JUDICIARY OF
ENGLAND AND WALES

THE RESPONSE OF THE SENIOR JUDICIARY to the THE MINISTRY OF JUSTICE CONSULTATION PAPER COURT FEES: PROPOSALS FOR REFORM (Cm 8751)

4 February 2014

I. Introduction

1. Access to justice is a fundamental feature of any society committed to the rule of law. It is not a service which the State provides at cost, but an element of the State and its governance essential to the rule of law and the operation of a free market economy. The State is therefore under a duty to provide effective access to justice irrespective of the State's ability to secure full-cost recovery. This, as we explain at paragraph 55, has always been the position of the Judiciary.

2. The Judiciary's response to this Ministry of Justice (MoJ) Consultation is predicated on the fact the Government does not accept this position and intends to ask Parliament to render the justice system self-financing. As has long been made clear there is a fundamental question as to whether the court system which benefits the economy and society as a whole should be financed by those whose use of it benefits not simply themselves but society as a whole. Ultimately it must be for Parliament to decide whether access to justice and hence the maintenance of the rule of law are to be self-financing. Under our constitution issues of taxation and expenditure are the province of Parliament.

3. The specific questions raised in the Consultation Paper relate in the main to detailed aspects of the proposals, and the answers given should be read subject to the issues we have addressed in the first section of this response.

4. The Consultation Paper contains two separate but cumulative proposals, both involving substantial increases in many court fees payable by parties bringing claims. It is essential to distinguish between them.

    (i) The first proposal, headed **Costs Recovery**, involves increases in court fees with a view to reducing the deficit on the costs of the civil and family courts. For these purposes the civil and family courts are treated as a single system. As such, total fee income in 2012/13 was about £500 million and expenditure was about £625 million, resulting

in a deficit of £125 million.[1] This excludes the cost of fee remissions granted to those on low incomes, which the Government has always accepted, at least until now, was a social cost which should not fall on other court users.

(ii) The second proposal, headed **Enhanced Court Fees**, envisages fees in a significant number of cases at a level above the cost of the proceedings in question. The Consultation Paper makes clear that this represents a departure from the Government's policy of not charging more than a service costs. It is a novel concept. It will require primary legislation. The purposes of the these Enhanced Fees include funding the balance of the deficit remaining after implementation of the Recovery Costs proposals and contributing to the costs of fee remissions.

The position of the courts

5. In the Ministerial Foreword to the Consultation Paper, Mr Shailesh Vara MP correctly states that:

   "The courts are a cornerstone of our democracy: a fundamental pillar of the rule of law."

   Paragraph 1 of the Consultation Paper expands on this:

   "The courts play a vital role in our democracy. They provide access to justice for those who need it, help to maintain social order and support the proper functioning of the economy."

6. These principles are reflected in the statutory duty of the Lord Chancellor to ensure that there is an efficient and effective system to support the carrying on of the business of the courts and that appropriate services are provided to the courts: s.1 (1) Courts Act 2003. When prescribing court fees, the Lord Chancellor must have regard to the principle that access to the courts must not be denied: s.92(3) Courts Act 2003.

7. It is the function and duty of the civil and family courts to provide the opportunity to obtain legal redress to all sections of society, including those with limited resources. This duty arises in a wide variety of circumstances, many of which have little or no connection with financial considerations. By way of example, a principal function of the family courts and a very substantial part of their work is to provide security and protection for children, often in very difficult circumstances, by way of care orders, adoption, custody arrangements and so on. It hardly needs to be emphasised that this is an essential public purpose in which society as a whole has a deep and direct interest.

[1] The recalculated deficit figure has not yet been subject to audit checks. It is also subject to the accuracy of the raw data used (sitting days/hours) *'to apportion shared costs between criminal and civil business'*: see paragraphs 32-33.

8. The courts exist to answer a need of society, and represent one of the core functions of the modern state.

9. In the light of the central position of the courts, and their functions and duties undertaken in the public interest, it should not be a cause for surprise if their full costs cannot be recovered from those who need recourse to them and if there is therefore an element of public funding.

10. While the Consultation Paper opens with a clear acknowledgement of the role of the courts, the bulk of the Paper, the proposals it contains and the prevailing approach appear to be based on a view that recourse to the courts is a matter of discretionary spending by those who can afford to and should pay its full cost and, in some cases, more than its full cost. It must be a matter for Parliament to consider how these two conflicting principles should be reconciled.

Subsidy of the family courts by civil court users

11. The civil courts are fully self-financing, while the family courts run at a very substantial deficit. The annual accounts for HM Courts and Tribunals Service (HMCTS) contain the breakdowns of the relevant figures. These may be summarised as follows:

	2010/111 £000	2011/12 £000	2012/13 £000
Civil courts			
Gross income	338,564	346,296	336,312
Expenditure	(342,129)	(323,247)	(337,807)
Surplus/Deficit	(3,565)	23,049	(1,495)
Family courts			
Gross income			
Expenditure	134,312	138,344	153,122
Surplus/Deficit	(250,355)	(253,192)	(263,056)
	(116,043)	(114,848)	(109,934)

Notes
1. For 2012/2013, HMCTS have included the Probate figures in the figures for the Family courts. The comparable figures for 2010/11 and 2011/12 are adjusted on the same basis.
2. The figures for gross income assume that full fees are paid and that there is no remissions system. The Government has to date accepted that the cost of remissions must form part of general public expenditure, rather than being a cost to court users who pay fees.

It is therefore clear that the Cost Recovery proposals are largely directed to funding the family courts' deficit out of charges to be paid by users of the civil (non-family) courts.

12. There is no good reason for treating the civil and family courts as a single system. Their functions are quite separate. There is no obvious connection between (1) civil claims, such as actions for damages for personal injuries, consumer disputes, claims against the Government or commercial disputes between businesses, and (2) the business of the family courts, whether care proceedings or divorce.

13. While there are some judges who hear both civil and family cases and court premises are shared in some places, the same applies to judges and premises shared between criminal and other courts.

14. Costs have to be allocated between the different systems, but the annual accounts of HMCTS show that this can be done without undue difficulty.

15. The issue that must be faced and debated, although not raised explicitly in the Consultation Paper, is whether it is right that parties in civil proceedings should pay more than the costs of the civil courts in order to fund the deficit in the family court system. This issue we suggest also has to be considered in the context of recent changes made to the availability of legal aid, to the level of fee remissions, and to the funding of civil litigation generally following the "Jackson" reforms on costs.

16. The proposals for Costs Recovery (as opposed to those for Enhanced Court Fees) are expected to raise an additional £105 million p.a., the great majority from increased fees for civil (non-family) court proceedings. Is it right that parties in civil proceedings, many of whom will not have money to spare, should subsidise proceedings between divorcing couples, still less proceedings for the protection of children?

17. If, as all agree, it is essential in the public interest to provide a family justice system, and it cannot be fully self-financing, should the cost be found from society at large or from a charge, essentially by way of taxation, on those who need to bring claims in the civil courts?

18. The proposals for Enhanced Court Fees go even further. They are expected to raise an additional £190 million p.a., of which £160 million is expected to be raised from civil claims. The Impact Assessment for these proposals contains on page 1 a statement of how the additional funds will be applied:

    > *"Government intervention is necessary to set fees at a level that recovers more of the cost of the civil court system (civil and family courts) (net of remissions), to set fees above cost in specified circumstances to reduce the taxpayer burden for the cost of remissions, and to ensure the continued operation of an effective court system."*

19. It therefore appears that as well as funding that part of the deficit on the family courts not funded by the Costs Recovery proposals (about £20 million) the Enhanced Court Fees will fund the whole or part of the cost of fee remissions (about £25 million).

20. This marks a fundamental change in policy. Until now the Government has accepted that fee remissions, provided in the public interest for those unable to pay court fees, should be borne by society at large. This policy is re-stated as part of the Costs Recovery proposals, but is to be modified or abandoned under the Enhanced Fee proposals (although not so stated in the Consultation Paper).

21. This too raises an issue of policy that must be clearly acknowledged and debated. None of the documents issued by the Government sets out the policy justification for requiring civil court users who pay fees, some of whom will themselves be hard-pressed, to fund those unable to pay the fees. A benefit given in and for the public interest might be expected to be a public expense.

22. No explanation is given as to how the balance of the funds to be raised by Enhanced Fees (about £145 million) will be applied, save *"to ensure the continued operation of an effective court system"*. This is too vague. A proper analysis, in effect a business plan, should be provided before consideration is given to raising this amount through increased fees. We return to this issue at paragraph 57.

23. The Consultation Paper acknowledges that the proposals for charging fees in excess of cost of the service runs contrary to the Government's standard approach to charging for services set out in "*Managing Public Money - Charges and Levies*".

24. In summary, the proposals, particularly the novel concept of enhanced fees, give rise to major issues of policy which require public debate:

    (i) How is the position of the courts in providing access to justice for all and maintaining the rule of law for the benefit of all to be reconciled with the proposition that they should be financed only by those who actually use them?
    (ii) Should those who use the civil (non-family) courts subsidise those who use the family courts?
    (iii) Should fee remissions for those who cannot afford to pay fees be financed by other users of the courts?

    These are issues of policy which it will be for Parliament to decide, but we are concerned that they should be openly acknowledged and explained so that there can be a fully informed debate about them.

Access to justice: is the MoJ research and impact assessment adequate?

25. Access to justice is a practical requirement, not a theoretical aspiration. The State must provide a court system to which parties can in practice have access, as section 92(3) Courts Act 2003 makes clear.

26. The research so far undertaken by the MoJ is clearly inadequate to assess the probable consequences of both the Costs Recovery and Enhanced Fees proposals on the ability of parties to afford access to the courts and on their willingness to do so.

27. The MoJ admits as much in the Consultation Paper and Impact Assessments. It is expressly *assumed* that increased fees would not reduce the volume of cases brought, or would do so only to a small extent. It is admitted that the MoJ does not have detailed statistics on the proportions of parties that are businesses (although it is stated that of the £105 million expected to be generated by the

Recovery Costs proposals, around £65 million will come from business users). It accepts that the research has been very limited.

28. Paragraph 121 of the Proposals documents states:

> *"The research we have undertaken, which suggests that court fees are a secondary consideration in a decision to pursue litigation, provides some reassurance that this is unlikely to deter people from bringing arguable cases before the courts."*

The research so far undertaken is, with respect to the MoJ, clearly inadequate. The principal research has been undertaken by Analytical Services, consultants who are closely involved in the development of the fee proposals on behalf on the MoJ. Their 21-page report is published with the Consultation Paper. The research consisted of 18 telephone interviews conducted with organisations and solicitors falling into the categories listed on page 1 of the executive summary. Twelve were with large organisations, debt recovery agencies and solicitors concerned with debt recovery claims. A further two were solicitors who make personal injury claims on behalf of clients and the remaining four were solicitors who represent privately paying private law family clients.

29. While this may provide some basis for conclusions on the possible effect of the proposals on debt recovery claims brought by debt recovery agencies and large businesses, it provides no evidence on the likely effect on individuals and small and medium-sized businesses. Debt collecting businesses have large numbers of claims of a generally straightforward type. They can take a commercial decision based on the likelihood of recovery and the amount of the costs set against the background of a large number of claims.

30. By contrast, claims brought by other businesses and by individuals are of many different types and sizes. There are some claims, such as for personal injuries, which share common features but there are many that have their own particular features and are often one-off. For most of these parties, litigation is an unusual, and probably unique, experience.

31. Most individuals and businesses avoid litigation unless they consider it absolutely necessary. For most, it is an expensive process which they may already have difficulty in funding. Fee remissions are available to individuals but they are set at a level that provides relief only to those on very low incomes. Under the system in force since October 2013, full remission is available only to those with a *gross* monthly income of less than £1,085 (assuming they have no children) and for every £10 of income above that amount the party must pay £5 towards the fees.

32. The rationale for Enhanced Fees is said in paragraph 118 to be that *"those who use the courts should make a greater contribution to the costs of running those services where they can afford to do so."* There is no evidence advanced for the apparent assumption that the size of a claim and the means of the party making it, are necessarily related.

33. It should also be borne in mind that those who bring claims do so in the expectation of recovery. When claims are successful however, it is the defendant who has to reimburse the claimant for the court fee through the mechanism of

costs. It is a matter for consideration whether debtors for example (very often in difficult financial circumstances themselves) should pay more than their debt, the interest on that debt and the true court costs to finance other parts of the court service.

34. The research so far conducted has not investigated the likely impact of the proposals on this broad range of businesses and individuals drawn from all sections of society. Nor has it investigated the broader social implications the proposals may have, since it cannot be doubted that access to justice at reasonable cost plays a vital role in moderating individual and commercial behaviour more generally, and is therefore of benefit to all, whether they are "court users" or not.

35. The assertion in the Impact Assessment (page 6) that user demand will not change in response to planned fee rises appears to contradict a basic law of economics concerning the elasticity of demand. It therefore requires justification based on data which has not been obtained, and an analysis which has yet to be made. In the absence of such evidence, the presumption has to be that there will be a demand effect, and the number of cases will go down, not because of need, but because of cost.

36. The research so far undertaken does not therefore enable the Judiciary to share the MoJ's confidence that the proposals will not affect access to justice. The same applies to the assumptions on case volumes made in the Impact Assessment which are critical to the economic savings which the proposals are designed to achieve. It is of the utmost importance that short term proposals to save costs do not lead to a vicious circle of decreased volume and increased costs and result in irremediable damage to the system of civil justice as a whole.

Enhanced Fees in commercial cases: the mistaken approach

37. A significant part of the proposals is to levy higher fees on "commercial proceedings" (paragraph 20).

38. "Commercial proceedings" are defined for these purposes as proceedings brought in any of the jurisdictions accommodated in the Rolls Building, that is the Chancery Division, the Commercial Court, the Admiralty Court and the Technology and Construction Court (TCC) and their District Registries.

39. This proposal rests on a misunderstanding of the way the courts operate in practice and which would have undesirable and unintended consequences.

40. We agree that those who bring very large claims in relation to commercial, financial, property and other business matters in any part of the High Court, whether in London or out of London, should pay the full cost of the proceedings.

41. However, the rationale for the proposal contained in paragraphs 153 to 158 suggests that the role of the courts housed in the Rolls Building has not been fully understood. It is stated that in the disputes brought to these courts "there

are significant sums of money at stake" which "often involve large multi-national organisations or wealthy individuals." (Paragraph 153). It is to be noted that there is no statistical evidence provided to support this assertion. While it is certainly true that there are some cases in these courts involving large organisations or wealthy individuals, there are many cases, and almost certainly a significant majority, which involve small or medium-sized UK-based businesses and individuals who are not wealthy. The intense publicity surrounding cases involving certain very rich individuals should not lead anyone to think that the great majority of individuals involved in litigation in the Rolls Building fall into that category or anything like it.

42. This is particularly true of the Chancery Division, which sees a very broad spectrum of cases falling within the areas of law dealt with in that Division. While a material portion of its caseload has a strong international dimension (including intellectual property - where the High Court of England and Wales is in direct competition with the courts of other EU states - large cross-border insolvency cases and competition cases), a large number of business and property-related cases are brought in the Chancery Division, most of them originating within England and Wales. As well as providing a court for dealing with disputes over wills, trusts and land, the Chancery Division may fairly be described as also providing a business and property court for the UK domestic economy alongside the other specialist courts in the Rolls Building and the Mercantile, TCC and Chancery Courts outside London. Reflecting that economy, many of the parties in such cases are, as mentioned above, small or medium-sized businesses, as well as individuals. This is reflected in the volumes of business of the different courts in the Rolls Building. Even leaving aside insolvency and company claims, some of which are very substantial, there were in 2012 4,999 claim forms issued and 255 trials heard in the Chancery Division in London, compared with 1,253 claims issued and 43 trials heard in the Commercial Court and 457 claims issued and 35 trials heard in the TCC.

43. The TCC has both a High Court and County Court jurisdiction and deals with a wide range of claims. In the High Court about 50 per cent of the claimants who issued claims in 2013 are small or medium sized business enterprises. Such litigants are usually not cash rich and may be seriously prejudiced by issue fees of the order of, say, £10,000. Further, the TCC deals with the enforcement of adjudication claims on a regular basis. These are claims for summary judgment by the successful party to an adjudication where the unsuccessful party has refused to pay the adjudicator's award. The sums at stake are often not substantial - typically between about £15,000 and £250,000 - but they can raise difficult points of law and, as a matter of policy, these cases are always heard by High Court judges of the TCC to ensure consistency and coherence of approach. This policy has proved very successful. The imposition of high issue fees would mean that in the smaller claims the fee would be similar to the sum at stake.

44. The proposal also conflates two concepts: that of a commercial/non-commercial claim and a "high-value" claim. A claim by the owner of a house against the contractor who badly built an underground swimming pool is not a commercial claim, but the claim by the contractor against the sub-contractor who carried out the relevant work is a commercial claim. They would be treated differently for these purposes even though they are not materially different. Similarly, it would

be odd if the claimant, instead of suing for breach of contract, made a demand on the contractor's performance bond - a claim which, if disputed, could be resolved by the court in a one day hearing - should pay the same court fee as he would pay if he claimed a similar sum for breach of contract - a claim that might take four weeks of court time to resolve. If the former claim is a "standard money claim", the question may be asked why it is that the claimant having to pay 20 times as much per unit of court/judicial time?

45. A further problem is presented by claims for a declaration by the court of the parties' legal rights, which may be worth very substantial sums, but no sum of money is claimed. The TCC, Chancery, Mercantile and Commercial Courts often deal with cases where the parties seek declarations as to the meaning of contracts where the outcome will often determine that there are millions of pounds due one way or the other. Such cases may take a substantial amount of case management and indeed trial time. They cannot readily be accommodated into the proposed system of scales of fees by reference to the amount claimed.

46. Paragraph 153 continues by stating that the parties to commercial proceedings are persons "who have chosen to have their commercial affairs governed by English law, and to have their disputes decided through the English courts." The same theme is picked up in paragraph 158 where, referring to commercial proceedings (as broadly defined above) it is said "the Government believes that, for this specific group of cases, litigants obtain a much greater benefit from being able to litigate their disputes through the UK courts."

47. It is a minority of parties in cases in the Chancery Division who have any choice over the law that governs their commercial affairs or the courts that have jurisdiction over them. As the majority live or carry on businesses in the UK and have dealings with other persons and businesses in the UK, there is no realistic alternative to English law and to the jurisdiction of the courts of England and Wales. The notion that they "choose" to bring their proceedings in the courts based in the Rolls Building is a fundamental misconception.

48. The imposition of Enhanced Fees and higher Enhanced Fees on the parties will impose a material additional cost on domestic businesses, many of which are small and medium-sized, and on individual litigants, many of whom have limited resources. As mentioned above, no research has been undertaken as regards the likely effect of substantial fee increases on such claimants.

49. The Commercial Court itself, like the Chancery Division and the TCC, has an excellent international reputation as a forum to resolve disputes. Its continued success brings significant economic and wider benefits for the UK economy. There is a concern that the introduction of Enhanced Fees may affect the amount of international work which these courts currently attracts; and will be counterproductive in the long term. The loss of only a small number of such cases could cost the economy more than the savings which the proposals in the Consultation Paper, including the introduction of Enhanced Fees are designed to achieve.

50. Commercial litigants not infrequently start proceedings in order to bring a recalcitrant defendant to the negotiating table in the expectation that following

the issue of proceedings the dispute will be swiftly resolved. If faced with a very significant issue fees for "commercial claims", such litigants may respond by incorporating arbitration clauses into their contracts so that the courts do not resolve their disputes in future. Alternatively, those who have a choice of forum may go elsewhere; there is already strong competition from New York. Singapore will establish an International Commercial Court with considerable Government investment to provide state of the art facilities. There is also a PRIME Finance Disputes Centre in the Hague supported by the Government of the Netherlands; proposals to establish an English language commercial court in Germany are ongoing.

51. There is no justification for distinguishing between "commercial proceedings" in the Rolls Building (and District Registries of those courts out of London) and cases brought elsewhere in the High Court, particularly in the Queen's Bench Division or the other courts out of London. Many of the cases brought in the Chancery Division, the TCC and the Commercial Court could equally well be instituted in the Queen's Bench Division or in the other courts out of London. It is to be expected that with the introduction of higher Enhanced Fees well-advised parties will indeed issue their proceedings in the Queen's Bench Division or in the other courts out of London. If so, there may be contested applications to transfer the claim from the Queen's Bench Division to the Commercial Court/TCC/Chancery Division or, more likely, both parties will be content to continue with their cases in the Queen's Bench Division, expecting judges to be reassigned to hear the claim, thereby enabling the claimant to have the same judge for a fraction of the cost.

52. There are already many cases properly brought in the Queen's Bench Division that are for all intents and purposes indistinguishable from those brought in the Rolls Building. For example, claims brought by investment bankers for payment of bonuses worth many millions of pounds are brought in the Queen's Bench Division as are claims for negligence against solicitors, accountants or other professionals arising out of commercial transactions. There can be no obvious justification for charging such claimants a lower fee than is required of an individual bringing a similar negligence claim against solicitors but arising out of a property transaction, the usual venue for which would be the Chancery Division.

53. It is difficult therefore to justify imposing higher fees for cases simply because they are brought in some parts of the High Court rather than in others. That is not to say that there may not be justification for a lower level of fees for particular types of case, such as personal injuries, or higher fees in other types of case.

54. As this proposal stands, it is unworkable. Great care and precision would be needed if such a proposal is to be taken forward to avoid not only injustice but also damage to the international position of London and hence the UK economy.

Conclusion

55. The Judiciary has for many years consistently made clear that it does not support the policy of successive Governments that the justice system should be self-

financing. As Sir Richard Scott VC (now Lord Scott of Foscote) said, this "profoundly and dangerously mistakes the nature of the system and its constitutional function." That is an issue of principle which must be the subject of debate and ultimate decision by Parliament.

56. We have also sought to highlight difficulties to which the proposals may give rise in the light of the stated aims contained within the Consultation Paper itself. Quite apart from these matters, it is difficult to see the merit of proposals which would increase the cost to litigants but provide no tangible benefit to them or the judicial system more generally, through the hypothecation of the increased fees.

57. Finally there can be no justification for increasing fees unless:
    (i) it is clear that the fees will be retained within the court system and used, through the governance structure of HMCTS established by the constitutional settlement of 2005-8, for the benefit of those who use the system; and
    (ii) the Government permits (or itself makes) proper investment in the court system through HMCTS so that it can be modernised and made fit for purpose, for the benefit of the economy, and the public as a whole.

    Unless these conditions are fulfilled, increases in fees of the types proposed would be wrong.

II. Specific questions raised in the Consultation Paper

58. The specific questions raised in the Consultation Paper relate in the main to detailed aspects of the proposals, and the answers given should be read subject to the issues of principle which we have addressed above.

59. **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?*

    This is a matter on which the Judiciary cannot comment.

60. **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.*

    We do not disagree with this proposal in principle, although we note that the rate of the increase for many of the claims is high.

61. **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 Productions Centre that would be charged for applications lodged online? Please give reasons for your answer.*

    We agree with the proposal not to increase court fees for the four lowest categories of money claim. However we have concerns about the proposed

levels of increase for claims above those levels. First, there is a large and unexplained variation in the rates of increase for other categories (ranging between 12 per cent and 81 per cent). Claims exceeding £3000 but below £5000 and exceeding to £5,000 but below £15,000 (a significant number of which will be small track claims) are subject to 66 per cent and 81 per cent rises respectively.

We also agree with the reasons in the Consultation Paper for giving a 10 per cent discount for MCOL & bulk centre issue claims. However we suggest consideration should be given to assisting those who do not have access to the internet, many of whom are likely to have protected characteristics.

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

    We agree with the proposal to remove separate allocation and listing fees for the reasons given in the Consultation Paper, though steps may need to be taken to ensure this does not reduce the opportunity the court has at these stages to encourage the parties to settle their disputes (through ADR for example).

63. **Question 5:** *Do you agree that small claims track hearing fees should be maintained at their current levels, which are below cost?*

    We agree with this proposal for the reasons given in the Consultation Paper, though noting that some claims in the small track are facing substantial increases: see the answer to Question 3 above. It is a matter for debate whether the resulting costs should be borne by other court users, who derive no benefit from the small claims track.

64. **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.*

    We can see the argument for leaving these fees as they are. We do not therefore disagree with this proposal. Consideration might be given however to distinguishing between High Court and County Court multi-track fees since litigation in the High Court is more costly than that pursued in the County Court: see paragraph 38 of the Consultation Paper.

65. **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.*

    We agree with this proposal for the reasons given in the Consultation Paper, whilst noting that abolishing the refund of a hearing fee might remove an incentive for a hearing not to take place.

66. **Question 8:** *Do you agree with proposals to retain the current fee levels for private law family proceedings and divorce, and the proposal to no longer charge a fee for non-molestation and occupation orders?*

We agree with the proposals to retain the current fee levels for private law family proceedings and divorce. We also agree with the proposal no longer to charge a fee for non-molestation and occupation orders (proceedings relating to domestic violence) given the importance in the public interest of such applications, but we do not consider that the costs of such proceedings should be borne by other court users. Ordinary civil and family court users should not be required to fund what is essentially a crime prevention measure. It may well be, but we do not have the relevant figures, that there is a higher than average level of fee remissions in applications of this sort, in which case the proposal to abolish fees will benefit the MoJ's budget but impose a greater charge on court users by reducing the cost to MoJ of fee remissions.

67. **Question 9:** *Do you agree with the standardisation of the fee for Children Act cases, and with the proposal that there should only be one up-front fee for public law family cases? Please give reasons for your answer.*

We agree with the standardisation of the fee for private Children Act cases at £215; and welcome the simplifying proposal of a single "up-front" fee of £2,000 for public law family cases for the reasons given in the Consultation Paper.

68. **Question 10:** *Do you agree with the standardization of general application fees and fees for applications within family proceedings? Please give reasons for your answer.*

We agree with the standardisation of fees for applications within family proceedings (£150 for general applications made on notice and £50 for those made by consent or without notice) in the interests of simplification, for the reasons given in the Consultation Paper.

69. **Question 11:** *Do you agree with the proposed fee levels for judicial review cases?*

We do not agree with the proposed fee levels for judicial review. This is an area of public law which, as the Consultation Paper acknowledges, operates as a critical check on the powers of the State and is a key mechanism to hold the Executive to account (paragraph 91). The substantial increase in fees proposed (125% for permission to apply applications and 216% for permission to proceed and applications for oral renewal that are not successful) will make only a small contribution to the ultimate objective of reducing costs but will inevitably have a substantial "chilling effect" on such applications, particularly when looked at in the context of the reduction in the availability of fee remissions, and the proposed changes in the availability of legal aid for judicial review.

We also question the cost attributed in particular to applications for permission, usually listed for half an hour (£680) where by way of comparison, £1090 for a multi track hearing is said to be more than the cost (paragraphs 63 and 64).

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

    Subject to the points made in the first section of this response, we do not disagree with the proposal that the fee for an application for grant of probate should be increased to full-cost levels. However, there is no evidence in the Consultation Paper that the proposed increase (a very significant one, of £45 to £150 i.e. of 223 per cent) is necessary to achieve that aim.

    Paragraph 98 of the Consultation Paper states that financial modelling shows the fee for a probate application significantly under-recovers the cost of the service. Although separate figures for probate business are not given in the accounts of HMCTS for 2012/13, we note that the accounts for earlier years show that there was a surplus of £2,233,000 on gross fee revenue of £16,715,000 in 2010/11 and a surplus of £3,954,000 on gross income of £17,805,000 in 2011/12.

71. **Question 13:** *Do you agree with the proposed fee levels for cases taken to the Court of Appeal?*

    1) We agree with the increase of the fee for permission to appeal and with the level proposed subject to the system of fee-waivers and remissions remaining in place, and the raising of the threshold to a commensurate degree. However we do not consider an applicant should be charged for an oral hearing for permission to appeal, if the court of its own motion directs that such a hearing take place.

    2) Subject to 3) below, we agree that if the current proposal for the fee for a renewed oral application is adopted, no further fee should be charged for the full hearing, whether the full hearing is listed at a later time or follows immediately on from the oral permission hearing.

    3) We agree that an additional fee should be incurred where there is an application for an oral permission hearing. This serves the legitimate aim of deterring unmeritorious or spurious applications and reflects the substantial additional resources involved in an oral hearing and the production of a reasoned judgment. However we do not agree that all oral permission to appeal hearings should attract the full appeal fee.

    4) We suggest instead the following would be more proportionate and better reflect the cost of such applications:

    > (a) An oral permission to appeal hearing should attract up to half the full appeal fee. If permission to appeal were granted, the appellant would then incur the full appeal fee minus the oral permission appeal fee.
    >
    > (b) An oral permission to appeal hearing, listed with appeal to follow if permission is granted, should attract the full appeal fee. But there should be a discretion to remit the difference between the oral permission to

appeal fee and the full appeal fee depending on whether the appeal was fully argued or dealt with as an application for permission, something which would only be apparent following the hearing.

5) We support the proposal to increase the fee for full hearings to the same level as that which applies to a multi-track hearing as fees in respect of appellate process ought, generally, to be consistent with the approach taken to first-instance fees.

6) We support the proposal to introduce fees for applications made in an appellant's notice, or by separate application notice, but not for applications to extend time. The latter, unlike the former, incur minimal administrative costs and often arise for reasons beyond the parties' control, for example, ill-health (we note also applications to extend time were exempted from the earlier similar proposals to introduce fees in CP15/2011).

7) We support the proposal to introduce a general fee and a standard fee at the levels proposed since all stages of the appellate process use administrative resources. It is important that General Applications are accurately defined however to avoid unintentionally reducing the fee of £235 currently charged for certain applications, to the proposed level of £150.

72. **Question 14:** *Do you agree with the Government's proposed changes to the fees charged in the Court of Protection?*

Given the special nature of the jurisdiction of the Court of Protection and its rules on making orders for costs, we consider it would be wrong to charge any fee that seeks to recover more than the relevant underlying costs. We make the following comments on the specific proposals for change.

1) We agree with the proposal to charge a fee of £220 for what are described as simple applications, and £400 for all other applications in Part 9 Applications (to start proceedings).

2) However, the detail of how the proposals will work in practice will need to be carefully considered. For example, a simple application will need to be carefully defined. In addition, consideration needs to be given as to how to categorise applications for permission (Part 8 applications) and the subsequent application, if permission is granted. It will also be necessary to consider whether as a matter of principle there are some applications for which a fee should not be charged at all or for which the lower fee should be charged although they are not simple: for example applications involving the liberty of the protected person or applications made because the protected person no longer lacks the relevant capacity.

3) We agree that it is appropriate to charge a fee for Part 10 Applications (applications within proceedings), but we do not agree that the general points in paragraph 86 about different types of application, and the charges to apply to each is an appropriate one to make in the Court of Protection, and suggest any application under Part 10 should attract the lower fee (£50) only. There are two reasons broadly, why we take this view:

(a) First, there is a statutory "steer" towards the making of applications in existing proceedings over what could be the lifetime of a person who lacks capacity in Section 16(4)(a) of the Mental Capacity Act 2005 (it provides that in determining whether to appoint a deputy the court must have regard to the principles that a decision of the court is to be preferred to that appointment and that the powers of the deputy should be as limited in scope and duration as is reasonably practicable).

(b) Secondly, the court only has jurisdiction because the relevant protected person does not have capacity, as a result of lifelong illness or accident for example. The effectiveness of the court would be significantly reduced – and the protection of the most vulnerable accordingly undermined - if anyone was deterred from making an application because of the fee charged: if a "whistleblower" for example, was deterred from objecting to improper steps taken in relation to a protected person.

4) We agree with the proposal that the hearing fee should be charged before the hearing rather than at the end of the proceedings.

5) We do not agree with the proposal that applications objecting to the registration of Enduring or Lasting Powers of Attorney to register powers of attorney should attract the same fee as that for a complex application, £400. Similar considerations apply to these applications as those referred to at 3) (b) above.

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

A substantial amount of fees go uncollected. A reason for this (anecdotally) is that the Judiciary at many levels will deal with requests made by letter rather than requiring an application. Examples include extensions of time and applications for varying certain directions, and the making of consent orders. We suggest HMCTS could investigate this and with the Judiciary put measures in place to reduce its occurrence.

74. **Questions 16-19:**

We have set out our views on Enhanced Fees in the first section of this response. We add the following in relation to the specific proposals made.

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

We have no observations to make on the specific percentage proposed, but note there may be practical difficulties in charging an issue fee which is based on a percentage value of the claim where the assessment of a claim's value is ultimately made by the court, not the parties. It would be sensible in our view to

limit the fee which a claimant ultimately recovers through the mechanism of costs to one which reflects the value of the claim assessed by the court, rather than the amount claimed by the litigant initially.

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

    If fees are to be based on the value of the claim, we agree it would be sensible to adopt a cap of a maximum fee. We have no observations to make on the maximum cap proposed except that there appears to be no logical basis for distinguishing between specified money claims and unspecified claims (see the answer to Question 18 below).

77. **Question 18:** *Do you believe that unspecified claims should be subject to 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.*

    We agree that a maximum fee of £10,000 may deter claimants from bringing unspecified claims, which would be undesirable in relation to any meritorious claim, and especially so in the case of personal injury or clinical negligence claims for example. There is also a risk that parties may underestimate the value of their claim to reduce the cost of the fee. In our view however, the acknowledgment in the Consultation Paper of a potential deterrent effect, supports the concern already raised about the effect of the introduction of Enhanced Fees generally, whether for specified or unspecified claims, and we can see no logical justification for distinguishing between the two types of claim. If the proposals in the Consultation Paper are to be implemented however, we would not disagree with a lower cap of £5,000.

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

    We have nothing further to add.

79. **Questions 20-27:** *Questions relating to commercial proceedings*

    (i) **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?*

    (ii) **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.*

    (iii) **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 minimize the cost? Please provide further details.

(iv) **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.*

(v) **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?*

(vi) **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.*

(vii) **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 minimizing the risk that the appropriate fee could be avoided?*

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

We have set out our views on Enhanced Fees in the first section of this response.

80. **Question 28:** *Do you agree that the fee for a divorce petition should be set at £750?*

1) We do not agree with the proposal that the fee for a divorce petition should be set at £750.

2) Almost certainly, the suggestion would act as a significant impediment to access to justice for many individuals. The great majority of petitioners are women. Many of them will be of limited means, but not entitled to fee remission and the new fee will be unattainable. They may well forego divorce; and when forming new relationships may prefer to cohabit rather than re-marry. Thus, they would lose the many financial and other protections afforded to married women under the existing law. The proposal, therefore, might give rise to an objection that it is indirectly discriminatory because most of the petitioners are women, and because the impact of price increases would affect them disproportionately.

3) This is an enhanced fee which significantly exceeds the value of the work in administering the case in question. The suggestion is to increase the current fee for what, almost inevitably, will be an administrative process (given that 95 per cent or probably more, of all petitions are undefended) from £410 to £750, i.e. "*around three times the cost of proceedings*": see paragraph 188 of the Consultation Paper.

4) The Government accepts (paragraphs 71 and 188) that the current fee of £410 already exceeds the actual cost of the administration of an undefended

divorce case, namely £270. Currently, the profit element on each petition is £140. There are around 120,000 such petitions annually. The revenue raised from a captive divorce market is already £16.8 million (£140 x 120,000 = £16.8 million).

5) We recognise that it would be not be feasible in the present climate for the Government to reduce the fee to its actual value and to forfeit this revenue of just under £17 million (which equates to more than 10 per cent of the direct judicial costs of the civil justice system as a whole (£161 million)).

6) The proposal for increase, if implemented, would raise a further £40.8 million (120,000 x 340 = £40.8 million) and not £30 million as stated in paragraph 189. When added to the existing profit element (almost £17 million) the resulting figure is a little under £60 million or just short of 10 per cent of the total cost of the entire civil justice system of £610 million.

7) The justification for the proposal is set out in paragraph 187 of the Consultation Paper: "*We believe that divorcing couples would be prepared to pay a higher fee to complete the dissolution of the marriage. We believe that it is right that those who can afford to pay more should do so to ensure that the courts are properly funded.*"

8) There appears to be a misconception that the fee is paid by the *divorcing couple*. It is paid by the petitioner: hence the important issues highlighted at 2) above. In any event, the Consultation Paper advances no evidence either (a) to justify the belief that divorcing couples would be prepared to pay a higher fee to complete the dissolution of the marriage, or (b) to justify the assertion that the captive divorcing market "*can afford to pay more*". Nor does it explain why it is right that those who can afford to pay more should do so to ensure that the courts are properly funded. We question whether it is appropriate that this particular sector of the litigating community should assume so large a responsibility to fund the courts properly, rather than the general taxpayer.