

moneyadvicescotland
Scotland's Money Charity

RESPONSE

SCOTTISH GOVERNMENT CONSULTATION ON SCOTTISH COURT FEES

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October 2016

Introduction

Money Advice Scotland is the national umbrella organisation in Scotland, which was set up in 1989 to promote and champion the development of free, independent, impartial, confidential money advice and financial inclusion. Our three objectives are:

- Leading and improving the education and training of money advisers in Scotland
- Leading and improving the financial health and wellbeing of the people of Scotland
- Leading and improving public and social policy in Scotland.

We welcome the opportunity to respond to this consultation paper. Our members include many experienced money advisers, with significant experience of representing clients throughout the court process, primarily in small claims, debt, rent arrears, mortgage repossessions and sequestration cases.

We are particularly concerned with the impact which the proposed changes will have on individual court users and potential court users, whom our members advise and represent.

General comments - full cost recovery and access to justice

Money Advice Scotland has concerns about the likely impact of the proposals on access to justice. While we appreciate that there are currently constraints on public finances, we do not support the policy of full cost recovery. We accept that those who can afford to do so should pay something towards the cost of their case. However, we do not believe that litigants should be expected to pay for the entire cost of running the civil justice system. As recognised by both Lord Gill's review and the Scottish Government's Strategy for Justice in Scotland, the civil courts provide a vital public service.

Like any other public service, the civil courts provide a public good. We agree with the view expressed by the Civil Justice Council for England and Wales that *'The policy of full cost recovery through court fees fails to recognise the public function that civil law and civil litigation perform. Fees are collected only from litigants, but the civil justice system benefits many who do not become involved in proceedings. It is to the collective benefit that individuals have an efficient and authoritative means for resolving disputes'*.¹

We believe that the government should have some responsibility for financing the court structures through which civil disputes are resolved. Those who appear in the criminal courts are not asked to pay for their cases to be heard, while the Scottish Government's stated policy is not to charge fees for tribunals. It is unfair that those

¹ Civil Justice Council (2002) Full Costs Recovery: A paper by the Fees Sub Committee

with civil disputes should be expected to pay for the whole cost of running the civil justice system, with no contribution from the taxpayer.

We are particularly concerned with the impact which the proposed fee increases will have on individuals, particularly those who wish to raise a claim under the simple procedure. We think that the proposed fee levels are likely to deter people with legitimate claims from taking action, particularly where the sum involved is relatively low. They are likely to exacerbate the inequality of arms experienced by individual consumers who seek to uphold their rights against public bodies or large companies.

The paper states at page 8: *'We are aware that there will be a tipping point where fee increases may deter people from raising actions. We do not believe that the level of rises in either option 1 or 2 as proposed will have a deterrent effect as individual fees will still be relatively low, particularly when viewed against the costs of taking legal action including the cost of legal advice.'* While this may be true in relation to some higher value cases, those who raise simple procedure actions are unlikely to be paying for legal advice, while a fee of £97 or £100 to raise an action for payment of £201, for example, is disproportionately high in relation to the sum which might be recovered.

We are concerned that those on low incomes may be deterred from pursuing, or defending, their rights in court because they are concerned that they will be unable to meet potential expenses, including court fees. While we appreciate that there is a system of fee exemptions in place, this requires people to be aware of these exemptions and to navigate the system of applying for them. We also note that most of those who qualify for exemption do so because they are receiving legal aid, which is not currently available for small claims actions. There are also many people on low incomes who are in work and may have irregular and unpredictable work patterns, including those on zero hour contracts, who may not be in receipt of the relevant benefits. This means that they may not qualify for a fee exemption.

We are also concerned that the proposed fees will deter even those on moderate incomes from taking action, due to concerns about the perceived costs involved. The Paths to Justice Scotland research found that those on middle incomes felt most disadvantaged in obtaining legal advice when compared with both those on higher and lower incomes.² Regardless of income levels, court fees are an important aspect of the costs of going to court, particularly in lower value cases. We believe that most people would consider the proposed fee for raising a simple procedure claim for over £200 to be disproportionate where the amount involved is in the hundreds rather than thousands of pounds.

We would have fewer concerns about the fee increases if they were proposed within the context of a system designed to encourage parties to consider alternative ways

² Genn, H. and Paterson, A. (2001) Paths to Justice Scotland: What People Do and Think About Going to Law, Oxford – Portland Oregon: Hart Publishing

of resolving their disputes. We believe that court should be viewed as a last resort, and that encouraging the use of alternative dispute resolution (ADR) processes is an important means of improving access to justice. There is no indication in the paper, however, that this is the case. We have previously expressed our concerns that the simple procedure rules are unlikely to achieve their stated aim of encouraging parties to consider ADR in the absence of: 1) any emphasis on using ADR early in the process/before raising an action; and 2) the availability of sufficient appropriate mediation services for parties to be referred to.³

³ Money Advice Scotland (2016) Response to the Scottish Civil Justice Council Consultation on the Draft Simple Procedure Rules

Answers to the consultation questions

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

This question seems somewhat redundant in the context of the proposed rises. What it appears to mean in practice is 'Should the current small claims and summary cause fees levels be the starting point for considering what the proposed level of simple procedure fees should be?'

While basing court fees on the value of a court claim is not without shortcomings – a claim for a large sum of money may be straightforward in a legal sense, while a low value claim can raise complex legal issues – they should not be disproportionate to the sum involved. We therefore broadly support the principle of lower fees for lower value claims, but we do not agree with the proposed minimum threshold at which the standard fee for simple procedure will be charged.

At present, the fee is £18 for claims under £200, rising to £78 for claims between £201 and £5000. The proposals – whether option 1 or option 2 is taken up- would continue this approach, maintaining the £200 threshold, while increasing the fee levels both above and below this threshold.

We would question this approach which we believe unfairly penalises those with claims which are worth more than £200, but are well below the £5000 threshold. The current £200 threshold appears to be linked to the current expenses provisions, under which no expenses (including the cost of the court fee) are normally awarded where the value of the claim is below £200. We do not believe that it is fair that a successful party should not be able to claim back the cost of their court fee, regardless of the sum involved. We would therefore call on the Scottish Government to consider amending this approach when making secondary legislation on expenses for simple procedure.

We note with concern that the recent Scottish Civil Justice Council consultation on the simple procedure rules indicated that the secondary legislation on expenses for simple procedure was expected to largely replicate the existing small claims provisions for claims of up to £3000, with a new Act of Sederunt for claims over £3000. It is nearly 30 years since the small claims procedure – with its expenses regime and a £750 upper limit – was introduced and much has changed since then. We would therefore oppose any automatic transposition of the current expenses and court fees regimes into the new simple procedure, without consulting further with consumer and advice bodies about the impact on individual court users.

It appears to us to be unfair that a consumer who wishes to pursue a valid consumer claim for unsatisfactory goods or services with a value of £201 should have to pay the same court fee as someone else with a similar claim worth £5000. The difference between the proposed fees under options 1 and 2 is negligible. With that in mind, a fee of either £97 or £100 is entirely disproportionate at the lower end of the scale. For a claim marginally above £200, this represents very nearly half of the sum claimed, which is bound to deter most of those with a claim at this level from

pursuing it. By contrast, the same level of fee represents approximately 2% of the value of a claim for £5000. This is entirely inequitable.

We would suggest that a fairer approach would be to set the threshold above which the higher fee is payable at a significantly increased level. One approach might be to charge a lower fee for claims of under £3000, tying this in with the differing expenses levels. We would suggest that a parallel might be drawn with the Minimal Asset Process for debtors who wish to apply for sequestration. Where the debtor has few assets and owes over £1500 (with certain other criteria being met) they can use this route for which there is a reduced fee of £90. Where the debtor owes more than £3000, however, they must use the Full Administration route, which incurs a fee of £200.

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

As stated at the outset of this response, we do not support the principle of full cost recovery. We believe that both options will impact disproportionately on those who wish to raise actions under the simple procedure, deterring them from doing so, particularly where their claim is worth more than £200, but is well below the £5000 threshold. We believe that any increase on the current small claims/summary cause fee should be minimal. We note that the paper states at page 8 that option 2 (targeted increases) includes increasing selected fees, whilst avoiding impacting upon small claims and other access to justice barriers. Yet the proposed simple procedure fee under that option is £100, which is more than the £97 under option 1 (flat rise). This does not appear to be consistent.

The anticipated amount raised from the proposed fees appears to assume that similar numbers of actions will be raised under simple procedure as are raised currently under small claims and summary cause procedure. While the effect is unlikely to be as dramatic as the drop of almost 70% in the number of employment tribunal applications which resulted from the introduction of fees,⁴ it seems likely that the fee increase – representing a rise of either 24% (option 1) or 28% (option 2) – will result in fewer claims being made. If this happens, the aim of full cost recovery may not actually be achieved.

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

No response.

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

⁴ House of Commons Justice Committee (2016) Courts and Tribunal Fees: Second Report of Session 2015-16

No response.

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

As stated throughout this response, we do not support the policy of full cost recovery and consider that the costs of running the civil justice system should be at least partly funded by the taxpayer. This should include ensuring that there is adequate provision of alternative dispute resolution services in order to encourage parties to consider other ways of resolving their dispute before they go to court.

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

We believe that the proposed increases will create an additional barrier to accessing justice for many people involved in consumer/debt disputes. We also anticipate that the fee for raising a simplified procedure claim will deter many people from raising claims, particularly those on low incomes and/or those with claims involving relatively small sums of money but are for more than £200.

Recent research by Citizens Advice Scotland demonstrates that people on low incomes already pay disproportionately more for basic goods and services.⁵ This principle also applies in relation to court proceedings: a small amount owed to a person on a low income is worth more to them than the same amount would be to someone with a higher income. But the court fee will cost them proportionately more which is likely to deter them from taking action to recover it.

We also have concerns that the proposals will impact disproportionately on debtors and those who wish to defend actions raised against them. The increased fee payable by lenders in mortgage repossession cases under the summary application procedure, for example, will ultimately be added to the expenses which are passed on to the borrower, who is already in financial difficulty. The same will be true for those being pursued for debt under the ordinary cause procedure, simply adding to their debt problems. Where a party has legitimate grounds to defend an ordinary cause action, the fee they have to pay to lodge defences will also be increased, which may deter them from doing so.

⁵ Citizens Advice Scotland (2016) Paying More to be Poor

