



OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities, Human Rights and Civil Justice Committee

Tuesday 24 September 2024

Session 6



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Tuesday 24 September 2024

CONTENTS

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE	1
CIVIL COURT FEES.....	2

EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE
19th Meeting 2024, Session 6

CONVENER

*Karen Adam (Banffshire and Buchan Coast) (SNP)

DEPUTY CONVENER

*Maggie Chapman (North East Scotland) (Green)

COMMITTEE MEMBERS

Meghan Gallacher (Central Scotland) (Con)

*Marie McNair (Clydebank and Milngavie) (SNP)

Paul O’Kane (West Scotland) (Lab)

*Evelyn Tweed (Stirling) (SNP)

*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Julie Hamilton (Law Society of Scotland)

Patrick McGuire (Thompsons Solicitors)

Aaliya Seyal (Legal Services Agency)

Hyo Eun Shin (Citizens Advice Scotland)

Rachel Walker (Legal Services Agency)

CLERK TO THE COMMITTEE

Katrina Venters

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 24 September 2024

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Karen Adam): Good morning and welcome to the 19th meeting of 2024 in session 6 of the Equalities, Human Rights and Civil Justice Committee. We have received apologies from Meghan Gallacher and Paul O’Kane. Our first agenda item is to agree to take item 3, which is consideration of today’s evidence, in private. Are we agreed?

Members indicated agreement.

Civil Court Fees

10:00

The Convener: The second item on our agenda is an evidence session on the proposal by the Scottish Government to increase civil court fees from 1 November 2024. I refer members to papers 1 and 2.

I welcome to the meeting our witnesses: Hyo Eun Shin, a senior policy officer at Citizens Advice Scotland, is joining us remotely; Aaliya Seyal is chief executive at the Legal Services Agency Ltd and Rachel Walker is a partner and head of the mental health department at the Legal Services Agency; Julie Hamilton is a member of the Law Society of Scotland’s civil justice committee; and Patrick McGuire is an equity partner at Thompsons Solicitors Scotland. Good morning to you all. Thank you very much.

I invite everybody to give us an opening statement, starting with Hyo Eun Shin, please.

Hyo Eun Shin (Citizens Advice Scotland): Thank you for giving Citizens Advice Scotland the opportunity to provide evidence today. Citizens Advice Scotland, our 59 member citizens advice bureaux, and the extra help unit together form the country’s largest independent advice network. Our network provides an essential community service offering free, confidential and independent advice, available to everyone. We also look at the problems and issues that people bring to us and campaign and advocate for positive change where it is needed most.

Last year, our online advice site had more than 4.2 million views across all advice areas, with the law and courts pages the most viewed. CAB and our national projects supported almost 190,000 clients across the country on a wide range of civil and criminal justice issues, providing holistic, person-centred advice on social security, debt, housing, employment, family and relationships, discrimination, consumer issues and legal proceedings. In an average month, CAB provide about 3,300 pieces of advice on legal proceedings alone.

The network serves some of the most marginalised and disadvantaged communities as well as individuals with multiple and often intersecting protected characteristics. For example, in the past five years nearly a third of our clients resided in the most deprived areas by Scottish index of multiple deprivation quintile, 54 per cent of our clients reported having a disability or long-term health condition and 56 per cent were women.

On access to justice and human rights, we work to ensure that people's rights are protected and realised, that Scotland provides equal access to justice for all, regardless of who they are or where they live, that everyone can navigate and engage appropriately in transparent and fair proceedings to resolve issues, prevent detriment and pursue recourse when things go wrong. We believe that no one should be excluded from seeking justice on grounds of cost. Enabling everyone to protect and enforce their rights by seeking resolution before independent courts where necessary is an essential component of the rule of law. Access to justice for all benefits our democratic society as a whole, not just the individual court user who should pay to use it.

We strongly oppose the suggested increase across all court fees in Scotland from November. This massive fee hike will likely curtail the public's right of access to justice, especially for those on lower incomes, those who are vulnerable and/or share a protected characteristic. At CAS we know that the cost of living crisis is not over for many and is still causing hardship. We know that court fees, at the current level, are already among a host of access to justice barriers experienced by too many people in Scotland today. These barriers need to be urgently addressed and not built up further. We simply cannot afford a justice system that puts access to the courts and to a fair hearing further out of reach for people in our communities such as those in debt, those experiencing discrimination or those treated unfairly by public bodies.

I am happy to answer your questions and provide more detail during the session. Thank you.

The Convener: Thank you very much. We move to Aaliya Seyal, please.

Aaliya Seyal (Legal Services Agency): Good morning and thank you very much, convener. The Legal Services Agency was pleased to join our colleagues in the Scottish Association of Law Centres and the Human Rights Consortium Scotland in submitting a response to the Scottish Government's consultation on Scottish court fees. SALC consists of community-based law centres across Scotland that specialise in areas of social welfare law and are committed to defending legal rights and using the law to effect social change, especially for people who experience disadvantage, discrimination and inequality. Collectively within SALC there is significant experience in civil court procedures.

The focus of our contribution relates to court cases covering our areas of expertise, which include the application of human rights, equality and public interest litigation matters. From a human rights perspective, access to justice is fundamental. It is crucial that fee structures do not

undermine the right to a fair trial enshrined in the European Convention on Human Rights. Reflecting on our experience, we consider that, for those facing complex legal issues, court fees could be a financial barrier that makes human rights and equality remedies inaccessible and unaffordable.

We acknowledge that legal aid, which covers court fees, is available to some. However, the current system excludes many people who do not meet the financial eligibility limits and cannot afford to fund a court action themselves. In addition, legal aid can be obtained only through a registered legal aid solicitor. There is an increase in the shortage of legal aid practitioners in the areas of expertise covered by SALC collectively. This is particularly the case outside the central belt, leaving individuals with limited options.

The complexities of legal issues, court procedures, the threat of expenses and the lack of understanding of the process of court fee exemptions often results in not only the individual being unable to seek effective redress of rights violations but leaving many others in similar circumstances open to vulnerability, breach of rights, continued systemic failures and, ultimately, an unequal justice system. We note the contrasting approach taken by Scottish tribunals, which do not charge fees for the right to a fair trial. We consider that court fees should not be applied to human rights or discrimination claims at all, let alone increasing them by a further 10 per cent.

In closing, while we recognise the financial pressures on the court system, we submit that any changes to civil court fees must not undermine the fundamental right to access to justice. We recommend that further research is undertaken prior to implementation of any increase in fees and that the impact of any changes on access to justice is carefully monitored and reviewed to ensure that the court system remains accessible to all. Thank you very much for the opportunity to provide evidence. We are very happy to answer any questions.

The Convener: Thank you very much. We move to Julie Hamilton, please.

Julie Hamilton (Law Society of Scotland): Good morning, convener and committee members. Thank you for the opportunity to give evidence today on behalf of the Law Society of Scotland's civil justice committee. I am a solicitor member of the committee and I am a partner in the full service Scottish law firm Morton Fraser MacRoberts. I specialise in commercial dispute resolution and generally act for private companies or commercial entities in commercial disputes but I also act for some public sector clients and, on occasion, private individuals.

The aims and functions of the Law Society of Scotland's civil justice committee include improving the practice and procedure of civil law in the Scottish and United Kingdom legal systems for the benefit of the public and also the profession. Committee members like me are committed to ensuring the best possible system for operating civil courts in Scotland and assisting the society's input to making changes to it, including consultations such as the present one by the Scottish Government. For today's session, I refer to the society's consultation response dated June 2024.

In summary, our committee's response indicates some concern about the level of the proposed 10 to 20 per cent increase in court fees, given that inflation is currently running at 2.2 per cent, as well as concern about the lack of information about the proportionality of the increase and the justification for the 20 per cent increase across a significant amount of civil court business.

In April this year, court fees increased by 2 per cent and a further 10 per cent increase will come into force on 1 November. That is an increase of 12 per cent in a very short period. It is not clear to our committee what service improvements are to be delivered in light of the proposed increases nor what, if any, efficiencies are planned, with increasing use by practitioners of digital platforms, for example lodging documents at court by electronic means or online court hearings.

On the longer-term policy, it is not clear to us what the position is on court fees in Scotland, nor is there a clear evidence-based rationale to ensure predictability and avoid the need to consult on the increases faced by users so regularly. I note in the policy note accompanying the fees orders that were made on 5 September, that

"the fee increases are expected to raise an additional £5 million in revenue for the SCTS."

It is not known why there is a budgetary shortfall and why this route is being adopted. Parties may not litigate, as they may have concerns over cost. There is a concern that we are moving towards a user pays model rather than ensuring access to justice, as the fee exemptions are very limited.

I will be happy to answer any questions.

The Convener: Thank you very much. We move on to the opening statement from Patrick McGuire, please.

Patrick McGuire (Thompsons Solicitors): Good morning and thank you for the opportunity to attend here today to give this evidence. Thompsons Solicitors is a specialist personal injury and employment law firm. I give this evidence predominantly looking at the impact that these changes will have upon access to justice for

victims of accident, injury and disease in the context of personal injury claims.

Against that background, I think it is important that we remember that the Scottish Parliament, over the years and predominantly on a cross-party basis, has brought forward many progressive pieces of legislation that were aimed specifically at improving access to justice. I cite the redress scheme, the introduction of group proceedings and, most particularly, the introduction of qualified one-way costs shifting.

QOCS was introduced following the Sheriff Taylor review of costs and funding that recognised what he described as an asymmetrical relationship between large, financially robust—frankly, mega-rich—insurance companies that defend personal injury claims on the one hand and individuals pursuing personal injury claims on the other hand. Sheriff Taylor said that that asymmetrical relationship existed even where individuals were represented by a trade union or solicitors. Even in that context, he recognised that there was still an asymmetrical relationship that allowed the mega-rich insurers to flex their muscle and to impact upon the outcome of the cases—to impact and affect access to justice.

Therefore, QOCS was introduced. As colleagues will know, QOCS removed from individuals pursuing personal injury claims the financial burden associated with running and losing cases. It was designed specifically to remove the financial burden from pursuers. The mere fact of the introduction of QOCS, the mere basis on which QOCS was introduced, recognising the funding issue, shows us entirely that the Scottish Parliament and the Scottish Government knew, and continue to know, that there is an inextricable link between access to justice and the funding of litigation. Notwithstanding that inextricable link, we now have a situation in which the regime of paying for court fees per se, and certainly the proposed increases—up to 22 per cent in one 12-month period—will impose a significant and crushing financial burden on pursuers in personal injury cases.

This is a burden that will undoubtedly reduce access to justice. This is a burden that will undoubtedly see solicitors that fund these types of cases far less willing to do so. This is a burden that will see those solicitors pursue fewer claims each year. This is a burden that undoubtedly will arguably trigger certain convention rights under the ECHR. It is a burden that will have a disproportionate impact on people with protected characteristics under the Equality Act 2010, and on people who become disabled as result of suffering personal injury and who try to pursue personal injury claims. We therefore oppose the proposal.

10:15

The Convener: Thank you all for your opening statements. We move on to questions from the committee and I will ask the first question. You have all touched on the issue briefly and this gives us a chance to get into it in a bit more depth. What impact do you think the fee rises will have on those who are not covered by exemptions?

Hyo Eun Shin: We know that court fees, even at the current level, are among a host of access to justice barriers experienced by people in Scotland, especially in the context of the current cost of living crisis. We know from public polling that we commissioned from YouGov that almost one in four people in Scotland regularly run out of money before payday and need to use credit and overdraft facilities or borrow money to get by, with a further 20 per cent saying this happens sometimes. We also know from our network data that the cost of living crisis has a sustained impact and has eradicated any financial resilience that people might have had previously and continues to cause hardship. For example, views of our online advice pages for help with bills and for people struggling with living costs were up and views of pages on food banks and crisis help were up considerably. Hardship also manifests in demand for advice at citizens advice bureaux, where we see single parent families, disabled people and those living in SIMD1 areas more likely to require crisis support.

We have all these different bits of data from our network that show that people are really struggling with bills, financing, funding the essentials and have to make difficult decisions about heating or eating, about keeping the lights on or using the medical equipment necessary to manage chronic illness. The idea that people will be able to digest an up to 22 per cent increase in court fees if they have any issues that they want to bring before the courts is really difficult to justify.

Aaliya Seyal: I agree with much of what has been said. In my opening statement I made the point about eligibility for legal aid and that not everybody is entitled to legal aid. We argue that it is difficult for those clients to meet the cost of raising court action. Also, particularly where there are systemic issues in relation to disability discrimination, there is a wider impact for not only the individual but society as a whole if those cases are not taken forward. We consider that court fees have an impact where people do not fall within the waiver. We see that, where there is a public litigation interest, if the matter is raised, the court fees act as a barrier.

Rachel Walker (Legal Services Agency): As Aaliya Seyal said, we see that impact within the disability and social justice project work that we do at the Legal Services Agency, particularly with

more public projects and where there is not someone who is willing to come forward and who is eligible for legal aid funding. We know from first-hand experience that the costs of raising an action have put people off pursuing wider public interest concerns.

Julie Hamilton: I think that I addressed your question in my opening statement, but there is a concern about access to justice. Also, from a different angle, looking at Scotland as a favourable jurisdiction in which to litigate, there is a concern that there will be fewer cases brought to court if the fees are increased drastically without a proper understanding of the level of that increase.

Patrick McGuire: In the context of personal injury cases, it is perhaps helpful to explain that the law firms that pursue the claims on behalf of victims of injury, accident and disease will pay the fees. They will carry that financial burden, so that is a form of funding available to such victims, but it is limited, of course, because the law firms have to carry the cash flow burden of paying the fees and then waiting until the conclusion of the case. That cash flow burden will run to hundreds of thousands of pounds for an average personal injury firm. It will be significantly more for large firms and it is a cash flow burden that they carry for the duration of the case, which will be years, literally. There is a finite amount of money and a finite appetite for law firms to engage with victims and assist them by pursuing personal injury claims. Where we are heading with these changes is, unquestionably, to firms backing off. They will not be able to face yet another increase and will pursue fewer cases.

I think that it is also heading towards what I describe as an Americanisation of the legal system. What I mean by that is that in the context of the sheriff court the fees that are paid as a case progresses are exactly the same for a case that is worth £5,000 as for a case that is worth £95,000. In the context of the Court of Session, the fees that are paid are exactly the same for a case with a value of £100,000 as for a case with a value of £2 million, £10 million or £15 million. Colleagues do not need me to explain what the consequences of that are. Solicitors will start to cherry pick and go after only the large-value cases because that is where the money is best spent.

When I say Americanisation, that is exactly what happens in America. American attorneys take on only the very big, high-value cases and victims of accident, injury and disease in America simply cannot get attorneys to represent them in medium and low-value cases. That is where we are heading with these changes and that would be an aberration for anyone in this room, I am sure.

Maggie Chapman (North East Scotland) (Green): Good morning to the panel. Thank you

very much for your contributions this morning. I take very clearly the message that you have all given about being opposed to these increases. I am interested in your views on where you think the burden of payment for court processes should lie. Do you agree with the Scottish Government that there should be some element of user payment as part of this? I will come to Aaliya Seyal first.

Aaliya Seyal: Many of our cases argue human rights and equalities law. In our submission, law centres assist people who are already disadvantaged and are probably on low incomes. We do not feel that, for the outcome that is intended—improving human rights and equalities—those types of cases should be subject to any fees. The court covers a wide range of different types of litigation and Patrick makes an important point about the court fees and the value of a case. Quite often, the cases that we are fighting are on the systemic issues. It is not about a particular value but about the outcome for not only that individual but a number of individuals. Our position is that in equalities and human rights cases and discrimination cases, the burden of using the court system should not fall on the applicants.

Maggie Chapman: You make the link very clearly between an individual taking a case and the systemic issues for the betterment of society in many ways. You talked about that earlier and I think that that link is important to highlight.

I ask the same question to Hyo Eun Shin about where the burden of court costs should lie. Has the Scottish Government got this right or not?

Hyo Eun Shin: I reiterate that access to justice, as Aaliya said, goes beyond the potential benefit for the individual in the case. To pay to use the courts is the wrong approach to take. Articles 6 and 13 of the European Convention on Human Rights, which enshrine the central aspects of the right to access to justice, place duties on the Scottish court system to uphold the right to a fair trial and to an “effective remedy” and we have to take that seriously.

In any case, there has to be an evidence-based approach to the issue of fee increases and a balance has to be struck between genuinely incurred cost increases on the part of the court system and the implications of any court fee increases for those who need to seek access to the courts. In this consultation paper, unfortunately, the Government has not made the point in relation to why the fees have to be increased to this amount and whether that can be done without harming people’s access to justice.

I do not want to talk for too long, but we also need to look at the increases in the context of the existing mechanisms to mitigate access-to-justice

barriers. We have fee exemptions and the legal aid system, but in practice that does not level the field for everyone and that is what we see throughout the network. Advisers highlight to us that court fees that need to be mitigated through an exemption scheme create additional paperwork and cause stress and worry. There can be complications, for example when people have applied for certain benefits that would lead to a court fee exemption but have not received a decision, which can take months and months on end sometimes, so they are not in a situation to move forward with a potential claim.

Receiving civil legal aid leads to court fee exemptions. That can work as a useful mechanism to mitigate cost barriers but we have consistently emphasised to stakeholders, and to this committee at the evidence session on access to justice last spring, that in many areas across Scotland and in particular legal specialisms, people experience legal aid deserts. If they cannot access a legal aid practitioner, they cannot have access to legal aid and, therefore, do not get the so-called automatic court fee exemption. That leads to people having no option but to give up on pursuing justice altogether, or they are left to navigate court proceedings on their own, which often disadvantages them right from the outset. If the mechanism of linked fee exemption does not kick in, we find that it can be more difficult for someone who is unrepresented to ask the court to waive the other party’s expenses if they lose the case.

All those problems are compounded further down the line as the case progresses. We also know that finding legal aid solicitors can be even more difficult for people with additional support needs, for example those for whom English is an additional language and who might require language translation. The systems that are there to mitigate cost barriers are not working in practice and we are building in another hurdle with an increase such as this.

Maggie Chapman: Thank you. That is very helpful. One of the things that is clear from what you have all said so far is that some types of cases might be more impacted than others. Patrick McGuire mentioned personal injuries and Aaliya Seyal talked specifically about human rights. In your experience across the CAB network, are there other types of cases that will likely be more affected by this?

Hyo Eun Shin: Our advisers advise on a wide range of claims and cases, so it is difficult to pinpoint. We certainly see potential impact on discrimination cases or on cases engaging human rights. Also, cases where people are defending claims for payment of debts can be very difficult because the person might be exempt from paying

court fees themselves—they might be; it is not always the case—but they might then be liable to pay the increased court fees of the other party if they lose the case. There is that perhaps unintended consequence.

In another example, a west of Scotland bureau alerted us to concerns about clients' difficulties in paying the fee to apply to recall decrees in summary proceedings. Those were clients who were being evicted because they were unable to maintain their mortgages and they were being asked to pay the fee to recall in urgent or emergency circumstances. They might not be able to manage the fee because of their financial difficulties, but they are also not exempt from paying the fee.

Generally, there is concern in the network that exemptions and the rules around exemptions are not clear enough or not generous enough to assist every case and some court applications are made by people who are struggling financially.

10:30

Maggie Chapman: Thank you. Patrick or Julie, do you want to come in on the types of cases that might be most affected?

Julie Hamilton: My practice is primarily commercial but we do deal with lower value debt disputes and I think that the proportionality point that Patrick McGuire and CAS have made is a good one. The real concern that we have about the proposed increases is the lack of evidence. The policy notes with the fee orders refer to the "unexpected" rise in inflation and that does not seem to us to be reflected in a 10 or 20 per cent increase.

Another concern is that the policy notes refer to the Government remaining

"committed to ensuring that access to justice is protected through a well-funded system of exemptions and legal aid."

We have heard already this morning the concerns about the limited nature of the exemptions and the fundamental problems with legal aid. I would particularly focus on those categories of cases, which is not my practice, but I am sure that Patrick and others can comment on that. It is an essential part of ensuring access to justice and to the courts.

Patrick McGuire: I have a couple of points. The great thing about going last is that I can echo and reflect positively on everything that has been said, and I do, particularly the point made by CAS about articles 6 and 13 of the ECHR and the point made by both CAS and the LSA that society must provide its citizens with a means by which they can resolve disputes and that all of society benefits from that. The court system ought to be

viewed in the same way as any other public service and paying for it runs contrary to the entire notion.

On the question about case types, I have spoken at length about personal injury. First, going back to what I have said, it is self-evident that every single dispute involving two members of the public will be negatively impacted. People will think twice before taking forward any dispute because they will be paying out of their pockets and, with these changes, paying significantly more out of their pockets. Perhaps the most obvious example that we have not spoken about yet—it is not my area—is family law. When a relationship comes to an end, we know how bitter that can be and how long such things may run. I hasten to add, in case my wife is watching, that I do not speak from personal experience. However, we know how bitter such things can be and the point is that every single penny that is spent on court fees by those spouses is a penny less that is not divided between them and used to move their lives forward.

Maggie Chapman: Thank you. I will shift the topic a wee bit to funding for advice projects. The question is probably mostly for Aaliya and Hyo as CAS and SALC both have experience of the Scottish Legal Aid Board's funding of advice projects. We know that the early resolution and advice programme stream 2 funding is coming to an end at the end of this month. Can you say a bit more about what you think the impact of that will be? We have already talked about the geographical inequality of the central belt versus more rural areas. Aaliya, I will come to you first. What will be the impact of the loss of that advice project funding on people's ability to access justice?

Aaliya Seyal: Significant, if you were to ask me for just one word. A lot of those projects are funding advice and representation in relation to heritable court matters and/or through lay representatives or simplified procedures. On your earlier question about the level of impact and the types of cases, simplified procedures is definitely one to add. It is meant to be a simplified procedure that people can raise themselves, but if the court fees are such that they are weighing up whether to take action or not, people quite often will not, but that does not mean that the issue has gone away. It is just that somebody has thought, "This is not worth my while."

I will go back to the funding situation for heritable court matters. A lot of the projects provide advice and representation to people who are undergoing court proceedings, so the matter is already in court. If people do not have the necessary advice and representation, quite often the likely outcome will be homelessness. We

already know that there is a housing emergency. It is in nobody's interest, let alone that individual's, for there to be an increase in homelessness. A lot of the projects focus on prevention and early intervention, even if it is at crisis stage. Our concern if those services are taken away is where those people will go. We know that practitioners in private practice are not taking those types of cases preventing eviction from happening in the first place, whether that happens to be in relation to rent arrears or anti-social behaviour eviction cases. I am not even going into dampness and disrepair, because the focus of the projects is more about preventing homelessness.

We have significant concern that so far the funding has been renewed yearly. Quite often, decisions have been received post-year end and are for a short period. This is not just about organisations planning their workforce. This is about people and the cases that we represent. When we take on a case, we have an obligation to see that case to the end and that limits the number of cases that we feel we are able to take on at the outset. As I said, however, where do you send people who are at the stage of losing their home? That needs to be taken fairly considerably into account. I know that resources are stretched, but if pulling away resources will have a consequence and a bigger impact, we need to be taking very careful decisions about where the resource is going in the first place and what the impact is of that resource.

Maggie Chapman: Thank you. I will come to Hyo on the loss of advice project funding.

Hyo Eun Shin: I echo Aaliya's words. A number of bureaux in our network receive funding from the SLAB grant funding scheme. The funding goes directly to the bureaux running the projects, it does not come via CAS, but CAS and bureaux affected by those changes remain concerned that that loss of funding will result in a huge gap in clients being able to access justice. The changes to projects include closure of some of the projects, change to focus in some others and staff changes at various bureaux to varying degrees. We need to consider that these are long-established projects that serve vulnerable clients in communities around Scotland and support them to access justice. While some of the projects will close as a result, the demand for support will certainly not diminish. That places even more of a burden on already stretched advice agencies such as CAB to support vulnerable clients with even sparser resources. It is one of those examples of how single-year funding for third sector organisations makes it really difficult to provide that essential community service.

Similarly to what Aaliya said, there is a lot of work on, for example, simple procedure that our

in-court advice projects will not be able to continue. That could affect people who are struggling with digital skills or who do not have the digital infrastructure to engage with online civil claims by themselves and need that support, or they will not be able to make that claim. Where can we signpost those people to now? What will happen going forward? We continue to engage with SLAB and the Scottish Government, at official and ministerial level, but we would also be grateful for any engagement that the committee may be able to have with the Scottish Government on this issue.

Maggie Chapman: Does the loss of the project funding have a disproportionate or asymmetric impact on rural communities?

Hyo Eun Shin: Yes. We see that in the Western Isles, where there is no other legal aid practitioner available and the bureau provides vital support to the local communities. We see it in the Highlands, where signposting relationships do not work because everybody is so stretched and people cannot find anybody to take the case on if they cannot do it themselves. It is that wider impact on the entire landscape that is being felt and that leaves people behind.

Maggie Chapman: Thank you very much. I will leave it there.

Marie McNair (Clydebank and Milngavie) (SNP): Good morning, panel. I will touch on the fee exemptions. Hyo highlighted the issues that people face when accessing benefits and the hold-up in accessing exemptions. Are people facing any other issues? Also, what is working well and are there any suggestions for improvements? Hyo, do you have anything else that you want to say, or I can pop the question out to the rest of the panel?

Hyo Eun Shin: Maybe give me a minute and let somebody else come in.

Marie McNair: Patrick; sorry to put you on the spot.

Patrick McGuire: Not at all. Dealing specifically with fee exemption and, therefore, legal aid, from my considerable experience and the thousands upon thousands of clients that we represent every year, it is a chocolate fireguard. The number of people we represent who would qualify for either is a tiny proportion of the clients that we have. It is almost not worth talking about, if that is not overly pejorative; it does not assist the vast majority of people. That is what I have to say about those two issues.

Marie McNair: Also, what needs to improve?

Patrick McGuire: Sorry, yes. The improvement—I do not think that I touched on this previously—would be that the entire fee structure payment by court users is scrapped. I know that

colleagues around the table agree with that, but I am somewhat of a realist and I think that the prospects of that are limited, shall we say. However, certainly thus far and no more, I think that this proposed up to 22 per cent increase in one year should not go forward and that there should be no more increases. It should at best be effectively red-ringed and there should be no more increases in the future.

Better still, we should move away from the current model. The meeting papers refer to that as a Thompsons Solicitors' notion. It is, but it is not. Many people have argued for a long time that the current pay-as-you-go model does not sit comfortably at all with everything that we have been speaking about today. The civil court should be a public service that is free at the point of use and if fees are to be paid, if that is a policy decision that the Government will not move from, they should be paid in the same way that everything else is paid for in the civil court setting, which is on what is called a polluter-pays basis: fees are paid at the end by the losing party.

Marie McNair: Julie, I am focusing on the exemptions and you were going to come in. We have heard the issues that people are facing. Is there anything that is working well and can you suggest any improvements?

Julie Hamilton: In preparation for this session I looked at the question of environmental cases, which is listed as a topic, because, frankly, it was not familiar to me although we do act in environmental cases. I read from the separate Government consultation on that and the response from the Law Society committee in October 2023.

10:45

The issue was raised in relation to non-compliance with the Aarhus convention, in that Scotland had not achieved compliance with the requirement for access to justice in environmental matters not to be prohibitively expensive. The exemptions in place for such cases are extremely narrow, however, and they have been in place only since July 2022. I noted that the Law Society committee's response to the outcome of the exemption was uncertain. I would be concerned and interested to see the data on the use of the exemption in practice. My impression is that it would be extremely low and limited. I think that the committee can continue to look at exemptions and whether there should be a widening of exemptions to ensure access to justice.

Rachel Walker: I think that our general positions are the same. We are very fortunate at the Legal Services Agency that a lot of our work is covered by legal aid, although that is not always the case. It is difficult enough in the first place to

get through the process to get legal aid and then to get the fee exemptions for clients coming to us at a time of crisis.

Our general position is that there should not be court fees for human rights and discrimination claims. Often, the cases that come to us are a person or a category or people who have been discriminated against by central Government, local government, local authorities or bigger organisations. We have talked about the disproportionate sense in the justice system and how one person has to pay to fight a much bigger organisation. I mentioned earlier that the fees completely put people off because they are scared that at the end they will have to pay the expenses of someone much larger than they are and they cannot afford that.

Marie McNair: Hyo, do you want another opportunity to add anything about exemptions? I am not putting you on the spot. If you do not want to speak, that is fine, I can move on to my next question.

Hyo Eun Shin: That is fine. We are supportive of any consideration of changing the fee scheme, whether that is to exempt from court fees particular types of cases, such as human rights cases, discrimination cases and those that engage equality law, or to change the system of paying as you go along. It is difficult for people to have that money ready at the start of a case.

I want to highlight the fee increases for judicial review. That is the main route to remedy against any unlawful practice by a public body, but the barriers are so high. Usually, an ordinary person would not be able to take that on by themselves. That those kinds of increases mean that people are further removed from that chance is quite telling and should caution the Government against going down this route.

Marie McNair: My final question is on an issue that has been covered, but I will ask it anyway. South of the border, discretion is available to offer fee remission in exceptional circumstances. Do you think that there should be a similar scheme in Scotland? You have touched on the fact that you would probably support such a scheme, but I will ask you anyway.

Aaliya Seyal: Anything that would provide more flexibility in the system would be welcome, but I go back to Rachel's point about the need for people to know about any such scheme in the first instance, and to be able to access it. The clients whom we see are in a crisis situation, and that crisis is not the only crisis that they are dealing with. When people are so overwhelmed, if there are options that offer flexibility, it needs to be absolutely clear how they can access those options, and assistance needs to be provided

because, in our experience, those individuals would not be able to undertake that by themselves. There would need to be organisations that could support them with that.

Although we would welcome anything that provided flexibility and increased access to justice, in our experience, it should not be expected that people would be able to navigate that by themselves because, in our experience, that is not practically possible.

Julie Hamilton: I think that I mentioned this earlier, but I would not want Scotland's court system to be viewed less favourably than that of England and Wales in relation to access to justice, especially if parties have a choice of jurisdiction. Parties may choose not to litigate in Scotland if they can access the exceptional hardship power of the Lord Chancellor south of the border, and I think that that would be a sorry position in which to leave Scotland.

Patrick McGuire: Of course, any improvement would be welcome, so I echo the previous comments. However, I do not think that such a scheme would be the solution to the proposed 22 per cent increase, by any stretch of the imagination. I think that it would have a minor impact and that—if I dare to be pejorative again—it would be far too little, too late. I would welcome such a scheme, but it would certainly not be the solution.

Hyo Eun Shin: We do not have much relevant data from the network on the exceptional hardship power, but we looked into a power to remit fees in the context of the previous UK Government's proposal earlier this year to reintroduce fees in the employment tribunal system. Our understanding is that the Lord Chancellor's exceptional power to remit fees for individuals who do not qualify for help with fees, but whose circumstances are such that they are not realistically able to afford to pay the fees, is used only in really exceptional circumstances. Between 2015 and 2016, when more than 86,000 individual claims were presented at employment tribunals, the power was exercised only 31 times, even at a time when claimants were charged really high fees of between £390 and £1,200. The fee system led to a sustained and significant fall in the number of cases that were brought to employment tribunals.

Given the low number of times that that power was exercised previously, we are not convinced that a similar exceptional power would act as a safeguard for access to justice for all. In any case, I think that effort should be focused on getting things right the first time. In other words, we should make sure that fee exemptions are generous and that it is easy for people to understand how to apply for them. They should also be open to people's individual circumstances

and not have cut-off lines whereby people who are just slightly over or under the limit will not be in a position to have their fees waived.

Marie McNair: Would you mind repeating those figures for me?

Hyo Eun Shin: Between 2015 and 2016, when 86,000 individual claims were presented at employment tribunals, the exceptional power was used only 31 times.

Marie McNair: Thank you.

Evelyn Tweed (Stirling) (SNP): Good morning, and thank you for your answers so far. Julie touched on the current exemption from court fees for environmental cases. Would it be worth looking at other types of cases that might be worthy of a similar exemption, given your comments about the limited nature of the existing exemptions?

Julie Hamilton: Even in the environmental context, the exemption provision seemed to be limited to Aarhus convention cases, so it would not tackle, for example, the judicial review matters that Aaliya mentioned. I think that there should be a wider consultation on suitable cases in which parties are struggling, such as discrimination and judicial review cases, which have been mentioned this morning.

I do not know what consultation took place before that change was introduced in July 2022, but it seems to have been brought about by the compliance committee, in that Scotland was not compliant. Therefore, it was a rearguard action, as it was not taken proactively and constructively, which, from what we have heard this morning, is what is necessary.

Evelyn Tweed: Would anyone else like to come in?

Patrick McGuire: I would not oppose what you suggest, but as I said in my previous answer, I think that it would be too little, too late.

Aaliya Seyal: As I have already said, I think that the exemption provision should be broadened to cover discrimination cases and human rights cases. I say that because such cases have a public interest impact and an impact on more than just one individual.

Evelyn Tweed: Hyo, do you have anything to add?

Hyo Eun Shin: No—I simply echo what has been said.

Evelyn Tweed: Patrick, you talked about the requirement to pay the fees in advance, and you said that it would be better if they were paid at the end. Do you think that such a change would have any impact on the finances of the Scottish Courts and Tribunals Service?

Patrick McGuire: That is obviously a question for the civil service and the Scottish Government to answer. I suspect that it might have an impact. I see the accounts that are published annually, as we all do. As far as I could tell, £39 million came in from fees for civil matters, so such a change could have an impact. My primary position is that I maintain that we should follow the polluter-pays model that we see in every other aspect of civil justice. Notwithstanding that, as a pragmatist, I offered a couple of other alternatives, including red-ringing, whereby there would be no more increases, decreasing the court fees to a lower level and entirely deferring payment of them until the end.

However, as with all other public services, the Government will have to grapple with that as a matter of policy if it decides that it is right that citizens should not be expected to pay as they go. If it is wrong for people to pay in that way, the right thing for the Scottish Government to do is to find the money. To a greater or lesser extent, we have all said that it was, frankly, wrong to blame geopolitical inflationary pressures for the imposition of a 22 per cent increase on the general public. That was the wrong thing to do.

Annie Wells (Glasgow) (Con): Good morning, everyone. I am sorry that I am not with you in person.

Most people have touched on this, but can you provide more in-depth insight into whether there are particular groups or communities that will be negatively impacted by the increase? Perhaps Aaliya can answer first.

Rachel Walker: I can answer that—our positions are the same, in any event.

The impact of financial barriers to accessing legal remedies will be greater on some communities than it will be on others. The socioeconomic realities that many of the clients who come to see us in law centres already face are harsher than those that many of us in this room face. The cost of living is having a significant impact on our clients. From speaking with my colleagues who specialise in housing, I know that some clients who come to see us must choose between paying their rent and buying their children food. There have been such cases for all the years that I have worked for the Legal Services Agency, but our drop-in services and housing services see more and more of those cases.

In addition, someone with a black or minority ethnic background is twice as likely to experience poverty as someone with a white Scottish or British background, so the increase will adversely impact BME communities.

I will pass over to Aaliya to provide some statistics from our colleagues.

11:00

Aaliya Seyal: I will add two points. First, an Inclusion Scotland report talks about the 49 per cent of disabled people who are living in poverty, and there would definitely be a disproportionate impact on them. Secondly, a 2024 report to the First Minister's national advisory council on women and girls found that women are overrepresented in the households that are most negatively affected by the cost of living crisis.

Patrick McGuire: As I said in my opening remarks, as far as Thompsons Solicitors is concerned, and as I have been advised by my fellow partner who specialises in equality work, the current fee structure has had, and the proposed increase will have, a disproportionate impact on disabled people. If it is accepted that the increase will reduce the number of claims that solicitors are willing to take forward for people who suffer injury or disease—which it will—and if it is accepted that injury and disease will cause disability, as defined in the Equality Act 2010, there will be indirect discrimination against disabled people, who will be impacted disproportionately.

Annie Wells: In her opening remarks, Aaliya said that further research needs to be done on the impact of the fee increase on human rights. What should that research cover? Is there anything that we have not looked at yet?

Aaliya Seyal: When we submitted our consultation response, we were not aware of any information about an equality impact assessment and/or a child rights and wellbeing impact assessment. We would certainly encourage research to be undertaken on those aspects prior to implementation of any increase.

Annie Wells: Thank you very much for those responses.

The Convener: I have a question to round up. In this meeting, we have been specifically discussing the increase in fees, but I recognise that a lot of what we have been talking about relates to the criteria for exemptions and to the system as a whole. We have heard that some people are opposed to fees altogether, not just to the increase. In the current financial environment, tough budgetary decisions must be made. If the fees do not rise, there could be an extra burden on taxpayers and on the public purse, and there could be an impact on access to justice throughout the whole court system. If you felt that access to the system and the criteria for exemptions were adequate, would you still be opposed to the fees being raised?

Hyo Eun Shin: That is a hypothetical question: if everything else worked absolutely fine, would we oppose an increase in fees of up to 22 per cent? I think that we would, because the cost of living

crisis and inflationary pressures are felt by households the most and by society as a whole, even though the impact is uneven. We have heard about the impact that the fees have on particular groups, on particular households and in particular areas, so a significant hike in fees is very difficult to justify.

One of our problems is that the consultation paper did not provide any evidence that would have allowed us to assess what a 22 per cent hike in fees could fund and how that money could be used more wisely. As a network, we have always advocated a general shift in funding towards early intervention and prevention, because a lot of the case load could be taken off the courts if people had earlier access to information and advice and if signposting was working well. Those are really important considerations.

Aaliya Seyal: There is no denying the financial constraints that every place is facing, but I echo the point that has already been made. The proposed percentage rise is disproportionate to the cost of living and people's incomes. I will not go into the figures, but the committee will be well aware of the actual income of people on the ground and the costs that they face. Ultimately, what will happen is that people will just not raise issues, so inequality in our society will increase. We would certainly not like to head in that direction as a society.

This does not directly touch on the court fees question, but there are means and mechanisms relating to early intervention and prevention. If we are trying to reduce the costs of cases that come to court, perhaps there needs to be more focus on that. We recognise that there are limited resources, but I go back to the point that I made earlier: where can we put our resources so that we have the maximum impact in promoting an equal and just society? If we do not do that and take a harsher decision, we will go in the wrong direction.

Julie Hamilton: I echo what has been said. The Law Society's civil justice committee was not opposed to a 2 per cent increase per se, provided that access to justice could be ensured, but we had no information about the basis for the 10 per cent increase this year standing with the 2 per cent increase in April and the further 10 per cent increase next year across such a wide range of civil court business. I echo the comments about the lack of evidence to understand what the additional money would be applied to in order to maintain the quality of services and the efficiencies in our justice system, as we all want.

Patrick McGuire: I agree with everything that has been said. I will follow up on the point that Julie Hamilton made. I well remember the consultation before the fees were first introduced. It was an incredibly detailed document that set out

the pounds, shillings and pence, and it clearly explained the ambition in relation to what percentage of the overall Scottish civil justice bill should be met by court users.

We now find ourselves in this twilight zone. In the consultation, there is a vague allusion to the war in Ukraine and the resulting significant inflationary pressures, but there is then a land grab for a 10 or 20 per cent increase in fees without any real explanation for it at all. That is just not the way that this should be done. I feel that the consultation was a lazy exercise, probably because the Scottish Government or the civil service thought that there would be no kickback and that, because the back had been broken on payment of court fees, we would all meekly sit back and say, "Well, that's going to be what's done."

That is why, frankly, I am incredibly grateful to the committee for putting the issue under the microscope and looking at it properly. Thank you for that and for giving us all the opportunity to give evidence.

The Convener: I thank all the witnesses for coming. That brings our public session to a close.

11:10

Meeting continued in private until 11:26.

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