



## Response to Ministry of Justice Consultation: Consultation on further fee proposals

September 2015

### Introductory and general remarks

These proposals represent the fourth set of court fee increase proposals in the past two years (discounting an additional inflation-linked rise), and the concerns which the Civil Justice Council (CJC) has set out in previous consultation responses stand and are heightened by the latest proposals.

Comments on the specific proposals are provided below, but there are a number of general points which the CJC would like to make.

- a) **Access to Justice** – these proposals will inhibit access to justice for a number of claimants, particularly individuals and small to medium sized businesses. Although the paper argues (with a degree of justification) that court fees are a small part of overall litigation costs and are recoverable, the fact remains that for many people finding sizeable court fees at the outset of litigation will either be beyond their means or will be a tipping point in not being able to pursue a case. It will thus mark a denial of access to justice.

For litigants in person the court fee represents a very large part of the costs of the litigation process, and in the absence of legal advice may provide a barrier that they are not willing to pass. Increases are on a large scale – 10% for a range of general fees is well in excess of current inflation rates, but the scale of the increases for the Court of Appeal are striking. Applications for permission to appeal would rise by 124%, and 158% where the appellant or respondent files an appeal questionnaire.

- b) **Evidence base** – the Council has previously voiced criticisms of the evidence base for fee increase proposals and this response is no exception. The main supporting research cited<sup>1</sup> only involved qualitative interviews with 31 civil court users ahead of the 2014 fee increases. Research published in 2013 was on the principles of court fees rather than the specific sums. Much of the supporting research was conducted before the first wave of serious court fee increases. The economic evidence also raises serious doubts – the assumption that numbers of cases will be unaffected by the increases, and an annual profile which projects monetised costs and benefits as being identical over a ten year financial period. **Above all, the CJC consider that monitoring and analysis of the effects of the fee reforms of the last 12 months should have been conducted before further increases were proposed**, as that will offer the most telling evidence of what the litigant and market will bear.

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<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/299804/role-of-court-fees-in-decisions-to-bring-cases-to-courts.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299804/role-of-court-fees-in-decisions-to-bring-cases-to-courts.pdf)

The Regulatory Policy Committee has previously criticised<sup>2</sup> court fee impact assessments as 'not fit for purpose' when framed in the same terms as the current proposals' impact assessment.

The CJC will be very interested in seeing the statistics for claims made in the short and medium term and whether the fee rises have had a detrimental impact. This is an area which the Justice Select Committee's inquiry will examine. There appears to the CJC to be a danger of a cycle developing where fees rise, numbers of cases fall, and the following year sees another rise to compensate for the loss of income which then drives further cases out of the system.

- c) **Impact on small/medium sized businesses** – the Ministerial foreword to the paper refers to a strong, secure and effective economy. A civil justice system has an important part to play in the health of an economy system by ensuring that there is a mechanism for business disputes to be resolved fairly and expeditiously and at a reasonable cost. For many small and medium sized enterprises (SMEs) litigation presents the same challenges as it does to litigants in person – a daunting process which takes time and expense. The large range of court fee increases is a disincentive for many SMEs with the frontloading of costs and with the new 5% value of claim basis making for sizeable fees. For business disputes over £20,000 the court fee increases will be sizeable. For example, a business bringing a claim valued at £350,000 will see a 75% increase in their court fee (£10,000 to £17,500).
- d) **Domestic competitiveness** – despite a traditional perception of there being a monopoly, the fact is the court system does not offer the only means of resolving legal disputes in England and Wales. Providers of arbitration services are already actively citing court fees in their marketing material as a reason not to use the courts. An increase in ombudsmen and current trends in establishing dispute resolution forums (for example the parallel Government proposal to establish a Small Business Commissioner) mean that the court system must be competitive. The system undoubtedly has many strengths – such as the independence and excellence of its judiciary, offering a recognised and final legal ruling, and the availability of an enforcement process. However, individuals and businesses seeking redress will be increasingly discerning in assessing their options, and the significant rise in court fees will be one of the factors weighing in the balance.
- e) **International competitiveness** – London and the UK are rightly considered to be one of the leading centres of excellence for legal services and dispute resolution. However, it is not the only provider, and international competitors are developing their facilities and professional expertise to increase choices for heavyweight international litigators. Although the Government decided not to introduce daily hearing fees for large value disputes, court fees are still one of the factors taken into account. This was illustrated in the study commissioned by the Government<sup>3</sup> in which 32% of those international litigators who responded said that court fees were taken into account when considering where to bring disputes. Litigators will be looking keenly at the increase in the cap for high value claims, and particularly the

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<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/273897/2014-01-14 - RPC13-MOJ-1958 - Enhanced Court Fees.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/273897/2014-01-14_-_RPC13-MOJ-1958_-_Enhanced_Court_Fees.pdf)

<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/396343/factors-influencing-international-litigators-with-commercial-claims.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigators-with-commercial-claims.pdf)

suggestion in the proposals that the cap will be 'at least' £20,000, leaving scope for yet higher fees.

- f) **Fee remissions** – the system of fee remissions was amended in October 2013 and has not been adjusted since the advent of enhanced court fees. The Government has recognised this, and proposes to increase the disposable capital threshold from £16,000 to £20-25,000 for fees of £10-15,000 plus respectively, and to £25,000 for those aged 61 and over. The Council welcomes these proposals as a measure that will slightly improve access to justice prospects for some litigants pursuing higher value claims. The CJC also welcomed the Government's announcement that lump sum compensation would be disregarded when considering fee remissions for those bringing mesothelioma and other asbestos related claims (see response to question 5 below).
- g) **Treatment of the civil jurisdiction** – the CJC's statutory focus is the civil justice system, and it has viewed with dismay the unequal approach taken by the Government to the imposition and increases in fees. The current proposals continue this trend, with no rises proposed for family proceeding fees, and a stated policy objective of using the civil justice system to support and subsidise the criminal, family and tribunal jurisdictions. Users of the civil courts will increasingly expect to see their greater investment in the system reflected in improved service and facilities, in particular IT improvements.

## Answers to individual questions

### Question 1: Do you agree with the proposal to raise the maximum fee for starting proceedings for the recovery of money from £10,000? Please give reasons.

No. Many of the reasons for our disagreement are set out in the general remarks above – we consider that raising the maximum fee will act as a barrier to access to justice, represents a risk in purely economic terms, is not supported by a sufficiently robust evidence base (in particular an analysis of the first set of enhanced fee rises), and risks driving disputes to other providers or international competitors reducing fee income and negating the policy objective of full or enhanced cost recovery.

Payment of the court fee is at the outset of litigation and many parties, even of some means, will struggle with finding £20,000 (and potentially a myriad of other increased fees for stages of the process). The CJC is very concerned about the consequences of an increase of this magnitude on individuals and SMEs seeking justice for their grievances. There is a risk that parties with deeper pockets will be tempted to deny liability in a case on the basis that claimants will be unable to fund court fees.

### Question 2: We would welcome views on whether the maximum fee for starting proceedings for the recovery of money should be increased:

- to at least £20,000; or
- to a higher amount;

The points made in the answer to question 1 apply, but the prospect of fees being raised even higher than £20,000 (e.g. a £50,000 fee for a £1million value money claim) exacerbate such concerns. This is particularly in relation to the competitiveness of the courts in England and Wales as a means of resolving higher value disputes.

**Alternatively, do you believe that there should be no maximum fee for commencing a money claim? Please give reasons.**

The CJC considers that there should be a maximum fee for money claims to provide a ceiling on the scale of court fees that can be charged. This provides certainty for parties and is easier for the courts to administer. Multi-million pound claimants would consider opting for alternative international dispute resolution centres if there was no fee cap, and this would be to the detriment of the UK legal profession and economy.

**Question 3: Do you agree with the proposal to exempt personal injury claims from the higher cap and that the maximum fee of £10,000 should continue to apply in these cases? Please give reasons.**

Yes. The consultation paper rightly accepts that the business model for personal injury claims is sufficiently different to warrant a modified approach. It is an area of litigation that were very high fees to apply solicitors would only be able to bring a small number of claims forward due to cash flow funding difficulties. This would be likely to have significant consequences for access to justice, particularly as legal aid is not normally available for personal injury claims.

**Question 4: Do you agree that if the maximum fee for money claim is increased as proposed, the disposable capital test for a fee remission should also be amended so that the disposable capital threshold for a fee of £10,000 is increased to £20,000 and to £25,000 for a fee of £20,000? Please give reasons.**

Yes, see comments in general remarks section. Raising the maximum fee to £20,000 or beyond represents an extremely large sum, even for parties with good disposable means. A higher disposable capital test would help soften the impact of these reforms on access to justice.

We commented in our fee remissions consultation response in May 2013 that the court fee represents just one call on disposable income that a litigant in person or small business is required to find in bringing an action, and the prospect of half a person's disposable income being used to pay the fee to commence proceedings will be a major disincentive.

**Question 5: Are there any other benefits or payments that should be excluded from the assessment of a person's disposable capital for the purposes of a fee remission?**

The existing scheme sets out a comprehensive range of benefits which are excluded, but an additional payment that might be added is payments made for childcare by working single parents. This was a suggestion made by the Bar Council in 2013<sup>4</sup> and the higher court fees which now apply reinforce the case for such a reform.

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**Question 6: Do you agree with the proposal to uplift all civil fees not affected by one of the other specific proposals by 10%? Please give reasons for your answer.**

No. While it is accepted that in the majority of cases a 10% increase is not significant in cash terms, it is considerably higher than present inflation rates. However, the main reason for disagreeing is the effect of all the 2014/15 fee increases will have a severe **cumulative** effect on court users and will reduce access to justice. The range of fees that are listed in Annex C of the consultation paper illustrate that someone who needs to enforce a court ruling in their favour will face a number of court fee increases as their case progresses.

**Questions 7-17**

These questions relate to tribunals and administrative justice and as such are out of the CJC's scope to comment upon. That said, the access to justice concerns would apply strongly in relation to this set of proposals, and the dramatic fall in cases coming to the Employment Tribunal following the introduction of fees is a stark illustration of the impact of fees on court and tribunal proceedings.

**Question 18: We would welcome views on our assessment of the impacts of the proposals for further fee increases set out in chapters 3 and 4 on those with protected characteristics. We would in particular welcome any data or evidence which would help to support these views.**

As the paper's equalities statement suggests, data for the demographic profile of court users is scarce, and the Civil Court User Survey 2014/15 mentioned in the paper will provide useful material when published. The profiling data on page 9 of the statement offers some insights – for example that Asian/Asian British court users are over-represented in using the civil courts and could therefore be disproportionately affected by court fee increases. Another interesting finding is that 76% of court users were not in receipt of any state benefits, which suggests that the fee remission scheme is unlikely to assist most court users, reinforcing access to justice concerns. The data also begs more questions – such as the reasons for under-representation of some groups in using the civil courts e.g. people with disabilities, those aged 16-24.

The data and evidence is simply not available to the CJC to offer any insights. It seems very likely that the tribunal fee proposals will have a greater detrimental impact on people with protected characteristics (e.g. the impact of higher asylum and immigration fees on ethnicity and religious groups), but others will be able to comment on that.

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