

Equality and Human Rights Commission Consultation Response on Scottish Court Fees 2018 - 21

Creating a fairer Britain

Equality and Human Rights Commission Response on Scottish Court Fees 2018-21

11 January 2018

Contact details:

Lindsey Reynolds, Senior Solicitor
Equality and Human Rights Commission
2nd Floor 151 West George Street
Glasgow
G2 2JJ

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).

We have previously responded to consultations on Court fees in 2015 and 2016 and would like this letter to be considered as a consultation response for the 2017 consultation within the context of our past and ongoing concerns on this subject.

2016 Consultation on Court Fees- ongoing concerns

In 2016 the Scottish Government consulted on the proposals for ways of moving towards full cost recovery in the Courts. The Consultation sought views on two options for achieving full cost recovery; a flat rise of 24% or a targeted rise of varying amounts.

At that stage the Commission responded and set out 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, particularly in the appeal Courts,
3. The potential disproportionate effect on individuals with protected characteristics, particularly disabled people and ethnic minorities. We suggested that the proposed increases to court fees for divorce petitions would be likely to have a disproportionate impact on women, as women are the petitioners in 65 per cent of divorce proceedings.¹

The Court Fees (Miscellaneous Amendments) (Scotland) Order 2016 came into force in November 2016. The policy memorandum for the 2016 order states that 36 Consultation responses were received and almost all stated opposition to the significant increase in court fees. The document stated that consultation analysis and responses would be published shortly. We were unable to locate this online but have now received an electronic copy. The consultation analysis summarises the responses and notes the weight of opposition to the proposals but does not address the concerns of the respondents. It concludes briefly that: *“Having fully considered the views of those who responded to the consultation, the Scottish Government has laid*

¹ <http://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce> p 14

an Order for increasing fees in line with the second option of targeted fee increases outlined in the consultation.” **We would therefore be interested to see any more detailed analysis and considered response to the concerns raised.**

The EQIA for the 2018 – 21 reforms also refers to responses to the 2016 consultation. It notes our concerns that divorce fees are more often paid by women and can be particularly onerous for women leaving abusive relationships. It also refers to our concerns about the potential for decline in equality and human rights challenges as a result of higher fees. We therefore welcome steps taken in the 2016 Fees Order to protect those seeking divorce. However we note that there have been increased fees targeted in other areas of between 40% (Petition) and 109% (Court hearing fee). In general it appears that full cost recovery is largely achieved through significant increases to Court of Session fees.

In our 2016 response we expressed concern about proposal 2 (which then became the structure used under the 2016 amended fees order) that 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 rose from £3763 to £7600. A claimant earning just over the legal aid income threshold (£26, 239²) would therefore have to pay three and a half months’ disposable income for Court fees alone.

We emphasised that 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 expressed concern that an individual of average disposable income may be deterred from proceeding and that this will have an effect on access to the Court of Session as well as on the development of human rights and equality case law. **We would therefore be interested in any analysis the Government has carried out on the impact of these fees on the volume of business at the Court of Session, in particular in relation to actions raised by individuals.**

Specific concerns regarding Consultation on Scottish Court Fees 2018 – 21

The Consultation on Scottish Court Fees 2018 – 21 now seeks views on further proposals for changes to the fees regime. We have two areas of concern relating to fees for appeals: relating to the proposals at paragraphs 36 and 39 of the Consultation.

We reiterate the important role of appeal proceedings in access to justice generally and in terms of developing strategic caselaw in the equality and human rights field. Many equality and human rights cases are novel, complex and often test cases.

We note that the Consultation document quotes a passage from Lord

² <http://www.slab.org.uk/providers/Keycards.html>

Reed's judgement in *Unison* about the general principle that fees can be a justifiable way of making resources available for the justice system and of deterring frivolous and vexatious cases. We welcome the Scottish Government's stated commitment to carefully considering the judgment and look forward to hearing further analysis. In doing so, we would invite the Scottish Government to give weight to other relevant passages of the *Unison* decision. In particular, at paragraphs 66 – 71 Lord Reed discusses the constitutional importance of access to a Court. He concludes that: *"Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance."* He cites a number of influential cases before stating: *"Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless. But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them."*

We remain concerned about any measure which may deter access to justice in general, and specifically in relation to the novel, complex and often untested cases raising equality and human rights arguments. The appeal courts play a vital role in developing this jurisprudence.

Proposals: Abolition of exemption from fees at Sheriff Appeal Court / Permission fees for appeals

The proposal at para 36 is to abolish the exemption from fees for the first 30 minutes at the Sheriff Appeal Court. This means that even if parties are appearing briefly to move for a hearing to be discharged, parties must pay the full £227 or £568 hearing fee. The justification stated is that substantive business should not be dealt with in a free hearing. We are concerned that paying a full day's fee for a brief hearing is disproportionate to this aim and may encourage a practice of appeal hearings proceeding when parties are not fully prepared.

The proposal at para 39 is that where an appeal from the sheriff appeal

Court to the Court of Session is sought, there would be a permission fee of £246. This is to deter unmeritorious appeals. The document states that *“many applications have been made but only 2 granted.”* It is not clear how many applications have been made, therefore what percentage were given permission. It is also unclear to what extent the refused applications were unmeritorious, or vexatious. It is also unclear what proportion of a Judge’s day is taken up with the average appeal case and therefore whether it is proportionate to charge more than the cost of a full day’s hearing for one Judge to consider the permission stage.

The stated aim of the reforms, as per the EQIA, are to improve consistency and take account of recent court reforms. **We invite the Scottish Government to consider the proportionality of these measures to that aim.** In doing so, we refer to paragraphs 109 – 117 of Unison on proportionality.

“The Strasbourg court has accepted that various limitations, including financial ones, may be placed on the right of access to a court or tribunal. In particular, the requirement to pay fees to civil courts in connection with claims or appeals is not in itself incompatible with the Convention. However, such limitations must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved.” (At para 110)

At para 116 Lord Reed identifies various factors which are relevant to the assessment of proportionality of a fees regime, which include; affordability, the stage of the proceedings at which the fees must be paid, and whether non-payment may result in the claim never being examined on its merits, whether the fees are proportionate in amount to the sums being claimed in the proceedings.

“Ultimately, the question is whether the limitation of the right to an effective remedy resulting from a Fees Order respects the essence of that right and is a proportionate means of achieving the legitimate aims pursued, or has led to an excessive burden being placed on individuals who seek to enforce their rights.”

We remain concerned about the impact of full cost recovery and the 2016 order on access to justice generally and in relation to equality and human rights cases. In the words of Lady Hale at para 132 of *Unison* *“Deterring discrimination claims is thus in itself discrimination against the people, by definition people with protected characteristics, who bring them.”*

We would invite the Scottish Government to reconsider the position in relation to the rise in fees at the appellate level and the proportionality of these measures.