



Department for Constitutional Affairs

Civil Court Fees

Submission by JUSTICE

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1. JUSTICE is an independent all-party human rights and law reform organisation. It is the British section of the International Commission of Jurists.
2. In addressing these proposals, we note that they are intended to raise a net gain of £34m, thereby raising by 12 per cent the contribution made by litigants. Further increases will presumably be required in order to fund the Supreme Court envisaged in the Constitutional Reform Bill. These have been estimated as requiring a rise of between one and two per cent on court fees. However, it would appear from this consultation that a further rise somewhat equivalent to this will be required if the Supreme Court is to be self-funding – though, no doubt, some part of this sum can be raised from fees payable by users of the court itself. Thus, it is particularly vital that the principles behind this increase are clear and acceptable. In its final statement of decisions on this round of court fees, it might be helpful if the Government also set out its plans in relation to the further increases that will be required to pay for the Supreme Court.

Principle

3. We note that the consultation paper indicates (paragraph 3.2) that comments are not sought on the ‘twin policies of recovering the cost of services through fees and of protecting access to justice’. We make no comment. We do, however, wish to make observations on the further principles set out in paragraph 5.1 to be applied in relation to access to justice and announced by the Lord Chancellor to Parliament on 19 November 1998. We consider that the following should be added:
 - The level of fees should recognise the public function of particular litigation.
4. The application of this principle has two relevant aspects to this consultation:
 - Appeals;
 - Applications for judicial review.
5. At paragraph 5.6, the consultation paper recognises that, in effect, fees in the County Court subsidise the High Court and Court of Appeal. This is said to be because:

Those cases resolved in the county courts benefit from decisions taken on appeal in other cases that by their nature are disproportionately costly. It would be unreasonable and would restrict access to justice if those claimants whose cases are resolved in the High Court were required to meet the full

costs individually, despite the fact that all other litigants benefit from those decisions.

6. It should be noted that, first, by no means all cases in the High Court are appeals. The paper gives no justification for subsidy of fees in High Court cases where the court is exercising an original jurisdiction. Secondly, the major third party beneficiaries of cases in the higher courts are those whose legal position can be resolved without litigation but by reference to that now-decided case. These will be many more in number than those who then choose to litigate, arguing that the decided case is not relevant in their circumstances.
7. The paper gives insufficient information on the impact of the proposed fee rises on applications for judicial review. Such an application necessarily involves a matter of public law and the competence of a public authority. The court is unavoidably performing a public function in making its determination in such a case. The proposed implementation of one fee of £200 for a judicial review application will mean the demise of a reasonable £30 fee for an application to be determined without an oral hearing. This may well deter applicants for whom it is worth spending this amount from their own resources to get their case before a judge. If successful, it will often be possible to obtain legal aid or other subsidy. We would argue for the retention of the split fee in judicial review cases. We would also argue against hourly court fees in relation to such cases (see below).

Exemption and remission

8. The proposals are intended to raise court fees by 12 per cent and, thereby, the level of court fees will rise substantially. They are already at rates that are an impediment to access to the courts for those who have to meet them out of their own resources. Authority for adequate subsidy of court fees for the poor ranges from Magna Carta's resounding:

To no one will we sell, to no one will we deny or delay right or justice

To the Recommendations of the Council of Europe:

No sum of money should be required of a party on behalf of the state as a condition to commence proceedings which would be unreasonable having regard to the matters in issue.

In so far as the court fees constitute a manifest impediment to justice they should be, if possible, reduced or abolished.¹

9. Current policy is to meet court fees of the poor by:
- Legal aid;
 - Exemption if on means-tested benefits;
 - Discretionary remission if, in exceptional circumstances, the applicant would suffer undue hardship.
10. There are two problems with discretionary remission. First, as court fees rise, there becomes a need to specify eligibility more clearly. Secondly, as the test for legal aid becomes more complicated, it cannot be assumed that meritorious cases taken by those on low incomes will be assisted by public funds.
11. The Legal Services Commission applies a cost-benefit test to the grant of legal representation in civil cases.² For example, a case will not be funded even if estimated to be more than 80 per cent likely to succeed if predicted legal costs are less than the quantifiable sum of damages claimed. Thus, a person with income just over basic means test limits may have an almost certain case but be unable to obtain legal aid if, for example, the claim was for £10,000 but legal costs are estimated at £11,000. They might well be unable to meet the cost of court fees. For example, in the case of judicial review, these are proposed at £200 and, in terms of the general time limits on taking such actions, would have to be paid within the short period of time, three months, generally allowed for the taking of such actions.
12. In any event, a judgement on merits of the case would be inappropriate in relation to remission of a fee payable on access to the court, even if justifiable in relation to access to state-funded legal aid.
13. Thus, the provisions on remission should be brought up to date. A relatively simple system would be to extend exemption to those with income within 150 per cent of the rates applicable for the appropriate means-tested benefit and on the same capital rules.

Discount for issuers in the County Court Bulk Centre (CCBC)

14. The paper proposes that the discount on fees for users of the CCBC be increased from £7 to £10. This is, however, simply stated as a fact in paragraph 7.2 without any

attendant costing: 'the aim is to maintain a common scale of fees on issue of money claims with the Supreme Court'. The increased discount for large corporate users, albeit that it will be passed on in many cases to defendants, sits oddly in a paper which will result in major increases in fees such as near doubling of the application fee for ancillary relief – from £120 to £210.

15. It is regrettable that the additional cost of this discount appears not to be disclosed in the paper.

Relative burden on the County Court

16. A feature of the proposed distribution of additional costs is that the Supreme Court is subsidised by fees from the county court. The paper takes the position that this is unavoidable:

A degree of county court over-recovery cannot be avoided if the Supreme Court is to significantly improve its level of cost recovery. (para 7.1)

17. Such a statement would appear to breach the third of the 'key principles' behind fee-setting which are stated in paragraph 5.1:

Fees should match the cost of the service for which they are charged.

This would appear to rule out any such cross-subsidy. If the Supreme Court fees cannot reasonably be raised beyond a certain point then this should not be remedied by attempting to breach the principle of a proportionate charge in each individual case.

Hourly hearing fees

18. The paper sets out three options in relation to hourly hearing fees in the Supreme Court and the Court of Appeal together with a fourth, 'D', in which all fees are raised by £100 for claims over £15,000. We consider, as a matter of principle, that hourly fees should not be paid in relation to applications for judicial review for the reasons set out above.

19. As a matter of practice, a way needs to be found which is practical to administer and resistant to any abuse. If the Government wished to pursue such fees, we consider that it would be easier to charge a set fee for any case that comes to trial – perhaps at one level for those estimated to last five hours or less; another for those under 11 (the latter being the average for a personal injury trial and the former apparently the

average for all trials in the Supreme Court (para 6.5); and a third, daily rate, for those longer than 11 hours. The judge could be given a power to allocate costs of any hearing that extended significantly beyond estimate.

Methodology of cost estimate

20. We are concerned by the possibility that the mechanism used by the Treasury to estimate costs of using assets bears unfairly on the Court Service because of the way in which the building of the Royal Courts of Justice was originally financed. This is the assertion of an editorial in the *New Law Journal*³. It would be extremely unfortunate if rises of the kind proposed in the paper were, in reality, based on flawed calculations of cost.

Conclusion

21. Accordingly, we consider that the proposals need considerable revision to address the following issues:

- The principle that fees should recognise the public function of particular litigation.
- Clear rules on remission of fees so that fees are automatically remitted for those with an income within 150 per cent of those applicable for eligibility for means-tested benefits.
- Reconsideration of the proposed discount for users of the County Court Bulk Centre.
- Removal of cross-subsidy in breach of the Government's principle that 'fees should match the cost of the service for which they are charged'.
- Flat rate hearing fees in the Supreme Court and Court of Appeal in three simple bands.
- Review of how costs for use of the Royal Courts of Justice are estimated.

¹ Council of Europe *On Measures Facilitating Access to Justice* 1981, recommendations 11 and 12.

² Para 4.5 *Funding Code* Legal Services Commission.

³ Adrian Jack, 'Court fees: the new stealth tax?' *New Law Journal* 18th June 2004.