

Consultation on Scottish Court Fees



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- Individual
 Organisation

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We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
 No

Consultation questions

1. Do you agree that court fees should rise by 2% in the financial year commencing 1 April 2022 and by a further 2% in each of the following two financial years commencing 1 April 2023 and 1 April 2024?

- Yes
 No

Please give reasons for your view.

The Faculty considers that court fees are excessively high and should not be increased.

The Faculty adheres to the views expressed in 2016 when the current system was introduced. A copy of our response then is attached.

2. Do you have any views on the operation of the fee exemptions system? In particular, we would welcome comments on the impact of fees in relation to access to justice for party litigants with a disability.

This question focusses the problem inherent in the system favoured by the Government; there are many people on modest incomes who cannot afford to go to court and the level of court fees compounds this issue.

The Faculty considers that unrepresented litigants are at a substantial disadvantage compared to represented ones. Those who cannot afford to pay for representation are best served by legal aid. Those who cannot obtain legal aid are best served by *pro bono*, speculative or third party-funded legal representation. All these groups are materially disadvantaged by the current levels of fees. The current fee exemption scheme does not help them.

The Faculty considers that fee exemptions should not encourage parties to litigate in person. Rather, they should support those who have legal assistance *pro bono*.

3. The Scottish Government is seeking views on whether to exempt environmental cases within the meaning of the Aarhus Convention. Do you consider that such cases should be court fee exempt? If so, how would you define an Aarhus case? Views on fees for public interest litigation more broadly would also be welcomed.

- Yes
 No

Please give reasons for your view.

Environmental cases are one example of litigation in which individuals and groups seek to have the courts hold the executive to account in the public interest. While this is understandably regarded as an inconvenience, it is an important feature of a democratic society. Public interest is present in many challenges to government decisions.

Even where a challenge to a government decision does not have a wider public interest, there is such an interest in the state being held in check and restrained from arbitrary exercise of power.

Most, but not all such litigation is by way of judicial review. The Faculty would support an exemption for fees for lodging petitions for judicial review and reclaiming from refusal of such petitions.

Failing such a blanket exemption, the Faculty favours including fee exemptions in the decision-making process of Protective Expenses Orders.

Such orders are available at common law as well as in Aarhus cases. The existence of such a facility provides a mechanism whereby exemption could be provided in a discriminating and targeted fashion: A party seeking a PEO could seek exemption from fees when lodging the application for the PEO and the Court could decide on that in deciding the PEO application. Such an approach would be consistent with the purpose of PEOs.

4. Do you have any views on fees and exemptions which you would like to share relating to group proceedings as discussed in section 2 of this consultation paper?

The Faculty does not consider that the amount of extra work for the courts in having test cases justifies additional court fees. Each hearing of a test case decides that case. The fact that it affects others in the same situation is immaterial. The sharing of the cost of pursuing a test case with the other beneficiaries is a matter between the lead and the other parties.

The new arrangements, whereby test cases are specifically provided for by group proceedings rules do not affect our view in this regard. Overall, the work for the courts will be reduced by the new rules.

5. Do you have any comment on the proposed technical changes to court fee narratives detailed in section 3?

Motion Fees

The Faculty can see the benefit of all motions being charged the same.

Annoying Creature applications

The Faculty considers that most such applications are likely to be brought in the public interest. Even where they are brought in the interest of the applicant, there is likely to be a wider public interest. There is a general public interest by way of public safety and animal welfare in such applications.

While the Faculty has little experience of such applications, it seems likely that court fees will disproportionately fall on local authorities and animal charities.

In the circumstances, the Faculty does not support the introduction of fees for applications under section 49 of the Civic Government (Scotland) Act 1982.

Insolvency

Paragraph 49: The Faculty agrees that this anomaly could be remedied by the proposal.

Paragraph 50: The Faculty recognises that an application for a moratorium might reasonably be compared to the lodging of an initial writ.

Multiple proceedings/counterclaims

The Faculty agrees with the first proposal in paragraph 53, essentially to treat those who are making a claim as pursuers where the pursuer is no longer claiming in the process.

Court of Session motions

The Faculty agrees that steps taken to seek the views of children in family cases should be exempt from fees.

Consideration and addition of matters listed in certain court fee orders

The Faculty has no observations on these matters

Fee for complaint in Sheriff Court Fees Order 2018

The Faculty has no objection to the clarification proposed although it cannot see the justification in shifting this cost of prosecution in the public interest onto the prosecuting body. Nor do we see the justification for distinguishing in this regard between the Procurator Fiscal and others such as local authorities who prosecute in the public interest.

Registration of clubs

The Faculty has no observation to make in this regard.

Bankruptcy

The Faculty has no observation to make in this regard.

6. Do you have any other comments on the subject of this consultation paper or on the future direction of policy considerations for court fees in Scotland?

The Faculty refers to its submission in 2016. While done for understandable reasons, the loading of court fees to the Court of Session is particularly detrimental to those seeking judicial review which is a bulwark of our freedoms.

7. Do you consider that any of the proposals in this consultation paper are likely to have a disproportionate effect on people or communities who face discrimination or social exclusion owing to race, age, gender, disability, sexual orientation, or any other factor? If so, please specify your views on the possible impact.

Insofar as the consultation paper proposes a continuation of the current regime of court fees, the Faculty considers the proposals likely to have a disproportionate effect on people or communities who face discrimination or social exclusion by reason of race, age, gender, disability, sexual orientation and other factors.

That disadvantage should not be measured only by the number of cases in which such factors are specifically pled as grounds of challenge or complaint.

Such individuals and groups are most likely to face disadvantage at the hands of the state and others. It is fallacious to reason that those who face such disadvantage are all in the poorest financial circumstances. Many will be in the middle ground between there and being able to afford to fund litigation themselves.