Equality and Human Rights Commission Consultation Response to consultation on Scottish Court Fees

Creating a fairer Britain
Equality and Human Rights Commission
Response to consultation on Scottish Court Fees

Consultation closes 12th October 2016

Contact details:
Lindsey Reynolds, senior solicitor
Equality and Human Rights Commission
2nd Floor 151 West George Street
Glasgow
G2 2JJ

0141 228 5967

Email Lindsey.Reynolds@equalityhumanrights.com
The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

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

See question two.

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

The Equality and Human Rights Commission (“the Commission”) has a mandate to monitor, protect and promote equality and human rights law in Scotland. The Consultation questions have been framed in a way which presupposes support for the policy of full cost recovery.

However the Commission has concerns with this underlying policy. We have three main areas of concern:

1. The impact of full cost recovery on access to justice generally,
2. Concern that the proposals may result in a decline in the number of equality and discrimination cases,
3. The potential disproportionate effect on individuals with protected characteristics, particularly disabled people and ethnic minorities (see Q6).

**Impact of full cost recovery on access to justice**

We emphasise the importance of preserving access to justice and of ensuring an effective legal remedy for potential breaches of equality and human rights law.

Article 6 of the European Convention on Human Rights (ECHR) protects the right to a fair hearing. The European Court of Human Rights has acknowledged the prominent place in a democratic society...
of the right to a fair hearing and access to a Court and some key principles have emerged from the case law in this area. If an individual cannot afford to pay fees, they will be denied a clear, practical and effective opportunity to go to Court.\(^1\) Where court fees are payable, the amount should be assessed in the particular circumstances of the case including the applicant’s ability to pay\(^2\). A substantial justification is required if court fees are imposed at an initial stage of the proceedings.\(^3\) Restrictions which are purely financial and which are unrelated to the merits of a claim require ‘particularly rigorous scrutiny’.\(^4\) Excessive fees which result in a claimant not proceeding with a claim may breach Article 6 (1).\(^5\)

We are concerned about the affordability of the court system for users in relation to both Options 1 and 2. It is difficult to fully assess affordability in the absence of information gathered from Court users.

However, it is clear that under option 1, the cost for an individual of pursuing a case consisting of lodging an initial writ, two motions, lodging a record, fixing a proof and a three day hearing will increase from £777 to £1293. This exceeds the £1200 (issue and hearing fee) for Employment Tribunals which the Scottish Government is seeking to abolish.

Under option two, the targeted increases range from 40% to 209%. The cost of a case at the Inner House involving lodging an action, a motion, a record and paying a one day hearing fee for a bench of three will rise from £3763 to £7600, A claimant earning just over the legal aid income threshold (£26,239\(^6\)) would therefore have to pay three and a half month’s disposable income for Court fees alone.

The Court of Session plays an important role in appeals and exercises supervisory jurisdiction in Judicial Reviews, which challenge the actions of public authorities and often raise important human rights and equality law challenges. In the absence of information to the contrary, the Commission is concerned that an individual of average disposable income may be deterred from proceeding and that this will have an

---

\(^1\) De Geouffre de la Pradelle v France (1992).

\(^2\) Podbielski v Poland (2006)

\(^3\) Weissman v Romania (2006)

\(^4\) Podbielski v Poland (2006)

\(^5\) Kreuz v Poland (28249/95) and Weissman v Romania (63945/00)

\(^6\) http://www.slab.org.uk/providers/Keycards.html
effect on access to the Court of Session as well as on the development of human rights and equality case law.

**Potential for decline in number of equality and human rights legal challenges**

**Article 5 ECHR**
Article 5 of the ECHR provides the right to liberty and security. Article 5 (4) requires that everyone arrested or detained is entitled to take proceedings to decide the lawfulness of the detention which shall be decided speedily by a Court. Appeals from the Mental Health Tribunal for Scotland are taken to the Sheriff Principal. Summary applications under the Adults with Incapacity (Scotland) Act 2000 often deal with essential procedural safeguards against arbitrary deprivation of liberty. If proposals under the recent Scottish Law Commission discussion paper are taken forward, there will be an even greater role for the Courts in adults with incapacity proceedings. If individuals cannot afford to pay the increased fees, they may be deterred from pursuing a legal challenge where an individual is at risk of deprivation of liberty.

**Article 8 ECHR**
Article 8 of the ECHR provides the right to respect for private and family life. If individuals cannot afford to pay the increased fees, they may be unable to pursue a judicial remedy for a family law dispute, which could involve issues of importance such as child contact and residence. The Consultation states that for many types of action, court fees are a much smaller component of the costs of taking legal action than the cost of paying for legal advice and representation. The consultation does not present any analysis of data about the numbers of party litigants in family actions, for whom Court fees may represent a significant barrier.

**Discrimination cases: 14 ECHR, Equality Act and EU law**
Given our remit, the Commission has a particular interest in access to justice in relation to equality law. S. 114 of the Equality Act 2010 is clear that cases under parts 3, 4, 6 and 7 (services, premises, education and associations) are to be raised in the Sheriff Court. Judicial Reviews making arguments about the Public Sector Equality Duty are usually heard in the Court of Session. Discrimination cases may also engage Article 14 of the ECHR (non-discrimination). Article 47 of the EU Charter of Fundamental Rights requires effective judicial protection of rights arising from EU law. The principle of effectiveness requires that domestic law does not make it impossible or excessively difficult to enforce rights under EU law. This would include enforcing rights under

---


We are concerned that a sharp rise in fees may lead to a decline in discrimination cases. We are aware that the introduction of fees in the employment tribunal (ET) in 2014/15 demonstrated the risk of an unintended scale of impact. The introduction of ET fees coincided with a 76 per cent decline in ET claims. MoJ figures\(^8\) compared the first quarter of 2013/14 (when no fees were payable) with the first quarter of 2014/15 (when fees were payable). There was a drop in disability (63 per cent), race (61 per cent) and sex (91 per cent) discrimination claims, and a 75 per cent drop in equal pay claims.

Citizen’s Advice research\(^9\) found that fees or costs were cited as a reason for ET claimants being unlikely to proceed in over half of claims assessed as having a very good, good or 50/50 chance of success\(^10\). An evaluation of the Acas early conciliation service\(^11\) found that 45 per cent of claimants (whose cases were not settled through Acas) decided not to submit an ET claim. The most frequently mentioned reason was that the fees were off-putting (a quarter of claimants).

The UK Government has yet to publish the findings of its post-implementation review of ET fees, which commenced in June 2015.\(^12\) However, the House of Commons Justice Committee report,\(^13\) referred to above, concludes that the introduction of tribunal fees has had a significant and unacceptable adverse impact on access to justice for meritorious claims and that they acted as a disincentive for employers to settle cases. The report made a number of recommendations including a significant reduction in the fees.\(^14\)

---


\(^9\) One year on from the introduction of fees to access the Employment Tribunal: Summary of results from a survey of employment cases brought to Citizens Advice bureaux.

\(^10\) Citizens Advice. 2014. One year on from the introduction of fees to access the Employment Tribunal: summary of results from a survey of employment cases brought to CABx.


\(^12\) https://www.gov.uk/government/publications/employment-tribunal-fees-post-implementation-review


\(^14\) Further recommendations: the binary type A/type B distinction (based on complexity) should be replaced, perhaps by a single fee; by a three-tier fee structure; or by a level of fee proportionate to the amount claimed, with the fee waived if the amount claimed is below a determined level; fee remission thresholds should be increased, special consideration should be given to the position of women alleging loca
In light of these findings, the Commission remains concerned about the potential for a decline in the already small number of discrimination cases raised in the Scottish Courts.

**Justification**
The Commission appreciates that the right to a Court is not absolute and case law has never ruled out the possibility that the interests of the fair administration of justice may justify imposing a financial restriction on the individual’s access to a court.\(^\text{15}\) However, a restriction on access to a court is only compatible with the ECHR, and Article 6 in particular, if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued.\(^\text{16}\)

The stated aims of the Consultation are to ensure that the Courts are funded to deliver a civil justice system that is accessible, affordable and which provides a high-quality service to those who have cause to use it. Beyond this there is the overriding objective that fees charged to Court users should recover the cost to public funds of providing those services.

Case law\(^\text{17}\) has established that there are three questions to ask on the issue of justification:

1) Do the changes go further than is necessary to achieve the aims?
2) Has there been a balancing exercise undertaken about the impact of the changes on the affected group, against the importance of the aims to the policy maker?
3) Are there any non-discriminatory or less discriminatory alternatives available, and have they been considered?

The consultation states that the Scottish Government is aware that will be a tipping point where fee increases may deter people from raising actions. However, we have been unable to locate the Scottish Government’s equality impact assessment of the current proposals or the underlying policy of full cost recovery. The EqIA for the 2012 court fee increases pre-dates the full cost recovery policy. The Equality Budget Statement For 2016 / 17 does not mention the Court fee increases. The Consultation states that the Scottish Government does

---

maternity or pregnancy discrimination, for whom, at the least, the time limit of three months for bringing a claim should be reviewed.

\(^\text{15}\) Tolstoy Miloslavsky v. the United Kingdom, 13 July 1995

\(^\text{16}\) Kreuz v Poland (28249/95)

\(^\text{17}\) Homer v Chief Constable of West Yorkshire Police [2012] 3 All ER 1287.
not believe that the level of rises in either option will have a deterrent effect as individual fees will still be relatively low. In the absence of an EqIA, the evidence base for this assertion is unclear. It is not clear what alternatives have been considered. It is not clear whether the incomes of existing or potential Court users have been considered, nor whether their views been sought to assess the impact that the new fees might have. Without information of this kind, it is unclear how many people will be unable to afford the proposed fees in practice.

We welcomed the Scottish Government pledge to abolish Employment Tribunal fees\(^{18}\). However it is not clear how substantially increasing Court fees fits with the Government’s position on ET fees when rights-based and discrimination claims are heard in both forums.

We note that the Fees consultation of May 2015 described full cost recovery as a ‘longer term’ and ‘eventual target’. A sharp rise from 2% to 24% in 2017 represents a significant reversal of this commitment to a gradual approach.

The Scottish Government may wish to publish further information on the justification for the policy of full cost recovery, assessed against the three questions above, as well as an Equality Impact Assessment.

---

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

See question two

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

See question two

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

---

\(^{18}\) http://www.gov.scot/Publications/2016/09/2860/downloads#res505210

Ioca
It may be helpful to consider the extent to which costs are recovered in other EU member states. A project completed by the European e-Justice Portal in 2007\(^\text{19}\) compares the costs of Court proceedings in Europe. According to the report, most states have some form of proceeding fee. Luxembourg repealed all Court costs in 1980 and access to Civil Courts in France (except for Commercial proceedings) is free. States which do charge calculate the extent of proceeding fees in three different ways: by the value of the claim, the type of litigation and by the acts carried out by the Court. Proceeding fees only exceptionally exceed 1000 euros. In 2007 the UK (Royaume-Uni) had the highest proceeding fees in Europe.

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

As discussed above, we are unclear whether or not the Scottish Government has carried out an equality impact assessment to assess the potential disproportionate effect of full cost recovery on a particular group. We have been unable to locate one. However the Commission produced the report “Is Scotland Fairer” in 2015 from which it can be seen that in 2012/13 21.4% of disabled people were living in relative poverty after housing costs, as were 32.1% of people from ethnic minorities.\(^\text{20}\) We would infer from this data that a significant rise in Court fees may have a disproportionate effect on disabled people and on people from ethnic minorities.

The Commission also has concerns about the impact of the proposals on women. We note that the Committee for the Elimination of Discrimination Against Women has previously made a general recommendation that the State party ensures effective access by women, in particular women victims of violence, to courts and tribunals.\(^\text{21}\) (This was primarily in response to legal aid issues in England and Wales.) However, the Commission has raised the issue of increased Court fees for divorce petitions in England and Wales in our

\(^{19}\) https://e-justice.europa.eu/home.do?plang=en&action=home


\(^{21}\) Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland 30th July 2013
follow up report to the CEDAW Committee on the impact of changes in access to justice on women in the UK.\textsuperscript{22} This was because proposed increases to court fees for divorce petitions are likely to have a disproportionate impact on women, as women are the petitioners in 65 per cent of divorce proceedings.\textsuperscript{23} We would infer from this information that a significant rise in Court fees for family and divorce actions in Scotland may also have a disproportionate effect on women.


\textsuperscript{23} http://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce p 14