

Business and Regulatory Impact Assessment

Title of Proposal

- The Sheriff Appeal Court Fees Order 2015

Purpose and intended effect

- **Background**

Court fees policy

The long standing policy position on court fees is that, where a dispute is between two private individuals, the majority of the benefits of resolving that dispute are expected to flow to the parties rather than to the state. Therefore, it is unreasonable to ask taxpayers to pay for this. Consequently, fees are charged rather than the costs being funded from general taxation which is reserved for other services, for example criminal prosecutions. Of course, the state already provides most of the funding for the administration of the courts through the Scottish Courts and Tribunals Service (“SCTS”).¹

In terms of the cost to individuals of pursuing a legal action, court fees comprise a relatively small proportion of the total cost by comparison with the cost of legal representation. Individuals may apply to the Scottish Legal Aid Board (“SLAB”) for Legal Aid in civil actions to fund the costs of legal representation, if they are eligible.

Whereas full cost recovery is the eventual target for the Scottish Government, it is considered that a gradual approach of moving towards this is preferred. There will continue to be a focus on charging fees for those who make use of the civil courts and the services of the Office of the Public Guardian (OPG) where they can afford to pay them, but with systems in place to protect access to justice for those who cannot. Therefore the main proposals within the consultation² on the 2015 fees orders were:

- proposals to move closer towards full cost recovery;
- proposals to adjust/align/clarify specific fees referenced in the consultation paper; and
- proposals to provide for specific fees as a consequence of the implementation of certain measures from the Courts Reform (Scotland) Act 2014 (“the 2014 Act”)³.

¹ The Scottish Court Service was renamed the Scottish Courts and Tribunals Service on its merger with the Scottish Tribunals Service on 1 April 2015.

² “Fees charged by the Court of Session, Accountant of Court, Sheriff & Justice of the Peace Courts, High Court, Office of the Public Guardian, personal injury court and the Sheriff Appeal Court” - www.gov.scot/Resource/0047/00471895.pdf

³ A copy of the Bill for the 2014 Act including accompanying documents can be found here - www.scottish.parliament.uk/parliamentarybusiness/Bills/72771.aspx.

In June 2015, the following court fees instruments were laid and came into force in September 2015:

- The Court of Session etc. Fees Order 2015 - <http://www.legislation.gov.uk/ssi/2015/261/contents/made>
- The Justice of the Peace Court Fees (Scotland) Order 2015 - <http://www.legislation.gov.uk/ssi/2015/263/contents/made>
- The High Court of Justiciary Fees Order 2015 - <http://www.legislation.gov.uk/ssi/2015/262/contents/made>
- The Sheriff Court Fees Order 2015 (incl. fees for the Sheriff Personal Injury Court) - <http://www.legislation.gov.uk/ssi/2015/264/contents/made>
- The Adults with Incapacity (Public Guardian's Fees) (Scotland) Regulations 2015 - <http://www.legislation.gov.uk/ssi/2015/260/contents/made>

The Sheriff Appeal Court Fees Order 2015 is a further component of this package. An order to make provision for simple procedure court fees will be developed in due course.

Courts reform – court fees instruments in 2015

In September 2009 Lord Gill published the landmark Report of the Scottish Civil Courts Review ("SCCR") which recommended substantial changes to modernise and improve the structure and operation of Scotland's civil courts. The aim of the recommendations was to ensure that cases are dealt with promptly and efficiently, by courts appropriate to the case, and at a proportionate cost to those litigating.

The 2014 Act provided for many of these recommendations. A number of provisions under the 2014 Act have been commenced in 2015 including the establishment of the new Sheriff Appeal Court (Civil) to be established on 1 January 2016. The longer term impact is expected to be positive on parties using the court to litigate i.e. ensuring that their cases are heard at the appropriate level in the system will mean that the court fees charged will be appropriate to the case. The consultation paper in 2015 set out the proposals for these fees.

The Sheriff Appeal Court (Civil) fees instrument is made under the revised fee prescribing powers in section 107 in the 2014 Act.

Sheriff Appeal Court (Civil)

The 2014 Act makes a number of changes in relation to the **civil appeals system** including enabling the **Sheriff Appeal Court (Civil)**. The commencement of the provisions on civil appeals and the Sheriff Appeal Court (Civil) in January 2016 will make a number of changes to the existing system as follows:

- Currently small claims appeals, summary cause appeals and ordinary cause appeals from cases heard at first instance in the sheriff court are appealed to sheriffs principal. From there summary cause appeals and ordinary cause appeals are able to be further appealed to the Inner House of the Court of Session. Small claims have no onward right of appeal beyond the appeal to the sheriff principal. For ordinary causes there is also the option of appealing directly to the Inner House.

- Summary applications and their appeal routes are set out in many different specific enactments and these types of appeals are appealed either to the sheriff principal (most summary applications) or directly to the Inner House of the Court of Session.
- Once the relevant provisions in the 2014 Act are commenced, most of the appeals that were formerly heard by sheriffs principal will now be heard by the Sheriff Appeal Court (Civil) including, until the commencement of simple procedure later in 2016, small claims, and summary cause appeals.
- Ordinary cause appeals (from ordinary cause cases heard at first instance in the sheriff court) will also now be heard in the Sheriff Appeal Court (Civil) and it will no longer be possible to appeal directly to the Inner House, subject to the Sheriff Appeal Court (Civil) being able to remit appeals raising a complex or novel point of law.
- Once simple procedure commences later in 2016 and small claims and summary cause are abolished, all simple procedure appeals will be appealed to the Sheriff Appeal Court (Civil).
- The 2014 Act enables most appeals including simple procedure appeals to be able to be further appealed from the Sheriff Appeal Court (Civil) to the Court of Session subject to the test set out in section 113 (“the second appeals test”).
- Section 114 of the 2014 Act makes provision for certain special civil appeals that will continue to be heard by sheriffs principal to be able to further appealed to the Court of Session without reference to the second appeals test.

- **Objective**

The Scottish Government's and SCTS's policies are to move towards fees which reflect the full cost of the processes involved with a well-targeted system of fee exemptions to protect access to justice. In line with that aim, the set of fees instruments laid in June 2015 and which came into force on 22 September 2015 move cost recovery levels slightly closer to full-cost pricing, i.e. upwards from the 80% level in the financial year 2013-14. In addition to inflationary increases and the realigning of minor fees to provide consistency across the courts, it is the intention that any above inflationary increases in 2015 will be directed towards the costs of delivering improvements to the civil courts system. The fee proposals for all the fees instruments in 2015 including those already in force will result in a moderate increase in the level of cost recovery of £500k per annum. This will include investment in a new civil IT system. The funds will also contribute towards the cost of the Scottish Civil Justice Council (SCJC) and the development of simplified and more effective rules for civil court procedures. Court fees will continue to be subsidised for the present.

Full implementation of the proposed civil courts reforms will take a number of years to complete as the reforms involve a major restructuring of the courts. It is therefore appropriate that the court fee structure should be monitored and carefully reviewed during the next few years to ensure that it continues to be fit for purpose.

The Sheriff Appeal Court Fees Order 2015 should be seen as part of the package of fees orders and the proposals represent a proportionate step towards the aim of full

cost recovery including slight inflationary increases in 2016-2018.

- **Rationale for Government intervention**

Both the Scottish Government and the SCTS are committed to delivering efficiencies and ensuring best value. In recognising the significant financial constraints being faced by all public bodies and the expectation of significant reform to the justice system, the SCTS has set out a clear vision to "build a stronger court service".

The policy contributes to the Scottish Government's Wealthier and Fairer and Safer and Stronger objectives, through the following national outcomes.

- Our public services are high quality, continually improving, efficient and responsive to local people's needs.
- We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others.
- We live our lives safe from crime, disorder and danger.

Consultation

- **Within Government**

The Scottish Government worked closely with officials at the SCTS in drawing up the proposals. The SCTS is a non-ministerial public body providing the people, buildings, technology and administrative services to support the work of Scotland's courts and the judiciary and the OPG. The SCTS is led by a governing Board, chaired by the Lord President, with members drawn from the judiciary, the legal profession, and from outside the justice system. The SCTS, SLAB, and the Scottish Government participate in the Making Justice Work Programme 1 Board: Effective Courts and Tribunals Programme. Progress on implementing the measures in the 2014 Act is regularly discussed at this forum.

- **Public Consultation**

In 23 February 2015, the Scottish Government issued a consultation paper entitled *Proposals for Fees Charged by the Court of Session, Accountant of Court, Sheriff & Justice of the Peace Courts, High Court, Office of the Public Guardian, Personal Injury Court and the Sheriff Appeal Court*. This publication was widely circulated including to members of the legal profession, judicial bodies, the SCJC including relevant sub committees, and consumer groups. It closed on 15 May 2015.

- **Business**

The public consultation afforded the opportunity for business stakeholders (bodies within the legal profession, legal advice suppliers), local authorities, insurance organisations, consumer groups and union representatives) to make their views known.

Options relating to the Sheriff Appeal Court Fees Order 2015

As discussed previously, the main policy proposals and their impact under consideration in this BRIA are:

- proposals to move closer towards full cost recovery;
- proposals to adjust/align/clarify specific fees referenced in the consultation paper; and
- proposals to provide for specific fees as a consequence of the implementation of certain measures from the 2014 Act.

The Sheriff Appeal Court Fees Order 2015 arises out of this last category and it is therefore particularly relevant.

When the Sheriff Appeal Court (Civil) is established it will deal with appeals that were previously heard either in the Court of Session (under fees set out in the Court of Session Fees Amendment Order 2012 (SSI 2012/290) and subsequently updated in the Court of Session etc. Fees Order 2015 (SSI 2015/261) or in the sheriff court before a sheriff principal (under fees set out in the Sheriff Court Fees Amendment Order 2012 (SSI 2012/293) and subsequently updated in the Sheriff Court Fees Order 2015 (SSI 2015/264).

Appeals formerly from the sheriff court to the sheriff principal will make up the majority of the appeals that form the caseload of the court. For the 2013-14 financial year, according to statistics held by the Scottish Government, there were 239 civil appeals lodged with the Court of Session. Of those 46 were appeals from the sheriff courts and this element of business will transfer to the Sheriff Appeal Court (Civil). There were 419 civil appeals initiated from the sheriff court to the sheriffs principal (304 ordinary cause, 63 summary cause, and 52 small claims) – these appeals will form the bulk of the workload of the Sheriff Appeal Court (Civil). This is notwithstanding any additional appeals that will transfer to the court as a result of the transfer of first instance cases to the sheriff court due to the raising of the exclusive competence – however this is not expected to have a significant impact on the overall volume of civil appeals initiated.

Solicitors commonly conduct appeal proceedings to Sheriffs Principal and will be able to conduct proceedings in the Sheriff Appeal Court (Civil). Solicitor Advocates may conduct proceedings but the practice is very rare. Counsel are not commonly used but may be sanctioned by the Scottish Legal Aid Board or the court in non-legally aided cases.

Options have been classified as follows:

- option 1 – do nothing (i.e. do not put in place a separate table of court fees for the Sheriff Appeal Court (Civil);
- option 2 – Sheriff Appeal Court (Civil) fees set at a rate based on the provision for fees for appeals to sheriffs principal in the Sheriff Court Fees Amendment Order 2012 with no increase for inflation;
- option 3 – Sheriff Appeal Court (Civil) fees set at a rate based on a considered change to the level of increase on the provision for fees for appeals to sheriffs principal in the Sheriff Court Fees Amendment Order 2012; or
- option 4 – 100% cost recovery.

Option 1: do nothing

Costs and benefits

Doing nothing is not an option. As this relates to the establishment of a new court, the Sheriff Appeal Court (Civil), a new fees order is required. The Scottish Government's policy objective is that the fees set should recover the costs to public funds of providing those services which means that those who make use of the services of the courts should meet or contribute towards the associated costs to the public purse where they can afford to do so. If cost recovery is not improved, SCTS will be unable to offer improved levels of quality and service to court users and to secure additional funding for implementing the civil court reforms.

Sectors and groups affected

Doing nothing is not an option. Solicitors, Solicitor Advocates, counsel and litigants will require to know what the court fees are in the new court.

Option 2 – Sheriff Appeal Court (Civil) fees set at a rate based on the provision for fees for appeals to sheriffs principal in the Sheriff Court Fees Amendment Order 2012 with no increase for inflation

Sectors and groups affected

Court users whose cases would previously have been heard before the sheriff principal will experience no increase in fees. (No increased outlays for solicitors).

Court users whose cases would previously have been heard in the Court of Session will experience a reduction in the court fees as the Court of Session fees for an appeal are higher than sheriff court fees for an appeal to the sheriff principal.

Costs

The effect for SCTS would be a reduction in real terms of cost recovery. This would result in a reduction in funds for the maintaining and development of the Scottish courts.

Option 3: Sheriff Appeal Court (Civil) fees set at a rate based on a considered change to the level of increase on the provision for fees for appeals to sheriffs principal in the Sheriff Court Fees Amendment Order 2012 (i.e. as uprated in the Sheriff Court Fees Order 2015)

Sectors and groups affected

The first year's fees proposed for the Sheriff Appeal Court (Civil) in 2016 are the same fees as those that would previously have been charged in the sheriff court for an appeal to be heard by a sheriff principal which were uprated slightly in 2015 on the 2014 fees. The fee for marking an appeal in a summary cause is £58 (previously £56). The fee for lodging an appeal in a cause other than a summary cause is £111 (previously £107). (See table 1 below).

The small proportion of court users whose appeals would previously have been heard in the Court of Session and will now be heard in the Sheriff Appeal Court (Civil) will experience an initial reduction in the court fees (from £210 for lodging an

Appeal in the Court of Session in 2015 to £111 in the Sheriff Appeal Court (Civil) in 2016) as the Court of Session fees for an appeal are higher than sheriff court fees for an appeal to the sheriff principal.

The users of the Sheriff Appeal Court (Civil) will also be subject to a 2% increase for inflation in the second and third years covered by this fees order. There would be slightly increased outlays for solicitors.

To cover procedures within the Sheriff Appeal Court (Civil), new fees lines have been included for hearing fees for a bench of one or a bench of three. As mentioned in the consultation paper, these fees have been set at 2.5 times the rate of hearing fees in the Court of Session to reflect the judicial officer hearing the case. Only a small proportion of the total civil appeals to the Sheriff Appeal Court (Civil) are likely to warrant a bench of three Appeal Sheriffs. Simple procedure appeals will be heard by a bench of one.

The decision has also been taken to replicate the position within the Court of Session on hearing fees i.e. that the hearing fee in the Sheriff Appeal Court (Civil) will not apply to the first 30 minutes. This is to incentivise the expeditious conduct of routine hearings and ensure proportionate costs for litigants.

Table 1: Comparative costs of selected actions in appeals

Action	Appeal to SP fee (1/04/2014 – 22/09/2015)	Proposed appeal to SAC fee 01/16	Appeal to CofS fee (1/04/14 – 22/09/15)	Current appeal to CofS fee 22/09/15
Lodging an Appeal (in a cause other than a summary cause),	£107 (From 22/09/15 = £111)	£111	£202	£210
Hearing Fee per day or part thereof (bench of 1)	£214 / day (From 22/09/15 = £223)	£223 / day	£90 / ½ hour	£94 / ½ hour
Hearing Fee per day or part thereof (bench of 3)	N/A	£557 / day	£225 / ½ hour	£234 / ½ hour

In terms of general comments on the fees orders consultation, some consultees thought that above inflation increases were too high however several said that these were reasonable with one saying that the increases are not significant enough to have a tangible impact on those using the court system.

The consumer price index (CPI) has been used to calculate the inflation increase. See the HM Treasury CPI forecast for the UK economy in November 2014 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/37641

[3/forecomp_201411.pdf](#) A further 2% increase over the notional rate of inflation in 2015-16 has also been applied to fees based on the provision for fees for appeals to sheriffs principal in the Sheriff Court Fees Amendment Order 2012 to provide funding for civil court reform at the commencement of the 3-year period. It is not considered that these proposals will affect access to justice.

The Scottish Government believes that the level of the fees in relation to the size of the claims in the appeals is proportionate and affordable. We consider that our approach is reasonable in terms of improving cost recovery.

Benefits

The effect for SCTS in terms of cost recovery of the whole package of fees orders in 2015 including the Sheriff Appeal Court Fees Order 2015 is that the slight increase to fees overall will generate an additional fee income of £500k in each year of the 3-year period. It will enable SCTS to offer the current level of quality and service to court users and to secure additional funding for implementing the civil courts reforms. If fees are not increased, SCTS would need to reduce spending over and above the level that has already been set to cope with reduced funding. This would inevitably affect court performance and service to court users.

In terms of specific proposals, it is the intention for example to preserve the existing exemption in relation to Universal Credit - those previously exempt from paying court fees because they were in receipt of a passporting benefit should continue to be exempt under Universal Credit.

Costs

The only cost to the Scottish Government in this option are those associated with producing this Order to provide for fees in the Sheriff Appeal Court (Civil).

There is no cost to the SCTS.

Option 4: 100% Cost Recovery

Sectors and groups affected

This option would set fees at a level designed to recover the full cost of providing these services. This would mean that the Scottish Government's policy objective will have been achieved more quickly than planned. Any changes to fees thereafter would be likely to cover inflationary increases only, apart from those which could be introduced as a result of the reform of the civil courts. This increase would enable SCTS to offer improved levels of quality and service to court users and to secure additional funding for implementing the civil courts reforms.

This would result in an additional financial burden for court users and increased outlays for solicitors with a much greater impact on the cost of proceeding with court actions. SCTS has estimated that a 25% increase in fee income (£6.7m) would be required to achieve 100% cost recovery. Whereas full cost recovery is the eventual target for the Scottish Government, it is considered that a gradual approach is to be preferred.

Benefits

This option would set fees at a level designed to recover the full cost of providing these services. This would mean that the Scottish Government's policy objective will have been achieved, quicker than it anticipated. This increase would enable SCTS to offer improved levels of quality and service to court users and to secure additional funding for implementing the civil courts reforms.

Costs

The only cost to the Scottish Government in this option are those associated with producing these orders to make the changes to the courts fee regimes. There is no cost to the SCTS. There are increased costs for users.

Scottish Firms Impact Test

The consultation questions in the 2015 consultation paper on court fees were as follows.

- Do you have any comments on any of the miscellaneous amended fees as set out in paragraphs 30 to 39?
- Do you have any comments on any of the fees related to the civil courts reforms as set out in paragraphs 40 to 52?
- Are any of the fee proposals likely to have a disproportionate effect on a particular group? If so, please specify the group and the impact.
- Do you have any other comments on any of the proposals in the consultation?

The paper was widely distributed to legal organisations and firms, judicial organisations, public sector bodies, insurers and consumer groups. It was also sent to the SCJC for circulation to relevant committees. 17 responses were received in total, 8 from organisations and 9 from individuals. Table 2 below details the category of respondents and the number of responses:

The following organisations responded to the consultation:

Shoosmiths	The Law Society of Scotland (LSS)
Simpson & Marwick	Thompsons Solicitors
Equality and Human Rights Commission	Forum of Insurance Lawyers (FOIL)
Association of Personal Injury Lawyers (APIL)	
East Ayrshire Council	

Table 2: Breakdown of consultation responses to the 2015 consultation on court fees proposals

Category	Number of responses received
Individuals	9
Legal Organisations (including legal firms)	5
Independent Organisations	1
Local Authorities	1
Insurers / Insurance Organisations	1

A BRIA questionnaire was also circulated to a number of contacts including companies and organisations responding to the consultation.

The main sectors affected by the overall package of proposed fees in 2015 are small business, solicitors, solicitor-advocates, counsel, and litigants. These areas are not

dominated by a small number of large firms and are not characterised by rapid technological change. The overall package of proposed fees in 2015 would affect existing and newer potential business/individuals in the same way. As such the proposed fees are not expected to have an impact on competition. The Scottish Government considers that the proposals are unlikely to have a negative impact upon competition in any market. It is unlikely that there would be any markets that would face a disproportionately large impact and a detailed competition assessment is not deemed necessary.

Competition Assessment

Having reviewed the four competition filter questions provided within the Office of Fair Trading guidelines for policy makers on competition assessment at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/191489/Green_Book_supplementary_guidance_completing_competition_assessments_in_impact_assessments.pdf the Scottish Government is satisfied that the proposed changes will not impact on competition within the market place.

Test run of business forms

Not applicable.

Legal Aid Impact Test

The proposals will not result in a rise in the number of applications for legal aid.

Enforcement, sanctions and monitoring

Enforcement and sanctions are not applicable. A person who does not pay an applicable fee will not receive the service they are seeking. The SCTS will monitor the effect of the fee changes.

Implementation and delivery plan

The fees instrument will be commenced on 1 January 2016.

- **Post-implementation review**

The fees instruments cover the next 3 years and so will be reviewed by SCTS and the Scottish Government in 2017-2018 ahead of the next round of fees orders.

Summary and recommendation

- **Summary costs and benefits table**

Options relating to the package of fees instruments

The options considered were as follows:

- option 1 – do nothing (i.e. do not put in place a separate table of court fees for the Sheriff Appeal Court (Civil));
- option 2 – Sheriff Appeal Court (Civil) fees set at a rate based on the provision for fees for appeals to sheriffs principal in the Sheriff Court Fees Amendment Order 2012 with no increase for inflation;
- option 3 – Sheriff Appeal Court (Civil) fees set at a rate based on a considered change to the level of increase on the provision for fees for appeals to sheriffs principal in the Sheriff Court Fees Amendment Order 2012 (i.e. as updated in the Sheriff Court Fees Order 2015); or
- option 4 – 100% cost recovery.

Option 3 is recommended. Option 1 would mean that fee income to the SCTS will reduce in real terms and option 4 would result in a large increase (c.25%) in court fees to litigants. Option 3 is a proportionate step towards the aim of full cost recovery which places a relatively small burden on some court users (4.04%) in real terms for those with appeals formerly to the sheriff principal and an initial reduction in fees for those with appeals formerly to the Court of Session (subject in subsequent years to slight inflationary increases).

It is not possible to tabulate the costs and benefits for individual court users or court user groups as this will depend on the appeal. Table 3 overleaf compares the effect of fee income for the SCTS, solicitors and litigants in making the orders rather than doing nothing.

(See options table overleaf)

Table 3: Effect of options on fee income for SCTS, solicitors and litigants

Option	Total benefit per annum: - economic	Total cost per annum: - economic - policy and administrative
1. Do nothing (i.e. do not put in place a separate table of court fees for the Sheriff Appeal Court (Civil))	Reduction in real terms in fee costs for court users Reduction in real terms in fee costs (solicitors' outlays)	Reduction in real terms in fee income to SCTS Potential confusion by the court and practitioners as to the court fees that apply in the new court. Specific changes that should benefit some litigants will not be made
2. Sheriff Appeal Court (Civil) fees set at a rate based on the provision for fees for appeals to sheriffs principal in the Sheriff Court Fees Amendment Order 2012 with no increase for inflation	Reduction in real terms in fee costs for court users Reduction in real terms in fee costs (solicitors' outlays)	Reduction in real terms in fee income to SCTS Specific changes that should benefit some litigants will not be made
3. Sheriff Appeal Court (Civil) fees set at a rate based on a considered change to the level of increase on the provision for fees for appeals to sheriffs principal in the Sheriff Court Fees Amendment Order 2012 (i.e. as updated in the Sheriff Court Fees Order 2015)	When considered as part of the overall package of fees orders, there is an increase in real terms in fee revenue to SCTS £1,5m over the 3-year period in order to maintain and improve service levels and implement courts reform Specific changes that should benefit some litigants will be made	Small increase in fee costs to court users (and in terms of solicitors' outlays) whose appeals would previously have been heard by the sheriff principal and are now heard by the Sheriff Appeal Court (Civil). Small initial reduction in fee costs to court users (and in terms of solicitors' outlays) whose appeals would previously have been heard in the Court of Session and are now heard by the Sheriff Appeal Court (Civil)
4. 100% cost recovery	When considered as part of the overall package of fees orders, there is an increase in gross fee income of £6.7m	Large increase in fees costs for court users Large increase in solicitors' outlays

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date: 4 November 2015

Minister's name: Paul Wheelhouse

Minister's title: Minister for Community Safety & Legal Affairs

Scottish Government Contact point: Hazel Dalgård