for solicitors who represent a reasonable number of clients each year the overall cost can be substantial.” (Legal firm)

“[We] believe that the civil court system should be a public service provided by the State funded through taxation.” (Legal firm)

Scottish Government response

30. The Scottish Government believes that the current approach to gradually increasing cost recovery in relation to court fees is proportionate. Court fees will continue to be subsidised. Legal aid and exemptions will also continue to be provided where appropriate. However, it is also important that those who can afford

to pay for their own legal advice and representation do so and that they also make a suitable contribution towards any court costs.

31. The current charging regime where court fees are collected as the case progresses through distinct stages or “trigger points” is judged to be appropriate.

32. In relation to other matters raised:

- The Scottish Government has recently consulted on primary legislation aimed at increasing access to justice by enhancing funding options and creating greater predictability and certainty in relation to the costs of litigation.
- An options paper on an environmental court or tribunal will be published and the Scottish Government is working to meet that commitment by the end of this Parliamentary session.

ANNEX 2: LIST OF RESPONDENTS TO THE CONSULTATION

Organisations

Shoosmiths

Simpson & Marwick

Association of Personal Injury Lawyers

East Ayrshire Council

Law Society of Scotland

Thompsons Solicitors

Forum of Personal Injury Lawyers

Equality and Human Rights Commission

Individuals

Six individuals gave permission for their responses to be published and three withheld permission.

Copies of responses

Copies of all published responses can be found at -
<http://www.gov.scot/Publications/2015/06/8835>



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