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1 October 2024

Dear Convener,

I am grateful for your letter of 26 September regarding court fees. I hope this response will be of assistance to the committee in their consideration of the suite of courts fees instruments currently before them.

Whilst the committee will have to come to its own view on the instruments, the evidence session and your letter rightly focus upon a much wider landscape of access to justice as well as a long history of amendments to civil court fees. It may therefore be helpful if I set out the detailed policy position and some of the background associated with court fees.

Since their introduction more than thirty years ago, successive governments have taken the view that those who can afford to contribute should do so and that charging court fees is a reasonable way in which to ensure a well-funded civil justice system. This principle was endorsed by the Supreme Court in *R (on the Application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] in which the court found that, 'Fees paid by litigants can, in principle, reasonably be considered to be a justifiable way of making resources available for the justice system and so securing access to justice. Measures that deter the bringing of frivolous and vexatious cases can also increase the efficiency of the justice system and overall access to justice'. It has also been very long-standing policy that court fees should move towards a position of 'full-cost recovery' whereby the fees generated cover the costs of the system insofar as is possible without imperilling access to justice. In 2023/24 the rate of recovery was 57%. In addition, it should be noted that the court fee is only a small part of the costs of taking legal action and in the majority of cases, the fee is far outweighed by the cost of legal advice.

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As mentioned above, the *Unison* case in 2017 has informed the Scottish Government's policy in relation to court fees. Whilst *Unison* has clarified the permissibility of charging fees, it also provided a stark reminder that the fees have to be affordable so as not to hinder the constitutional right of access to the courts, which is a principle we fully agree with.

That is why any changes to court fees are considered carefully and the support system of legal aid and remission of fees vigorously supported. Specific steps taken in recent years include the exemption in 2018 of certain protective orders and interdicts associated with domestic abuse from the court fee system. Similarly, in 2022 environmental cases within the meaning of the Aarhus convention were exempted from a court fee in the Court of Session. Alongside the court fee system, the introduction of Qualified-One-Way-Cost shifting in 2022 limits a defender's ability to seek expenses against a pursuer in Scottish personal injury cases, thus making the bringing of these cases far more attractive and viable.

The Scottish Government is committed to making further enhancements to continue to support access to justice. The amount spent on civil legal aid in 2022/23 was £47.5m. This is a substantial amount of public funds which it has been important to maintain. In addition, funding for Legal Aid has been maintained in cash terms at £141.3m this year. Of course the legal aid budget is demand led and all of those who meet the eligibility criteria will have access to legal aid, regardless of the allocated budget. Eligibility criteria for legal aid is assessed according to income and capital and allowances are made for those who have dependents. Many applicants are 'passported' through legal aid if they receive benefits such as universal credit. For example in the financial year 2023-24, 39% of civil legal aid grants had Universal Credit passporting, which equated to 5401 applications out of 13,832.

For those who do not qualify for legal aid, the court fee exemption system provides an additional layer of protection. Court fee exemptions are available to those who are either directly or indirectly (through their spouse or civil partner) in receipt of a range of benefits. Those whose gross income is under £20,592 and receive certain tax credits may also be exempt.

Concerns were raised during the evidence session that the number of court actions being initiated would decline due to court fees being raised. We are aware that there were 60,943 civil law cases initiated across the Court of Session and sheriff courts in 2022-23 (excluding summary applications). This represents an increase of 13% from 2021-22. Personal injury cases in particular were mentioned during the evidence session, which remain at pre-pandemic levels.

Whilst the fee increases with the current SSIs are more than previous years they should be seen in context of the soaring inflation that we have experienced over the past few years and the increased associated costs. In 2021 there was no fee increase due to the pandemic; in 2022 and 2023 the increase was 3% and in 2024 by 2%. There are no plans for any further increases until 1 April 2026. Looked at over a 5 year period the total increases will be in line with the post-pandemic inflation as measured by CPI.

The costs faced by Scottish Courts and Tribunal System (SCTS) have increased markedly over the same period reflecting increases in energy costs, building maintenance and pay amongst others.

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On the specifics of the individual increases, the majority of fees are proposed to increase by 10%. Those selected for a higher percentage increase were chosen because they are lower in nominal terms thus minimising any impact on access to justice. Specific examples are the fees for a Sheriff Court caveat which is proposed to rise from £48 to £58 and the fee for lodging a motion which is proposed to rise from £54 to £65. The point of course, is that whilst the fee increases may be larger in percentage terms they are not when viewed absolutely.

Looking beyond the civil system, the entire courts system has benefitted from substantial additional resource to support recovery from the pandemic. The 2024/25 budget has allocated £36.3m for justice recovery of which £21.3m is allocated to SCTS. This builds on justice recovery funding of over £145m since 2021 (£85.8m directly to SCTS) for recovery, renewal and transformation activity. This has included specific sums for investment in the Office of the Public Guardian, support for additional public health measures within court buildings and resources to address backlogs within the courts system. In summary, whilst court fee income is an important part of ensuring a well-funded courts system, taxpayer support has been required and is both significant and growing. It is also crucial for access to justice to fund the system properly, and fees in line with rising costs, are needed as part of that mix.

With regards to the wider points raised in your letter in relation to legal aid, the Committee will be aware that the Vision for Justice in Scotland: Three Year Delivery Plan contains an action to reform the legal aid system and engage with key stakeholders to inform and shape future legislative proposals. Any future proposals will build upon the Martyn Evans Review recommendations and subsequent public consultations.

The committee has asked about the consequences should court fee increases not be approved. Given the current significant financial challenges the Scottish Government faces there is no additional support available from public funds. Therefore SCTS will have to manage from within their budget. The SCTS delivers business in a demand-led environment where the majority of the processes it is obliged to follow are set down in statute. As such the ability to change either the volume of business or the processes followed by SCTS is limited. Costs to run courts, tribunals, and the Office of the Public Guardian and associated support functions have increased with inflation. Should the fee orders not be supported, and the reduction in forecasted fee income is not offset by additional SG funding, the SCTS would face difficult decisions. The ability to progress proceedings within current timescales may be affected with the potential for waiting periods for hearings and disposal of cases being extended, with a consequent impact on access to justice. The SCTS would also need to consider the viability of the projects they are currently undertaking which aim to make effective use of digital solutions bringing efficiencies and improving access to justice. Some examples of this include:

- the ability to lodge ordinary cause actions in the sheriff court using civil online - which will increase efficiency and ease of access;
- work on an Assisted Digital Strategy which will apply across SCTS systems following feedback and engagement with a range of stakeholders including Citizens Advice Scotland – which is intended to help ensure that digital services are straightforward and convenient, so that all those who can use them choose to do so, whilst those who cannot are not excluded from the justice process;
- the ability to enhance access to justice by increasing the number of cases that can be live-streamed would also have to be considered.

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Whilst the committee's question relates specifically to the civil court system, consideration would need to be given to costs and budget for SCTS as a whole. For example the ability of SCTS to deliver real efficiencies for justice partners and improve service standards for the most vulnerable in our society may be affected should they need to pause projects such as the further rollout of Remote Provision of Evidence for Police and Expert Witnesses or work to develop a Trauma Informed Domestic Abuse Court. Their ability to take forward phases 2 and 3 of the new OPG case management system, which cover guardianships and the Accountant of Court would also need to be considered. This work is to replace the current obsolete case management system - allowing the development of a new, proactive business model that will tackle the significant inefficiencies and risks in OPG's functions.

The committee also asked about the equalities impact of the proposed increases. It is a given that the impact on the most vulnerable is at the heart of consideration of the court fee system. Those with protected characteristics are more likely to be court users and are more likely to find paying fees challenging. However, they are also more likely to benefit from qualification for legal aid or court fee exemption, or from other measures that support access to justice such as qualified-one-way-cost-shifting. Scottish Tribunals which includes chambers such as the Social Security Chamber, the Housing and Property Chamber, and the Health and Education Chamber, alongside the independent Mental Health Tribunal for Scotland, all work with some of the most vulnerable in society and, accordingly, users of these tribunals do not incur fees. Support for those who are in most need is therefore baked into the system.

The Scottish Government is keen to do more and future court fee consultations will look at further enhancements as well as opportunities to restructure the system. I should note however that moving to a system of paying fees at the end of a case rather than 'pay as you go' merely shifts the burden onto the taxpayer of carrying unpaid debts and seeking to collect debt at the end of a case.

I hope that this is of assistance to the committee and they will feel able to support these proposals which are essential to ensuring a well-funded system of civil justice.

Yours sincerely,

SIQBHIAN BROWN

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