



**Civil Justice Council response to
Ministry of Justice consultation paper
Court Fees: Proposals for reform**

January 2014

Introductory remarks

The CJC remains opposed to the principle of full cost recovery for the administration of civil litigation.

We have some general comments to make regarding the reforms, before responding to the specific questions:

- The consultation perpetuates the suggestion that Civil Justice is not self-financing. The effects of these reforms would be to increase the degree of Civil Justice's subsidy of Family Justice. The reduction in fees for Children Act applications by 33% is out of kilter with the overall framework of fee increases.
- The tone of the paper is that a gentle touch is needed on family fees as cases give rise to 'difficult circumstances' (e.g. paragraph 67), and this is unquestionably true. However, there is no similar consideration on civil matters such as debt or possessions cases and many others, which also give rise to very distressing circumstances, which requires acknowledgement. The tone is then to some degree borne out in Annex A's full list of current and proposed fees, with enforcement and determination of costs being exceptions.
- Inconsistency of price increases – placing the proposed fee increases in percentage terms reveals some marked disparities. From an 81% increase for middle range money claims (exceeding £5000 but not £15,000 and falling within the small claims limit), to a 12% increase for fee for cases exceeding £300,000 in value. Some of the proposed increases are immense - 216% for Judicial Review (JR) permission to appeal applications, 140% for issue fees for online County Court money claims, a 114% increase in bankruptcy/insolvency applications. Price increases should be proportionate and set within a logical framework, explained, and consistently applied.
- The Government needs to bear in mind that – as with other above-inflation rises in other public service sectors – the users of the service will be increasingly questioning and scrutinising the levels of service they receive for the increased fees being paid. They will expect to see the additional charges being translated into improved services, especially in the IT field, if there is a move to above-cost recovery. An appropriate proportion of the increase should therefore be considered for such improvements to be funded.

- The Council is concerned about the potentially chilling effect on lower to medium value claims of the fee increases, as litigants may opt not to bring claims where the court fee represents a significant proportion of the legal costs and is significant in relation to the overall value of the claim. There is a danger that the effect of the proposals could be counter-productive in such cases, and represent a loss of court income rather than an increase.
- As we highlight in our answers below, great care is needed in adjusting the fee structure for commercial proceedings in a way that does not harm the UK's attractiveness for major international dispute resolution.

Question 1: *What do you consider to be the equality impacts of the proposed fee increases (when supported by a remissions system) on court users who have protected characteristics? Could you provide any evidence or sources of information that will help us to understand and assess those impacts?*

We consider that there will inevitably be equality impacts arising from the fee increases in the light of the reforms implemented last year to the fee remission system. A number of points made in the Council's consultation response to those proposals -

<http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fconsultation+responses%2fCJC+response+to+Ministry+of+Justice+consultation+paper+on+Fee+Remissions+for+the+Courts+and+Tribunals> - apply here in respect of access to justice fears, and the disproportionately adverse effect on groups with protected equality characteristics.

The equalities assessment in Annex C of the paper's impact assessment for the proposals argues that fee remissions will ensure that court fees do not inhibit access to justice, but we do not share the confidence of this assertion in the light of the reforms to the remission system. Nor in the light of a key finding from the Office for National Statistics (ONS) report¹ published last January (Poverty and Social Exclusion in the UK and EU, 2005-2011). This was that:

"The percentage of people who say they are unable to meet unexpected financial expenses has increased considerably since the start of the economic downturn, up from 26.6% in 2007 to 36.6% in 2011."

Question 2: *Do you agree with the premise of a single issue fee of £270 for non-money cases? Please give reasons for your answer.*

There is force in having greater consistency in fees for issuing different types of court proceedings. However, the rate of the increase is high – a 35% increase for many non-claims, and a 77% rise for insolvency applications (3.5 in Annex A).

¹ http://www.ons.gov.uk/ons/dcp171776_295020.pdf

Question 3: *Do you agree with the proposed fee levels for money claims? In particular, do you agree with the proposal to charge the same fee for claims issued through the Claims Production Centre that would be charged for applications lodged online? Please give reasons for your answer.*

The proposal not to increase court fees for the four lowest categories of money claim (those not exceeding claims to the value of £1,500) is a sensible and represents a proportionate approach.

The size of the increases for other money claims varies dramatically in percentage terms, from 12% to 81%. The increases that causes us greatest concern are the ones for claims exceeding £3000 but below £5000 – a 66% rise from £120 to £200 for small claims track cases (excluding personal injury and housing disrepair claims), and for claims exceeding £5,000 but below £15,000 – an 81% rise, from £245 to £445. This latter category will also catch a significant number of cases in the small claims track.

Another concern is in relation to the increased court fee being recovered from people who are defendants in cases where public utilities, building societies and the like are bringing actions for arrears in payments – the higher court fee will aggravate the personal debt of the people involved.

However, it is accepted that claimants in cases that are taken forward beyond the initial stage will benefit from the proposal to subsume the allocation fee into the issue fee.

In relation to the discount for online claims, the Council welcomes a reduction in the fee given for issuing online given the much lower costs of processing, and to provide an incentive for court users to make electronic claims where possible. However, we are conscious that this is another aspect that may impact on people with protected equality characteristics, who are proportionately less likely to have access to home computer – ONS figures for 2012² show that a fifth of UK homes do not have access to the internet. An affordability and/ or another appropriate exemption mechanism should be considered.

Question 4: *Do you agree with the removal of the allocation and listing fee in all cases? Please give reasons for your answer.*

In principle we can see the administrative efficiency advantages in not having a separate allocation and listing fee, and for subsuming the costs of that work into the fees for issue and hearings respectively.

However, we would flag one concern on this, which is that it may have the effect of reducing the incentives/opportunities on parties to seek mediation, as while streamlining the overall process it removes some opportunities the courts have to encourage ADR and can have the effect of fast-tracking parties into court with less pause for reflection.

² http://www.ons.gov.uk/ons/dcp171778_275775.pdf

Question 5: *Do you agree that small claims track hearing fees should be maintained at their current levels, which are below cost? Please give reasons for your answer.*

Yes, we agree this is the sensible and proportionate approach to adopt, as it will help to ensure people are able to gain access to justice for resolving low value disputes, but which may nonetheless be very important for the individuals/companies concerned e.g. bringing actions for non-payment or failure to do work paid for. As we note though, some claims now in the small claims track (with the threshold for non-personal injury and housing disrepair cases being £10,000) are facing substantial increases.

Question 6: *Do you agree that fast track and multi-track hearing fees should be maintained at their current levels, which are above cost? Please give reasons for your answer.*

Notwithstanding the Council's overall position on above-cost recovery through fees (see opening remarks), given that these fees are charged at present we do not on balance recommend reduction, while agreeing they clearly should not be increased.

Question 7: *Do you agree with proposals to abolish the refund of hearing fees when early notice is given that a hearing is not required? Please give reasons for your answer.*

This proposal may have the effect of discouraging mediation/settlement, as some parties will feel that as their hearing fee would not be refunded anyway, they have less incentive not to proceed with a hearing.

Questions 8-10:

These questions relate purely to Family Justice cases, and we confine our comments to contrasting the modest set of increases (and some major reductions in fees) with the wider range of larger increases on the Civil Justice side.

We do, however, welcome the move to make no charge for applications made by victims of domestic violence.

Question 11: *Do you agree with the proposed fee levels for judicial review cases? Please give reasons for your answer.*

No – we regard the proposed increases as wholly excessive. In particular the rise in fee for permission to proceed, from £215 to £680, a sum which represents a considerable sum for an individual, and which will deter many from bringing legitimate claims. The effect of the overall Judicial review fee increases will generate only a very small sum in any event – in 2011³ over 77% of applications were for

³ Court and Judicial Statistics 2011, Table 7.12 <https://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/appellate-courts-tables-chp7-2011.xls>

immigration and asylum cases, which it seems fair to assume would (in very many cases) be exempted from paying fees through the remissions scheme. Thus in *financial* terms the income generated would represent a very small amount of the £625million anticipated fees income, but in *justice* terms is likely to have a serious effect on cases brought, and the citizen's ability to question or challenge public authority decisions and policies.

We are extremely concerned at the chilling effect on access to justice for such an important area of public law, in which the decision and actions of public authorities can be subject to the independent scrutiny of the courts. Clearly the effect of this proposal when combined with the reduction in availability of fee remissions and the parallel reforms to reduce the availability of legal aid for judicial review will be to severely deter the making of applications, with potentially serious consequences.

Question 12: *Do you agree with proposals to increase the fee for an application for grant of probate to full-cost levels? Please give reasons for your answer.*

We note the point on the cost of providing this service, but question whether a 223% increase in the fee is proportionate.

Question 13: *Do you agree with the proposed fee levels for cases taken to the Court of Appeal? Please give reasons for your answer.*

We welcome the decision not to seek full cost recovery on fees for the Court of Appeal, which by its nature hears a more limited number of cases and (on the whole) many of the most important cases in the legal system. Its costs are naturally higher with three very senior judges hearing nearly all cases.

That said, the proposals would see almost a doubling of the existing fees for various applications, and a new set of fees designed to deter additional applications to the Court. The introduction of a charge for a renewed application for leave to appeal in the Court of Appeal is understandable in view of the additional costs this results in (including senior judicial time), but the proposed fee of £1,090 is extremely high.

We are concerned about the effects of these proposals on access to justice – while it may prevent some unmeritorious cases being pursued down every avenue, a number of such unmeritorious claims are brought by people who qualify for fee remissions anyway. The number of litigants in person using the Court of Appeal is increasing, and such dramatic fee increases risk making the Court of Appeal the preserve of those who can afford legal representation or those on incomes so low they are exempt from fees.

Question 14: *Do you agree with the government's proposed changes to the fees charged in the Court of Protection? Please give reasons for your answer.*

We leave this to others to comment upon.

Question 15: *Do you have any further comments to make on the government's cost recovery plans?*

See our opening remarks for our general views on the reform proposals.

Question 16: *Do you agree that the fee for issuing a specified money claim should be 5% of the value of the claim?*

There is an argument that the adoption of such a policy represents a tax on litigation.

We are concerned that telephone interviews with just 18 organisations is the basis of the Government's evidence that court users would prefer a proposal for fees charged to be a proportion of the value of the claim. We hope the Government will consider carefully the consultation responses, which will be drawn from a wider range of users.

Although the proposals set a cap of a maximum issue fee of £10,000 there is a risk that this measure will increase litigation costs at a time when the Government and judiciary has been trying to reduce them. There is a risk that cases will not be brought as the impact of very high court fees into the equation may be a tipping point for action not being brought.

From a defendant perspective there is a prospect of major additional costs, given the number of claims being handled, and perhaps a sense that the impact of the Jackson reforms has been lessened.

There is also a point about this being a 'crossing the Rubicon' in terms of the approach to levels of fees for issuing court proceedings – once the principle is established, the Government may seek to increase the percentage to what it feels the market will bear, but that may be concentrated on the highest value litigation rather than representative more generally.

Question 17: *Do you agree that there should be a maximum fee for issuing specified money claims, and that it should be £10,000?*

See comments above, although if it is decided to proceed with a fee based as a percentage of a claim then we would support the adoption of a maximum fee cap.

Question 18: *Do you believe that unspecified claims should be subject the same fee regime as specified money claims? Or do you believe that they should have a lower maximum fee of £5,000? Please give reasons for your answer.*

There seems no logical justification for a lower maximum fee.

Question 19: *Is there a risk that applying a different maximum fee could have unintended consequences? Please provide details.*

Clearly a move to charge court issue fees based on the value of a claim is going to be difficult to translate for the considerable and increasing⁴ number of unspecified money claims. The paper is right in our view to flag up the concerns that replicating the 5% approach that may be adopted for specified claims would have a chilling effect on the bringing of money claims for unspecified amounts.

There is clearly scope for unintended consequences, both in terms of claims not being brought as the court fees may turn out to be a significant sum in relation to the eventual value of a claim, and also in relation to low issue fees being charged for what prove to be very high value claims that would represent lost revenue to the courts.

A lack of reasonable expectation test might guard against the latter point, but at the risk of opening the door to satellite litigation. On balance we would not recommend such a test.

Question 20: *Do you agree that it is reasonable to charge higher court fees for high value commercial proceedings than would apply to standard money claims?*

Question 21: *We would welcome views on the alternative proposals for charging higher fees for money claims in commercial proceedings. Do you think it would be preferable to charge higher fees for hearings in commercial proceedings? Please give reasons for your answer.*

Question 22: *Could the introduction of a hearing fee have unintended consequences? What measures might we put in place to ensure that the parties provided accurate time estimates for hearings, rather than minimise the cost? Please provide further details.*

Question 23: *If you prefer Option 2 (a higher maximum fee to issue proceedings), do you think the maximum fee should be £15,000 or £20,000? Please give reasons for your answer.*

This is an area in which considerable regard should be had to the views of the specialist legal practitioners and their clients and the specialist judiciary.

The consultation paper sets out the central dilemma given the considerable strengths and attractions of the UK legal services market as a centre for excellence for resolving major international commercial disputes. On the one hand the current fees represent a tiny fraction of the litigation costs in such cases, and there is scope for increased revenue to help support the wider costs of the court system as well as fund the investment in the Rolls Building and the need for further investment in improved IT. On the other hand, this is a highly competitive market, and a number of international competitors are investing heavily.

⁴ Court Statistics Quarterly, April to June 2013, national caseload data

Any set of proposals must be highly sensitive to this market – if costs for court fees and hearings are raised too high, international clients may opt to forego some of London's attractions.

So there is a fine balance to be struck, and in our view the correct way to proceed would be with caution and restraint initially, with relatively minor increases and with regard to international comparisons (as mentioned in paragraph 165 of the paper).

As paragraph 177 notes, the availability of high level arbitration is also a consideration – rising court costs may drive parties to arbitration.

Of the two options we tend to favour Option 1 as it is more proportionate and attuned to the actual costs incurred by the court for which a fee is being levied. As Annex C illustrates, a one day court hearing would result in an £11,000 fee under Option 1 and £21,090 under Option 2. The cost of fully going to court is already very expensive for commercial litigators, and so a reasonable hearing fee would not necessarily be a deterrent in the way that a large flat issue fee would be.

There may be issues with hearing fees in terms of parties seeking to shorten or lengthen sessions to drive costs up or down, although less so in high value litigation, and judges already manage cases so that hearings are conducted fairly and proportionately.

Question 24: *Do you agree that the proposals for commercial proceedings are unlikely to damage the UK's position as the leading centre for commercial dispute resolution? Are there other factors we should take into account in assessing the competitiveness of the UK's legal services?*

See general comments above. No doubt an in-depth analysis of the international legal services market with comparative tables on court charges would help, but this also needs to cover services and facilities – for example IT provision.

Question 25: *Do you agree that the same fee structure should be applied to all money claims in the Rolls Building and at District Registries? Please give reasons for your answer.*

Yes, it is imperative that there is a level playing field, all locations offer specialist judges and there are already issues about cases being transferred to London to attract higher fees when the nature of the case is regionally based, and much of the litigation work is done outside London. It is vital that 'forum shopping' is deterred, and fees need to be consistent. There are much wider issues here about the health of regional legal professions and indeed economies.

Question 26: *What other measures should we consider (for example, using the Civil Procedure Rules) to target fees more effectively to high-value commercial proceedings while minimising the risk that the appropriate fee could be avoided?*

We are not sure what is being suggested here, or how it would work.

Question 27: *Should the fee regime for commercial proceedings also apply to proceedings in the Mercantile Court? Please give reasons for your answer.*

Yes, the Mercantile Court is one of the specialist jurisdictions and its fee structure should be in line with equivalent jurisdictions. A different fee regime would invite the sorts of problems (e.g. forum shopping) envisaged in our answer to Question 25.

Question 28: *Do you agree that the fee for a divorce petition should be set at £750? Please give reasons for your answer.*

This is a question for family justice practitioners and bodies to address.