



Ministry of Justice Consultation on Proposal for Reform: Alignment of the Fees for Online and Paper Civil Money and Possession Claims

Response of the Civil Justice Council

Executive Summary

The Civil Justice Council (CJC) welcomes this opportunity to respond to the Government's consultation on proposals to increase court fees for a number of online court processes (hereafter referred to as the fee proposals). The stated aim of the fee proposals is to align court fees of online processes with the fees payable for lodging paper claims for the same disputes.¹ For convenience, we will refer to the digital processes and the paper application processes covered by the fee proposals as 'online processes' and 'paper processes' respectively. Because the CJC's concerns with the fee proposals relate both to the principle of aligning online and paper processes, and the practical effects of doing so generally, below we provide a general response to the Consultation Document. This general response informs our answers to the specific questions in the Consultation Document.

The CJC does not support the principle of aligning court fees for using online and paper processes. We believe, and the Government's own Impact Assessment acknowledges, that its fee proposals are *likely* to have an adverse impact on access to justice, by reducing the number of people willing and able to bring their legal disputes to court. The negative impacts of that change, both for the people concerned, and society and the rule of law generally, are set out in section 1.

In section 2 we outline why we believe the fee proposals undermine the Government's own objectives for the HMCTS Reform Programme, and the value of digital legal processes. A major benefit of online processes is the ability to resolve claims at cheaper cost. The CJC believes this financial dividend should be enjoyed not just by taxpayers, but also by litigants using the system. Delivering some of the financial benefit of online processes to those using them helps courts resolve disputes at proportionate cost – a key aim of the HMCTS Reform Programme and the civil justice system.

The CJC addresses the practical effects of the fee proposals in section 3. The CJC believes that the behavioural assumptions underpinning the proposed forms, specifically the assumption that the ratio of litigants using paper and online processes will not change, is open to doubt. Moreover, because many of the court fees covered by the proposal are already set at *enhanced* levels, i.e. above the actual cost of processing the claim, falls in the

¹ Under the proposal, both users of the online platforms: OCMC, MCOL, PCOL and the CCBC and its equivalent paper-based system will pay the same consolidated court fee.

number of claims lodged could lead to a fall in revenue collected by the Government. Once account is taken of the likely fall in the number of claims, and the real risk of an increase in the use of costlier paper processes, the fee proposals may not even achieve the Government's stated objective of making savings for the taxpayer. The financial case for reducing access to justice for civil court processes is further undermined by the fact that they are already fully funded by its users and cost the taxpayer nothing.

Finally, in section 4 the CJC set out its answers to the specific questions in the Consultation Document.

Section 1 – The Constitutional Framework

The CJC welcomes the Government's acknowledgement that accessible courts benefit everyone and not just the individual litigants who use them. As the Ministerial Foreword to the Consultation Document notes: 'An effective court and tribunal system benefits the whole of society by ensuring that rights and obligations can properly be upheld and enforced.'²

Accessible courts play a unique role in upholding the rule of law and underpinning everyday economic and social relations. There are two key public benefits to accessible courts. The first is that courts are sometimes called on to resolve uncertainty about the scope, and application, of parties' legal rights and obligations. By clarifying the law in particular settings courts provide critical guidance to all similarly situated persons. Accessible courts, therefore, have the effect of reducing the need for litigation by letting everyone know where they stand legally, and the likely outcome of their dispute if they were to bring it to court.

Secondly, the existence of accessible courts, even when not needed, perform a crucial role in underpinning everyday economic and social relations. As the Supreme Court stated in the landmark *Unison* case striking down unlawful Employment Tribunal fees:

People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.³

Common knowledge of the ability to enforce legal obligations, helps promote compliance with those obligations as a matter of course. Similarly, when disputes do arise between parties, the option of recourse to the courts to obtain just outcomes acts as an incentive to resolve the dispute quickly and fairly without the need to go to court. In this way, accessible courts facilitate fair and efficient alternative dispute resolution processes. By contrast, if courts are, or perceived to be, too expensive and difficult to access, there is a risk that unscrupulous parties might choose to breach their obligations, or make unfair settlement

² Consultation Document, p 3.

³ *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51 [71].

offers, based on a calculation that the wronged party has no effective recourse open to them or may be deterred from pursuing a claim.

It is important to emphasise that the same benefits of accessible courts apply equally to defendants wishing to defend themselves against unmeritorious claims. The possibility that defendants are pressured into settling frivolous or vexatious claims, because the costs and risks involved in defending them outweigh the costs of settling, has a similarly deleterious effect on economic and social relations. In the CJC's view, the fact that the number of defended claims has increased following the launch of the Online Civil Money Claims pilot, is a sign of the system's success, not failure.⁴

Several fundamental principles about the funding of the court system can be derived from a proper understanding of the role courts perform in enforcing rights and upholding the rule of law.

First, given the substantial public benefits provided by accessible courts, the costs of funding court processes should not be borne solely by the parties who have the misfortune to need to use them. While the precise mix of public and private funding of the justice system involves policy considerations, there is a strong case for substantial public subsidy given the undoubted public benefits produced by the justice system.

Secondly, for courts to be truly accessible, all persons should be able to bring any reasonably arguable legal claims or defences to court, regardless of their individual means or circumstances, when necessary. While court adjudication is neither necessary nor desirable for everybody with a legal problem, where disputes are not able to be resolved fairly by other means, the option to access court must be available. This accessibility principle is supported by the common law right of access to justice, recently reaffirmed by the UK Supreme Court in *Unison*. The common law right of access to justice will be breached where, absent Parliamentary authority, financial barriers including courts fees are imposed that render litigation unaffordable to some segments of the population, or economically irrational because the costs of litigation are disproportionate to the financial value in dispute.⁵ Inevitably, therefore, some degree of public funding is required to ensure that those with limited means are able to access the justice system, and there are limits on the extent to which litigants can be required to pay for other litigants' access justice, as a precondition of accessing the courts themselves.

Thirdly, the precise mix of public and private funding, and the resulting courts fees litigants are required to pay, can have behavioural consequences – both positive and negative – in terms of when, how, and for what purposes, people use the justice system. This latter point is particularly important when considering proposed changes to fee structures that would remove incentives for litigants to use the most efficient and cheapest method of resolving legal disputes which cannot be resolved by other means.

⁴ R Goodman (HMCTS Change Director) 'Reform of Civil Justice' in A Higgins (ed) *The Civil Procedure Rules at 20* (OUP 2020) p 286-287.

⁵ *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51 [91], [96].

When considering the likely negative consequences of these reforms, it is also important to recall that they relate to parts of the civil justice system that are already entirely self-funded. For the civil courts, the total running costs in 2019/20 was £545 million and the income collected by the civil courts was £550 million once remissions are taken into account.⁶ Accordingly, despite the immense public benefits of the civil justice system, managing the civil courts costs the taxpayer nothing.

Section 2 - The Stated Purpose of the Fee Proposals are Inconsistent with the Objectives of the HMCTS Reform Programme

The CJC has always strongly supported making online processes more widely available for all court users. Litigants, advocates, the judiciary and the many courts and tribunal staff who support judges in administering the civil justice system, all benefit from accessible, easy to use, online dispute resolution processes. The CJC's Online Dispute Resolution Advisory Group has played an important role in shaping policy development in this area including through highlighting key principles that should guide the development of online courts. This includes the 2015 Report on Online Dispute Resolution for Low Value Claims.⁷ As the then Master of the Rolls and Chair of the CJC stated in the Foreword to the Report: 'There is no doubt that online dispute resolution (ODR) is an area with enormous potential for meeting the needs of the system and its users in the 21st Century. *Its aim is to broaden access to justice and resolve disputes more easily, quickly and cheaply.*'⁸

Similarly, Lord Briggs, whose Civil Court Structure Review in 2016 was a milestone in the development of online processes in England & Wales, has written that:

The online court may best be seen as a new digital platform, upon which the resolution of (initially small) civil claims may be achieved, by choice from a variety of routes (including ADR) of the one best suited to each claim, in which the improved facilities for efficient communication and triage which digital offers over paper will be available to enable court users, court officers, and judges to participate with greater efficiency, better speed, and at reduced cost.⁹

Although the Government decided not to proceed with the development of a single online court, several of the digital initiatives that comprise part of the HMCTS Reform Programme have had considerable success in achieving the goals outlined by the Master of the Rolls above. These, include, for example, the creation of OCMC in early 2018.¹⁰

The Government rightly acknowledges that one of the purposes behind the HMCTS Reform Programme is to make the courts more accessible and easier to navigate for users. Indeed, the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals issued a

⁶ Consultation Document, p 10.

⁷ Available at <https://www.judiciary.uk/reviews/online-dispute-resolution/odr-report-february-2015/>

⁸ *Ibid*, p 2.

⁹ Lord Michael Briggs 'The Online Court in England' in R Assy and A Higgins (eds) *Principles, Procedure and Justice: Essays in honour of Adrian Zuckerman* (OUP 2020) p 136.

¹⁰ By the end of 2019 this new service had already received more than 100,000 claims and 9 out of 10 users reported they were satisfied with the service: R Goodman (HMCTS Change Director) 'Reform of Civil Justice' in A Higgins (ed) *The Civil Procedure Rules at 20* (OUP 2020) p 286-287.

Joint Statement when launching the HMCTS Reform Programme which provided that: 'The transformation of the courts and tribunals across the country will be based on three core principles that build on its established strengths: • Just • Proportionate • Accessible'¹¹ They went on to state that the goal of proportionality includes reducing the costs of litigants using the justice system: 'We must make sure that the justice system is proportionate in order to save people time, *shrink their costs*, and reduce the impact of legal proceedings on their lives.'¹²

The Government's assertion that the lower fees for online processes have now achieved their purpose cannot be justified.¹³ Not only is the claim highly questionable as a practical matter (which is considered in more detail in section 3), it also does not provide a complete picture of the Government's objectives in investing in, and promoting, greater use of online dispute resolution processes.

The signature benefit of online systems is to reduce the costs of processing claims, both to the public purse and to users. These lower costs are currently reflected in lower court fees for users, and there is no principled justification for changing that approach. For low value disputes, the court fee will comprise a significant or major part of litigants' overall costs given many of them will be unrepresented.

It was never the vision of the HMCTS Reform Programme that the financial savings achieved by online processes would solely benefit the public purse and not also the litigants who use them. Indeed, the Ministry of Justice acknowledges that fees for online processes were discounted not just to encourage litigants to use them, but also in recognition that the lower fee 'better reflects the lower cost of administering the online service when compared to the cost of administering a paper-based system for claims.'¹⁴

By passing some of the savings from online processes onto litigants the Government helps courts deliver on their central mission of the HMCTS Reform Programme and the overriding objective of the Civil Procedure Rules: resolving cases justly at proportionate cost.

The CJC acknowledges that the higher fees that litigants are required to pay for paper processes does give rise to equality concerns for those litigants who are unable to use online services. However, the Council believes that the best way to deal with this problem is through digital assistance initiatives and/or partial fee remissions. The Government acknowledges in its Consultation Document that only 10% of court users currently use paper processes for civil money claims in preference to online processes.¹⁵ Therefore, the scale of this access to digital justice deficit, and the costs of any partial fee remissions for those unable to use online processes, is likely to be small. In any event, there is no principled case for achieving equality for those who cannot use online processes by charging the same higher fees to those who are able to use cheaper online services.

¹¹ 'Transforming Our Justice System' Joint Statement by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals (September 2016), p 5.

¹² Ibid (emphasis added).

¹³ Consultation Document, p 11.

¹⁴ Consultation Document, p 7.

¹⁵ Impact Assessment, p 7.

Section 3 – The Negative Impact of the Fee Alignment Proposals in Practice

According to the Government's own Impact Assessment, the reform proposals are *likely* to have a negative impact on access to justice by reducing the number of people able and willing to pay the higher court fees. Moreover, the Impact Assessment acknowledges that the extent of this 'demand response' reduction – to use its economic terminology - is uncertain. According to its best estimate, a 10% increase in fees would result in a proportional 2.5% reduction in claims, but the reduction could be higher.¹⁶ At this juncture it is important to recall that the proposed fee increases for all litigants using MCOL would be at least 10%, and significantly higher for those with low value claims.¹⁷

The Impact Assessment does not suggest, and the Government could not credibly claim, that the possibility that some claimants might be eligible for partial fee remissions through Help with Fees (HwF), means that there will be no fall in the number of claims filed. On the contrary, the Impact Assessment assumes there will be a fall in the number of claims. One of the contradictions in the Government's case for reform is that the Government asserts that access to justice will be protected because people who cannot afford the higher fees can apply for assistance through HwF, yet one of the assumptions in its Impact Assessment is that there will be no increase in people applying for fee remissions through HwF.¹⁸ The Impact Assessment also rightly notes that fee remissions are not available to businesses, including small businesses.¹⁹

The CJC believes that the deleterious effects of the predicted fall in access to justice should lead the Government to reconsider the case for implementing these fee proposals. It will have a concrete negative impact on people who will no longer be able to bring their legal disputes to court. As the UK Supreme Court observed in *Unison* this, in turn, will have a negative impact on everyday social and economic social relations, by undermining the generally held belief that remedies are available in the event that legal obligations are breached.

The fee proposals may fail to achieve even its own stated objectives

There are two reasons why the Government's fee proposals may fail to achieve its own stated objectives, quite apart from its negative impact on access to justice.

The first reason relates to the enhanced fees that are payable for many of the claims (whether issued through paper or online processes) that are subject to the fee proposals. The Government introduced enhanced court fees – i.e. court fees levied *above* the costs to

¹⁶ Impact Assessment, p 2.

¹⁷ For the lowest value civil money claims, up to a value of £300, the fee increase would be 40% (from £25 to £35).

¹⁸ Consultation Document p 11; Impact Assessment p 7.

¹⁹ *Ibid.*

the public purse of processing the claims – for certain types of money claims in 2015. The fees were set at 5% of the total sums at issue capped at a maximum of £10,000.²⁰

The effect of these enhanced fees is that the Government *generates* revenue for the taxpayer each time a claim is filed. If the Government has underestimated the reduction in the number of people using online processes following the reforms, it is possible that the loss of fees from the reduced number of claims exceeds the additional fees paid by those who continue to make claims. The Government's Impact Assessment candidly acknowledges this possibility stating: 'If demand is much more price sensitive than the assumptions used, it is possible that this option could lead to a reduction in fee income.'²¹

There is a further reason to think that any taxpayer savings from the fee proposals are likely to be lower than set out in the Government's Impact Assessment. In particular, the CJC believes that the Government's assumption that aligning the fees for paper and online processes will have *zero* impact on the ratio of litigants using those respective processes is not credible.²²

Removing the financial benefit to use online processes, instead of paper ones, will as a matter of economic logic, reduce the number of people willing to use online services in preference to more cumbersome, expensive paper ones. We acknowledge that the majority of litigants will continue to use online processes because they are more convenient, but the assumption that removing discounts in excess of 10% (and as high as 40%) will have *zero* impact on process choice is open to serious doubt.

It is not just economic logic behind the CJC's concern. The Government asserts that the goal of getting people to adopt online processes has now been achieved, and hence there is no longer a need to maintain the discount.²³ However, this assumes that all litigants using online processes are repeat players who are now familiar with those processes and comfortable with them. This is not defensible given that a significant number of litigants making civil money claims, particularly those with low value claims, will be small businesses or individuals who are unrepresented and have limited or no experience of the justice system. For such litigants, there is no established pattern of usage that can be reasonably expected to continue in the future.

Even a small increase in the ratio of litigants using paper processes is likely to have a significant negative impact on the revenue generated by the reform proposals, given the significant additional costs involved in processing paper claims. HMCTS has also made clear that there are other non-financial costs associated with the use of paper processes. HMCTS Change Director, Richard Goodman, has stated: 'Inefficient [paper] systems are not just

²⁰ Ministry of Justice, *Enhanced Court Fees--The Government Response to Part 2 of the Consultation* (Cm 8971, 2015). The changes were introduced by The Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015, SI 2015/576.

²¹ Impact Assessment, p 2.

²² The Impact Assessment states at p 7: 'We assume that applicants do not switch from using online to paper as a result of removing the online discount. In 2018/19, around 90% of specified money claims were issued online, the majority through the bulk centre which is an online only service. As the online service is now the default platform, we would not expect removing the discount to lead to a switch to paper applications.'

²³ Consultation Document, p 11.

more costly and slower than digital information processes, they are also more prone to error and loss.²⁴ This is another reason to continue to provide litigants with practical and financial incentives to use online processes instead of paper ones.

Section 4 – Answer to Specific Questions in the Consultation Document

Question 1: In light of our proposal as set out in Chapter Two, do you agree with the principle that online and paper fees should be the same? Please give reasons for your answer.

Answer: For the reasons stated in sections 1 to 3 above, the CJC does not agree that the fees for online and paper processes should be the same. Removing the discount for using online processes will undermine the objectives of the HMTCS Reform Programme and have a negative impact on access to justice.

Question 2: Do you agree that the discounted online issue fees for MCOL and OCMC should be aligned with its paper issue fees? Please give reasons for your answer.

Answer: For the reasons set out in sections 1 to 3 above, the CJC does not agree that the discounted online issue fees for MCOL and OCMC should be aligned with its paper issue fees. In addition to undermining the HMCTS Reform Programme and negatively impacting access to justice, the fee proposals are based on questionable assumptions which means that any savings to the taxpayer may be even lower than the modest savings predicted.

Question 3: Do you agree that the discounted online fee for PCOL users should be aligned with its equivalent paper fee? Please give reasons for your answer.

Answer: The CJC refers to its answers to questions 1 and 2. It does not support the alignment of these fees.

Question 4: Do you agree that the discounted online fee for warrant of control should be aligned with its paper fee? Please give your reasons for your answer.

Answer: The CJC refers to its answers to questions 1 and 2. It does not support the alignment of these fees.

Question 5: As part of our assessment of the potential demand response, we would be grateful for feedback from consultees on the relative importance of different factors in the decision to take a case to court. These factors might include the court fee, other associated costs, the probability of success, the likelihood of recovering any debt, and any non-financial motivations such as any prior experience of court processes.

Answer: The CJC believes that all the factors mentioned in Question 5 are relevant to a litigant's decision to take a case to court. As set out in section 3 of our response, the CJC

²⁴ R Goodman (HMCTS Change Director) 'Reform of Civil Justice' in A Higgins (ed) *The Civil Procedure Rules at 20* (OUP 2020) p 284.

believes that for small value claims in particular, the court fee is often the biggest expense for litigants in bringing a case to court. The proposed increase in court fees is likely to lead to a significant reduction in the number of claims being filed; the Government's own Impact Assessment reaches the same conclusion.

Question 6: Do you consider whether the proposal will have a disproportionate impact on individuals with protected characteristics? Are there any potential modifications that we should consider to mitigate this impact? Please give reasons for your answer.

Answer: The CJC believes that a significant increase in court fees – as contemplated by the current fee proposals – is likely to have disproportionate effect on vulnerable litigants, many of whom will have a protected characteristic under the Equality Act 2010. Women, people from minority ethnic groups, and people with disabilities are more likely to be poor and therefore more likely to be adversely affected by court fee rises, without substantial income related fee remissions that are set at realistic levels that make access to court affordable. In light of the obligations under the Equality Act 2010, and the Constitutional importance of access to justice as discussed in section 1, it is particularly important that the Government ensures that there is genuinely equal access to justice for all persons including those with protected characteristics.

The CJC notes the decision of Supreme Court in *Unison* is also relevant to this issue.²⁵ Not only did the Supreme Court strike down the relevant Employment Tribunal Fees as a breach of the common law right of access to justice, they were also held to constitute indirect discrimination in breach of the Equality Act 2010. The fees were deemed to have a disparate impact on people with protected characteristics, and this discrimination could not be justified as it had not been shown to be a proportionate means of achieving the stated aims of the fees regime.²⁶

For the reasons set out in section 3 of our response, the CJC does not believe that the proposals to align the fees for online and paper processes could be justified as a proportionate means of achieving the Government's stated objectives.



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On behalf of the Civil Justice Council

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²⁵ *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51. The discriminatory nature of the fees was dealt with in the judgment of Lady Hale, with whom the other judges unanimously agreed.

²⁶ *Ibid* [125], [131], [134].