

Scottish Court Fees 2022-2025

About us

The **Human Rights Consortium Scotland** is Scotland's civil society network to promote and protect human rights. We have 150 member organisations from across Scotland and across issues, as well as many more individual supporters. We work towards two outcomes: to ensure that civil society has the resources it needs to protect human rights throughout all of its work; and to be a strong collective civil society voice on human rights.

The **Scottish Association of Law Centres (SALC)** is the national body for the not-for-profit legal sector in Scotland, the community legal sector, and in particular community-based law centres across Scotland. We are an independent association, established to support the not-for-profit law sector to ensure the provision of free and accessible legal and related services to people, and communities including people experiencing discrimination and disadvantage.

Introduction

We welcome this consultation on court fees for the period 2022-2025 and Scottish Government's commitment to access to justice and to ensuring Scottish courts are funded to deliver a justice system that is affordable.

This consultation on court fees is taking place at a time of strong commitment from the Scottish Government to human rights leadership.

It is imperative that court fees are considered as part of developments and understanding around affordable access to justice on human rights, including children's human rights, and that court fees are also considered within the context of ongoing work to reform the legal aid system.

Increase in Court Fees - Adjusting for inflation

Question 1. Do you agree that court fees should rise by 2% in the financial year commencing 1 April 2022 and by a further 2% in each of the following two financial years commencing 1 April 2023 and 1 April 2024?

No.

We do not agree that court fees should rise.

Court fees and affordable access to justice

Our view is that, as a matter of principle, fees should not be charged to access the courts. Article 6(1) ECHR protects the right to access courts in a practical and effective way. The right to an effective remedy is also protected under ECHR article 13 and ‘recognises that people are entitled to seek effective redress for violations of their rights. This means they should be able to take their case to court to seek a judgment. To be effective, remedies must be available in practice and in law’ and be accessible¹. Courts are a necessary public service, essential for ensuring the rule of law and enforcing rights and obligations. The policy of Full Cost Recovery is not appropriate for our judicial system.

A core principle of the international human rights framework is that access to justice and accountability on rights should not be affected by your ability to pay. There should be no possibility of human rights legal protections being more accessible for those who are wealthy, than those who are not. We note that court fees are one aspect of a whole system of costs and help with costs that can hinder or enable access to justice, others including legal aid, Protective Expenses Orders and Qualified One-Way Costs Shifting. We note too that charging court fees sit in stark contrast to the approach taken by Scottish tribunals such as Additional Support Needs Tribunals and Mental Health Tribunals that do not charge fees. We question the rationale that recognises some routes to justice as supported by the public purse, whilst others are not.

This proposed rise in court fees should not therefore be seen in isolation from wider ambitions around access to justice and around human rights. Instead, the Scottish Government should end court fees as a means to ensure that no additional cost burden falls on those who are just outside of legal aid criteria, but who need to use the courts to get justice.

Amount of court fees

Court fees are already expensive and discourage people from claiming and defending their rights in the courts, leaving legal challenges to be far more easily raised by those with the greatest resources.

“It is important to emphasise the prohibitively expensive nature of the current court fee regime in order to understand the need for reform. In Aarhus Convention cases in Scotland, court fees can amount to thousands of pounds, and for complex cases can run into five figures. For example, in litigation in the Court of Session, the court fee payable for hearings within normal hours is £205 for every 30 minutes or part thereof before a bench of one or two judges, and £512 for every 30 minutes or part thereof before a bench of three or more judges.”

¹ EHRC, Following Grenfell: Access to Justice, 2019

Evidence submitted in response to this consultation by the Environmental Rights Centre for Scotland

Court fees apply when an individual or organisation wishes to raise proceedings. They also apply when an individual or organisation wishes to make a public interest intervention in ongoing proceedings, and those costs are similarly inhibitive. For example, court fees for an intervenor to participate in an Inner House reclaiming hearing with oral arguments are just under £5,000 per day.

“We have worked with civil society organisations seeking to intervene in the public interest where court fees affected the nature and substance of the evidence they were able to offer the court.”

Solicitor, JustRight Scotland

We emphasise too, that this review of fees comes at a time when many individuals and charities are facing increasingly desperate financial situations. The aftermath of COVID, Brexit, sharply rising living costs, and other impacts on our economy and society mean that now is not the time to further increase the costs of court action.

We urge the Scottish Government not to raise court fees in 2022-25.

Court fee exemptions

2. Do you have any views on the operation of the fee exemptions system? In particular, we would welcome comments on the impact of fees in relation to access to justice for party litigants with a disability.

For as long as court fees are a feature of Scotland’s justice system, we welcome the Scottish Government’s commitment to protecting access to justice through a well-funded system of exemptions and to considering concerns about access to justice for vulnerable people. In the 2017 Supreme Court *Unison* judgment, Lord Reed stated:

“In order for the fees to be lawful, they have to be set at a level that everyone can afford, taking into account the availability of full or partial remission”. (paragraph 91, *Unison v Lord Chancellor* [2017] UKSC 51)

The vast majority of individuals who are exempt from paying court fees do so because they are in receipt of legal aid. Additional exemptions are designed to exempt people on low incomes who are not eligible for legal aid. We are concerned about the burden of court fees upon individuals who are not covered by current exemptions, and we are concerned that this burden puts many claimants off pursuing their case.

- **Need for data to substantiate impact of court fees**

At the time of writing, the Equality Impact Assessment for the review of court fees is yet to be published. This, as well as a Child Rights and Wellbeing impact assessment, must be published as soon as possible.

We note that the Equality Impact Assessment for the 2017 consultation states that *“the Scottish Courts and Tribunals Service (SCTS) will continually monitor cost recovery from the courts. In addition, there will require to be a comprehensive review of court fees in the years to come. This will be informed by the data available from the newly operating Integrated Case Management System recently launched by SCTS and by an assessment of the impact of the court reforms such as the new Simple Procedure”* ([Scottish Court Fees Scotland 2018-2021 consultation: equality impact assessment](#), p. 6).

However, data such as this from SCTS was *not* included in the document for this consultation.

There is an urgent need to expand the evidence base around the impact that court fees have on people who are on low incomes but who are currently outside the eligibility criteria for exemptions, the impact on particular communities and protected groups, and the impact on organisations, particularly charities with an interest in seeking legal remedies through the courts.

A better understanding of the impact of court fees would help conclusions to be drawn on who or what cases should be prioritised for exemptions.

For example, we understand that there is currently no recording of discrimination claims, making it difficult to know the full effect that court fees are having in relation to those claims. The Equality and Human Rights Commission has in previous consultations raised concerns that disabled people, people from minority ethnic groups and women are disproportionately affected by a rise in court fees.

We urge the Scottish Government to undertake and publish a comprehensive data analysis before the next review of Scottish Court fees, presumably due in 2025.

- **Expanding the court fee exemption scheme**

To help close the justice gap, we urge the Scottish Government to legislate for further exemptions from court fees for:

- Discrimination claims brought under the Equality Act 2010
- People in receipt of PIP

We refer to evidence from Inclusion Scotland. Disabled people face extra costs of reasonable adjustments and living costs that non-disabled people do not face. In addition, disabled people are at particular risk of human rights infringements. For example, during COVID-19, some disabled people were strongly encouraged to sign DNACR forms, or indeed found them on their medical records without any

discussion. Other disabled or older people were told that they would not be given hospital care if they contracted COVID-19. These were infringements of their right to life.

Considering this increased risk of rights infringements and thus the increased need for routes to remedy, together with the extra costs disabled people face, and the limited cost burden that extending the fee exemption to people on PIP would bring, the Scottish Government should extend fee exemption to people on PIP.

- Actions seeking to enforce ECHR rights as protected by the Human Rights Act 1998 and the Scotland Act 1998.

We recognise, as previously discussed with the Scottish Government, that there would need to be consideration given as to how to identify these ECHR cases and to manage potential volume. However, we emphasise that all human rights cases are in the public interest. Furthermore, judicial review already includes a procedure to ensure that only cases with a reasonable chance of success proceed.

- Court actions and public interest interventions brought by the Equality and Human Rights Commission, the Scottish Human Rights Commission, and the Children and Young People's Commissioner Scotland.

These cases and interventions by rights commissions are by their very nature in the public interest. There should be no additional financial drain on their budgets by using the courts to fulfil their core mission or protecting equality and human rights. Further discussion under question 3.

- Environmental cases (see question 3)
- Public interest litigation (question 3)
- Group proceedings (question 4)

Looking ahead, we firmly believe court actions provided for by the UNCRC (Incorporation) (Scotland) Bill (under section 7 of the Bill as passed – 'Proceedings for unlawful acts') and proceedings provided for in the future Bill introducing a new Human Rights framework for Scotland should be exempt from court fees, as should any proceedings seeking to rely on the rights protected in those Acts.

We urge the Scottish Government to extend court fee exemptions to the above categories.

Environmental cases

3. The Scottish Government is seeking views on whether to exempt environmental cases within the meaning of the Aarhus Convention. Do you consider that such cases should be court fee exempt? If so, how would you define an Aarhus case? Views on fees for public interest litigation more broadly would also be welcomed

Yes.

We welcome the recognition in the consultation document that, “*were Aarhus Convention cases to be exempt from court fees then this would enhance access to justice by making justice more affordable*” (paragraph 33).

Exempting **environmental cases** would improve Scotland’s compliance with the UNECE Aarhus Convention, which guarantees the right to go to court to challenge decisions, acts and omissions that are contrary to environmental law. Article 9(4) of the Convention requires that access to the courts is fair, equitable, timely and not prohibitively expensive.

We refer to the evidence submitted by the Environmental Rights Centre for Scotland in response to this consultation. They point out that since 2014, the Aarhus Convention Compliance Committee and the Aarhus Convention Meeting of the Parties have made ten decisions in which Scotland’s legal system has been found to be non-compliant with the Article 9(4) obligation that litigation within the scope of Article 9 of the Convention must be ‘not prohibitively expensive’.

We support ERCS’ recommended definition of Aarhus Convention cases:

“(a) an appeal under section 56 of the Freedom of Information (Scotland) Act 2002 as modified by regulation 17 of the Environmental Information (Scotland) Regulations 2004;
(b) proceedings which include a challenge to a decision, act or omission which is subject to, or said to be subject to, the provisions of Article 6 of the Aarhus Convention; or
(c) proceedings arising from an act or omission by a private person or a public authority which contravenes the law relating to the environment.”

- **Public interest litigation more broadly**

We consider that all cases brought in the public interest should be exempt from court fees. Indeed, we highlight that if this is not the case, then individuals or organisations are carrying the financial burden for cases that are good for Scotland as a whole. Actions brought by individuals are of benefit to us all, as was acknowledged in the case *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.

Discouraging individuals and organisations from court action means they are less likely to apply, test or challenge new legislation or decisions in the courts. This has implications for the courts’ supervisory function, a vital role in a democratic society governed by the rule of law.

In Scotland, Public interest litigation (PIL) remains relatively rare. It can be described as the practice of taking a case to court, or intervening in a court case as a third party to assist the court, to advance a widely shared interest. Judgments in PIL

cases have been instrumental in progressing rights and making them a reality for society as a whole.

We highlight therefore two implications of a system that does not hinder public interest cases:

- Equality and human rights cases

These cases are self-evidently in the public interest. As noted in our response to question 2, consideration should therefore be given to court fee exemption for ECHR cases (including those raised under the HRA), for cases under the upcoming UNCRC Bill and wider human rights incorporation bills, and for discrimination cases under the Equality Act. Our national human rights institutions and CYPSC should also be exempt from fees for taking cases and for interventions.

- Organisations taking cases

The role of community organisations and charities in taking cases in their own name is an important consideration for public interest litigation (PIL). Our current justice system is largely based on individuals bringing cases, but progress is being made towards representative, group and structural approaches. The UNCRC Bill evolves standing rules for human rights cases in that it does not require claimants to be victim of a rights violation. The Taskforce for Human Rights Leadership has recommended the same for the new Human Rights Bill, and so we are likely to see more charities and statutory bodies bringing human rights cases. We very much support this as a way to bring justice to multiple rights-holders at once and in a way that reduces the burden on individuals.

However, we know that financial risk is stopping organisations from taking PIL. In 2018, HRCS, Clan Childlaw, Amnesty Scotland, Shelter Scotland, Rape Crisis Scotland, JustRight Scotland and Friends of Earth Scotland worked together to explore why public interest litigation has been so uncommon in Scotland – particularly among public interest groups and NGOs - and published the discussion paper '*Overcoming barriers to public interest litigation in Scotland*'. We held events in November 2018 and November 2019 which attracted much interest from the third sector, the legal profession and government. Cost and financial risk was a key recurring theme among the issues identified as hindering PIL. Organisations simply do not have equality of arms to take cases because of the substantial cost involved, not least of which is the significant cost of legal advice. Court fees, on top of these other costs, is one part of a system that poses too great a financial risk for organisations to even consider PIL, which is to the detriment of all of us.

Cases and court interventions brought by community groups or charities, clearly in the public interest, should therefore be exempt from court fees.

When considering how an exemption for PIL would work, it is pertinent to consider Court of Session and Supreme Court rules on intervening in the public interest. When a person or organisation applies to intervene in a case, it is for the court to decide whether the intervention would be in the public interest; the rules do not specify further what should be weighed up to make that decision. An applicant to

intervene in a case before the Court of Session must provide a brief statement of the issue in the proceedings which the applicant wishes to address and the applicant's reasons for believing that this issue raises a matter of public interest (see Court of Session Rule 58.8A). Court fees apply to public interest interventions, but are sometimes waived by courts using their inherent jurisdiction to make common law decisions to disapply fees.

Fees for group proceedings

4. Do you have any comment on the proposed technical changes to court fee narratives detailed in section 3?

Group proceedings are inherently brought in cases that affect many people and so can be understood to be in the public interest and as such should be exempt.

Certainly if one person in the group would be eligible for an exemption from court fees, it is not fair to remove that eligibility on the basis that others can pay. We believe that doing so could create an imbalance of power within the group, which is not beneficial to the group, or indeed to the wider interests of an efficient and fair justice system.

Technical changes to court fee narratives

5. Do you have any comment on the proposed technical changes to court fee narratives detailed in this section?

No.

Future direction

6. Do you have any other comments on the subject of this consultation paper or on the future direction of policy considerations for court fees in Scotland?

As we have set out in response to earlier questions, our view is that court fees should end in order to ensure access to justice for everyone.

Work is underway in Scotland to shape a Bill incorporating four international human rights treaties (ICESCR, CEDAW, CERD and CRPD), the right to a healthy environment and rights for older people and LGBTI+ people. We note that plans for this Bill are based on the recommendations of the National Taskforce on Human Rights Leadership, which have been accepted by the Scottish Government and include the following:

Recommendation 21: through engagement with key stakeholders, including those who face additional access to justice barriers, further consider accessible, affordable, timely, and effective remedies and routes to remedy that will be provided for under the framework.

Recommendation 26: As part of the development of the framework, to further explore access to justice, taking into account the views of right-holders, in order to consider how the framework could help provide a more accessible, affordable, timely, and effective judicial route to remedy.

We highlight that it is not possible to consider how this enhanced human rights framework will provide affordable justice without taking into account court fees and their impact on dissuading or hindering justice. The Scottish Government should therefore, in their development of this framework, consider ending court fees for all. The Government should ensure fee exemptions for all public interest cases including equality and human rights cases (those under the Equality Act 2010, Human Rights Act 1998, Scotland Act 1998, and the upcoming law on UNCRC and wider human rights incorporation), and those by the rights Commissions (SHRC, EHRC and CYPCCS) and charities.

We further highlight again, that the Scottish Government, working with the Scottish Courts and Tribunals Service, should now put in place mechanisms to collect and collate data around court fees and publish this analysis. No further review of the amount of court fees in three years' time should take place without the proper data to inform consideration.

Human Rights Consortium Scotland

Scottish Association of Law Centres

March 2022