

Written evidence from the Ministry Of Justice

Executive Summary

1. The courts fulfil a vital role in an effective and functioning democracy. They provide access to justice for those who need it, upholding the principle of the rule of law. That is why we need to make sure that the courts and tribunals are properly funded. The Government has set out its plans for reform to the courts and tribunals to deliver a modernised, more efficient and user-focused system.
2. There is however, only so much that can be delivered through efficiency measures alone. If we are to secure sustainable funding of the courts and tribunals, we must also look to those who use the system to contribute more where they can afford to do so.
3. In pursuit of the objective of protecting access to justice, since 2013, the Government has, following public consultations, introduced major fee charging reforms to bring civil cases to the courts and tribunals, including :
 - introducing fees into the Employment Tribunals in July 2013;
 - introducing a new fee remissions (waiver) scheme in October 2013;
 - increasing fees in civil and family proceedings to cost recovery levels in April 2014; and
 - introducing enhanced fees to issue a money claim in March 2015.
4. The Government published its response to the Consultation from January 2015 on further court fee increases in July, as notified to the Committee,¹ and, in doing so, announced the decision that we will be taking forward the proposals to increase the fees charged for possession claims, general applications and the fee to make an application for a divorce. In the same document, we also announced further proposals for consultation including: increasing the higher cap for money claims; a general uplift of 10% to the fees charged in a wide range of civil proceedings; and introducing or increasing the fees in a number of tribunals.
5. It is difficult to draw conclusions on the impacts of the changes in fees so soon after implementation. There have been, for example, changes to economic conditions, other policy changes and additional government intervention which have coincided with the fee reforms and have all contributed to a complex picture. Notwithstanding it being early days, the Government is committed to ensuring that access to justice is not restricted by fee increases. We routinely monitor caseload data extracted from court and tribunal systems to understand trends in caseload volumes and if there appears to be a cause for concern, the Government takes appropriate action.

For example this has led us to:

- carryout a post-implementation review of the introduction of employment tribunal fees;

¹ https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation/supporting_documents/courtfeesletter.pdf

- exempt certain applications from existing fees orders, (e.g. applications for certain protection orders in family proceedings);
 - improve the remissions guidance;
 - ensure eligibility for remissions takes account of certain compensation schemes; and
 - consult on further changes to the remissions scheme.
6. On the 13 April 2015, we introduced a criminal courts charge in the criminal courts. The provisions apply only to offences that have been committed on or after that date. The introduction of this charge makes it possible to recover some of the costs of the criminal courts from offenders, therefore reducing the burden on taxpayers. The Government believes it is right that convicted adult offenders who use our criminal courts should pay towards the cost of running them.
7. The charge is only levied when an offender is found guilty and after all other fines have been paid. At the same time we realise the importance of making sure offenders have a fair opportunity to pay. As with other court ordered financial impositions an offender has an opportunity to pay the charge in affordable instalments that can be adjusted if their financial circumstances change. If an offender complies with their payment terms and does not reoffend within two years, the court will be able to cancel all or part of their outstanding debt so the offender is no longer liable to repay the charge.
- 8. *How have the increased court fees and the introduction of employment tribunal fees affected access to justice? How have they affected the volume and quality of cases brought?***

Full cost recovery

9. The first part of the fees reform programme was to increase the fees charged in civil and family proceedings to the value of the proceedings to which they relate. The Cost Recovery fee reforms came into effect in April 2014 and were aimed at achieving close to full cost recovery of the Civil Court system through fees (less remissions), transferring more of the cost to the user who can afford to pay and reducing the cost to the taxpayer. There were, however, some fees that, given the sensitivities involved, remained at a level below cost recovery.
10. Since the fees were introduced, officials at the Ministry of Justice have been reviewing the data on case volume levels in order to monitor their impact. Having reviewed the data, officials reported that there was no obvious impact on case volumes across the wide ranging fee increases. This was with the exception of applications made for the recovery of money (money claims). Shortly before their introduction in April 2014, there was a noticeable increase in demand followed by a subsequent fall in claims. For the majority of cases the volumes did, however, quickly recover to pre-cost recovery levels.
11. In relation to case “quality”, which we understand to mean the strength or weakness of a case, given that there has been no noticeable change in case volumes since the reforms were introduced, it is unlikely that the “quality” of claims have been affected by this set of fee increases. In addition, the research that we have commissioned and/or carried out consistently indicates that fees are a secondary consideration in the decision to litigate

and the prospect of success and the likelihood of recovering the debt being the primary considerations.²

Enhanced Fees for Money Claims

12. The rule set out in *Managing Public Money (MPM)* is that fees for public services should be set at a level designed to meet the cost of those services. Despite the Cost Recovery reforms bringing the Civil Courts closer to full cost recovery, there remains a significant gap of £214 million³ in funding for HM Courts and Tribunals Service (HMCTS). Therefore, in order to ensure that HMCTS is adequately funded, Parliament has given the Lord Chancellor the power in section 180 of the Anti-Social Behaviour and Crime Act 2014 to set fees above the cost of the specific proceedings to which they relate. As with the setting of all fees, when setting fees at this level the Lord Chancellor must have regard to a number of considerations which includes the principle of access to justice.
13. This power was used for the first time to prescribe enhanced fees for money claims which came in to effect in March 2015⁴ (after originally being consulted on in December 2013)⁵. This changed the system for charging fees in both specified and unspecified money claims worth more than £10,000. We moved from a system of 'fee bands' to an approach whereby for a money claim worth more than £10,000 the fee would be calculated at 5% of the value of the claim (4.5% for claims initiated online) up to a maximum fee capped at £10,000 (the fee for a claim worth £200,000).
14. Enhanced fees were introduced for money claims in March 2015. Overall, this had little impact on the volumes of claims because most were unaffected. However, for those cases that were affected - higher value claims in the County Court (those over £10,000), and claims pursued in the High Court (over £50,000), there was a significant increase in volumes of claims issued in the period immediately before the fee increases, followed by a significant fall following their introduction. Insufficient time has passed (only four full months since the March 2015) to be able to draw conclusions about any long term effects on case volumes, particularly bearing mind the surge of cases immediately prior to the implementation of enhanced fees.
15. Officials at the Ministry of Justice will continue to closely monitor the data and consider whether any changes are required.

Employment Tribunal Fees

16. Following a public consultation, fees were introduced into Employment Tribunals and the Employment Appeal Tribunal in July 2013⁶. The objectives were to reduce the costs of the Tribunals on the taxpayer and to encourage parties to use other methods of dispute resolution, while maintaining access to justice.

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299804/role-of-court-fees-in-decisions-to-bring-cases-to-courts.pdf and https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/supporting_documents/feesresearch.pdf.

³ This figure is made up of Civil, Family and Tribunal costs and was taken from the Published 2014-15 HMCTS Annual Report and Accounts.

⁴ http://www.legislation.gov.uk/uksi/2015/576/pdfs/uksi_20150576_en.pdf

⁵ https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/supporting_documents/courtfeesconsultation.pdf

⁶ http://www.legislation.gov.uk/uksi/2013/1893/pdfs/uksi_20131893_en.pdf

17. Since the introduction of fees, there has been a sharp fall in the number of claims lodged, which subsequently led to concerns that the fees were restricting access to justice. According to the latest statistical bulletin,⁷ the total number of claims received by the Employment Tribunal in the financial year 2014-2015 was 68% lower than in the financial year 2012-2013, the last full year before the introduction of fees in July 2013.
18. While we accept that the introduction of fees has had an impact on volumes of claims, other factors, such as changes to employment law, the availability of alternative dispute resolution services (such as Acas's free mandatory conciliation service) and the improving economy, are also likely to have had an impact.
19. Acas have recently published their own review (available on their website) which evaluates the success of the Early Mandatory Conciliation service⁸. The review reported that over 80,000 people have used the service in its first year.
20. Nevertheless, given the concerns raised in relation to the fall in case volumes, the Government announced on 11 June 2015 the start of the post-implementation review of the introduction of fees in the Employment Tribunal. The full terms of reference for the review have been published on the MoJ website⁹ and will broadly consider how successful the policy has been in achieving its original objectives, which included maintaining access to justice for those seeking to bring disputes to the Tribunal.
21. We will report on the review as soon as we are able to, and should the Government propose to make any changes to fees, or to the remissions scheme, then these will be subject to public consultation in the normal way.
22. The Committee will be aware that the Employment Tribunal and Employment Appeal Tribunal fees have been challenged by way of judicial review. The original decisions to dismiss those claims has recently been upheld by the Court of Appeal. The judgement is available online and can be found at the following link:
<http://www.bailii.org/ew/cases/EWCA/Civ/2015/935.html>.

Further safeguards to justice

23. The current fee waiver or "remission" scheme was introduced in October 2013, following a public consultation. The scheme operates across the courts and tribunals (except for the Immigration and Asylum Tribunal where separate arrangements are in place) to protect access to justice for those unable to afford to pay a fee. If an applicant meets a capital test (which operates on a sliding scale depending on the level of the fee) and an income test then they are entitled to have their fee remitted in full or part.
24. We continually monitor the scheme and consider whether any changes are required. This includes monitoring the volumes of remissions applied for and accepted and meeting with stakeholder groups to discuss various aspects of the application process.
25. Having recently reviewed the process, we have decided to make changes in order to make it simpler and easier for applicants to understand. These include:

⁷ <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-january-to-march-2015>

⁸ Evaluation of Acas Early Conciliation 2015 - <http://www.acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf>

⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434207/tor-employment-tribunal-fees.pdf

- making the content and design of the application form and guidance clearer for users to understand and for HMCTS staff to process; and
 - simplifying the type and amount of evidence applicants have to send with an application for a remission; it is proposed that evidence will only be asked for in a sample batch of applications.
26. The Government has also decided to make amendments to the remissions scheme by excluding certain state funded lump sum compensation payments for mesothelioma and other asbestos related illness. The specific payments are:
- payments made under the Pneumoconiosis etc. (Workers Compensation) Act 1979;
 - payments made under the Child Maintenance and Other Payments Act 2008 (sometimes known as the 2008 Diffuse Mesothelioma scheme); and
 - payments made under the Mesothelioma Act 2014.
27. This means that these payments are now disregarded from the assessment of an applicant's disposable capital, so that mesothelioma sufferers are no longer expected to use these funds to pay court fees. The amendments to the Fees Order¹⁰ will be made as soon as possible, but in the meantime these payments are being treated as excluded capital from the remissions test.
28. The Government has also, in the most recent consultation document on court and tribunal fees, put forward for consideration a proposal to make the disposable capital test more generous, if the cap on money claims is increased or removed¹¹. We are also seeking the public's views on whether they feel there should be any other benefits or payments that should be excluded from assessment of disposable capital for the purposes of a fee remission.
29. In addition to the availability of fee remissions, there are a number of other safeguards in place to ensure that claims such as these can be brought before the Courts and Tribunals. For example, money claims are typically brought under Conditional Fee Arrangements (CFAs) with After the Event (ATE) insurance. In successful claims, costs (including disbursements such as court and tribunal fees) are recoverable from the opponent, but if the claim is unsuccessful, the court or tribunal fee is normally covered under an After the Event (ATE) policy.
30. The Lord Chancellor also has the statutory power under the Civil Proceedings Fees Order 2008 to remit fees, in full or part, in exceptional circumstances, even where a party has not passed the eligibility requirements to qualify for a remission.

How has the court fees regime affected the competitiveness of the legal services market in England and Wales, particularly in an international context?

31. The provision under section 180 of the Anti-social Behaviour Crime and Policing Act 2014 which allows the Lord Chancellor to set fee levels above cost requires him to have regard

¹⁰ http://www.legislation.gov.uk/ukxi/2013/2302/pdfs/ukxi_20132302_en.pdf

¹¹ https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation/supporting_documents/Government%20response%20to%20consultation%20on%20enhanced%20fees%20and%20consultation%20on%20further%20fees%20proposals%20web.pdf

to a number of factors, including how charging fees set above cost (referred to here as “enhanced fees”) would affect competitiveness of the legal services market.

32. In order to understand what impact, if any, enhanced fees would have on the legal services market, the Government commissioned various pieces of research to support the development of the consultation proposals, which are published and available on the Ministry of Justice website.
33. The first was a study carried out by the Ministry of Justice’s Analytical Services team¹² to discover the potential impact of changes to the court fees on the volume of cases brought to the civil and family court. In summary, they found that court fees were not a primary factor influencing decisions to take cases to court; other factors, such as the prospects of success and likelihood of recovery, were more influential.
34. Secondly, the Government commissioned Queen Mary, University of London, to undertake a study to compare services and court fees charged in a small number of other jurisdictions. These included: Singapore, New York, Delaware, Australia and Dubai. The study concluded that the London courts enjoyed a competitive advantage over most of the jurisdictions in the study.¹³
35. Thirdly, the Government commissioned additional research including asking the British Institute of International Comparative Law (BIICL) to undertake a research project gathering views from legal professionals involved in high value international litigation and the views of legal academics.¹⁴ The study confirmed some widely held views on the strengths that London offers: English law is the prevalent choice of law in commercial transactions because of its quality, certainty and efficiency; and the popularity of the English courts is mainly based on the reputation and experience of judges.
36. Fourthly, the Government also commissioned the leading market researcher, Ipsos MORI, to undertake a study on the reasons why people and businesses bring cases to courts.¹⁵ The study found that litigation was seen as a last option for many small businesses and individuals. The primary reason for someone taking their case forward was from an emotional motivation. Users with legal representation tended to have little awareness of legal costs, including court fees than those who represented themselves, as court fees were typically the sole costs they paid. When asked about specific hypothetical increases to court fees, the research participants felt they were affordable and would not deter them from going to court.
37. Following the introduction of enhanced fees for money claims, as noted above, the Government routinely monitors the caseload data on the number of claims being issued for money claims in the civil courts. Should there appear to be an adverse impact on the legal services market in England and Wales, including its international competitiveness, the Government will consider whether any further changes are required to the civil court fees regime or to the remissions scheme.

¹² https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/supporting_documents/feesresearch.pdf

¹³ https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/supporting_documents/competitivenessofcommercialcourts.pdf

¹⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf

¹⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299804/role-of-court-fees-in-decisions-to-bring-cases-to-courts.pdf

How will the increases to courts and tribunals fees announced in Cm. 9123, Court and Tribunal Fees, published on 22 July 2015, and the further proposals for introducing or increasing fees included for consultation in Cm. 9123, affect access to justice?

38. As set out above, the Lord Chancellor has a duty when setting fees to have regard to the principle that access to the courts and tribunals must not be denied. In order to ensure that access to justice is protected, it is vital that the courts and tribunals are adequately funded. Income raised through fees, payable only by users who can afford to do so, will necessarily play a significant role in the funding of this service if we are to bring down the deficit and ease the burden on the taxpayer.
39. In view of the financial challenges and the safeguards in place, in July the Government announced that it would take forward the proposals to increase the fee to make a possession claim, the fees for contested and uncontested general applications (subject to exemptions)¹⁶ and the fee for an application for a divorce.
40. The Government believes that these increases will not negatively affect access to justice. The increases are moderate and as the Impact Assessment explains, we do not anticipate that the increases will have any impact on demand¹⁷. Furthermore, all the research carried out, as set out in detail above, suggests that these increases will not deter anyone who would otherwise have taken their claim to court.
41. These reforms are still subject to Parliamentary approval and will be brought forward for the appropriate level of scrutiny as soon as Parliamentary time allows. If these fees do come into effect then the Government will carefully monitor their impacts on access to justice.
42. In the same document and in pursuit of the above objectives, the Government also announced further proposals for consultation which included: increasing the higher cap for money claims; a general uplift of 10% to the fees charged in a wide range of civil proceedings; and introducing or increasing the fees in a number of tribunals.
43. The consultation on these proposals closed on 15th September. Officials at the Ministry of Justice are considering all the responses that were received very carefully and will, of course, take account of any views or relevant material which relates to their potential effect on access to justice.

What have been the effects on defendants of the introduction of the criminal courts charge?

44. It is too early to draw any firm conclusions regarding effects on defendants resulting from the introduction of the charge. As set out in the primary legislation, this policy will be reviewed three years after implementation. In the meantime we are carefully monitoring commentary on the provisions.
45. Concern has been raised by some magistrates and other commentators that the charge will adversely affect defendants' decisions regarding plea and where to elect for trial, in

¹⁶ Applications to vary or extend an injunction for protection from harassment of violence; applications for a payment to be made from funds held in court; and applications made in proceedings brought under the Insolvency Act 1986.

¹⁷ https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation/supporting_documents/governmentresponseimpactassessment.pdf

the case of either way offences. Concern has also been raised regarding effects on poorer offenders and their ability to rehabilitate.

46. The provisions are drafted so that defendants facing trial do not have to pay the criminal courts charge and will only be subject to the charge if they are convicted. Offenders have an opportunity to pay the charge in affordable instalments; and the offenders' payment plan is linked to their ability to pay. If an offender complies with their payment terms and does not reoffend within two years, the court will be able to cancel all or part of their outstanding debt so the offender is no longer liable to repay the charge.

Has the criminal courts charge been set at a reasonable and proportionate level?

47. The primary legislation constrains the charge levels. The Lord Chancellor must make sure that charge levels do not exceed the relevant court costs reasonably attributable to the class of case in question. In line with the principles of MPM, the overall court cost has been calculated to include the direct costs incurred at the front line by the criminal courts, for example judicial and court staff time that includes administrative and preparatory work undertaken outside of court hearings. It also includes a share of indirect infrastructure costs such as buildings and IT.
48. HM Treasury assessed our costings methodology to make sure it met the principles of MPM. The levels have been set to balance recovering cost against the desire to avoid charging so much that offenders will be unlikely to be able to repay the charge. As a result, the charge levels have generally been set below the full cost of proceedings, with charges for Crown Court cases set well below cost.
49. We consider that the charge levels are reasonable and proportionate. We intend to review the charge levels on an annual basis to make sure they continue to reflect reasonable attributable cost and will work closely with HM Treasury as part of this process.
50. Further details on the costing methodology behind the charge levels can be found in the impact assessment accompanying the Prosecution of Offences Act 1985 (Criminal Courts Charge) Regulations 2015.

Is the imposition and collection of the charge practicable and, if not, how could that be rectified?

51. We have made imposition of the charge as practicable as possible by setting predefined charging bands and making the charge mandatory.
52. The charge is collected using existing HMCTS enforcement debt collection practices; the offender can pay immediately or can provide means information to the court so that the financial orders can be paid off in affordable instalments in a priority order that allows compensation, victim surcharge, prosecution costs and fines to be paid ahead of the criminal courts charge. Offenders are also able to contact a Fines Officer at any point if their financial circumstances change so that payments can be adjusted to reflect such

changes. If an offender fails to make repayments on their impositions this money can be taken directly from an offender's earnings or benefits. Other measures that fines officers can use to collect money include: issuing warrants of control, registering the debt in the Register of Judgments, Order and Fines or making a clamping order.

53. Offenders also have the opportunity to have outstanding amounts of the charge cancelled after two years if they take all reasonable steps to pay it and do not reoffend. This will encourage compliance with payment terms as well as incentivise rehabilitation by rewarding those offenders who do not reoffend.
54. The charge levels and the ability to have the charge cancelled after two years means there may be an increased request for payment of financial impositions by instalment, which in turn will mean accounts are live for longer periods. The Government is keen, however, to make sure offenders are given a fair opportunity to pay the charge and have it cancelled in deserving cases.

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Annex A – Post-implementation demand in July (% of pre-implementation demand)

Case type/channel	£15-50,000¹⁸	>£50,000¹⁹
Specified Money – County Court Money Claims Centre	N/A	55%
Specified Money – MCOL	90%	65%
Specified Money – Bulk Centre	N/A	N/A
Unspecified Money	75%	50%
RCJ	80%	60%

¹⁸ £50-200,000 for RCJ

¹⁹ >£200,000 for RCJ

Annex B – Review of the introduction of Employment Tribunal Fees Terms of Reference

1. To review the impact of the introduction of fees in the Employment Tribunals and the Employment Appeals Tribunal, including the scheme of fee remissions, to determine how successful this has been in achieving the original objectives:
 - a. financial: transfer a proportion of the costs from the taxpayer to those who use the tribunal where they can afford to do so;
 - b. behavioural: to encourage parties to seek alternative ways of resolving their disputes; and
 - c. justice: maintain access to justice.
2. To gather the evidence to support this analysis, including, where available, data and research on:
 - a. the take up of alternative dispute resolution services, including the numbers of people using ACAS's conciliation services and the impact of mandatory notification of a dispute;
 - b. the volumes of claims received and how cases progress in the Employment Tribunals and Employment Appeals Tribunal, including outcomes - settlements and withdrawals, cases determined by a substantive hearing;
 - c. data on fee remissions, including applications made, applications granted and applications refused;
 - d. financial information, including income received from fees, the costs (including implementation costs) incurred in setting up systems to charge and collect the fees and savings delivered;
 - e. the characteristics of those who use the Employment Tribunals and Employment Appeals Tribunal, in particular users with protected characteristics; and
 - f. other research, both Government and external evidence, relevant to resolving workplace disputes.
3. To consider other factors that influenced trends in the number of Employment Tribunal cases:
 - a. Evaluate the historic downward trend in ET cases prior to the introduction of fees, and continuation of this trend following the introduction.
 - b. The impact of the improvement in the economy on the number of people having their employment terminated.
 - c. To assess whether there has been a reduction in weak or unmeritorious claims
 - d. Whether there has been any impact from changes to employment law.
 - e. What impact the introduction of fees has had on claims from people who would not otherwise have been able to get anything from a former employer due to insolvency, or another similar reason.
 - f. Other changes in users' behaviour which has resulted in a fall in volumes of claims.
4. To make recommendations for any changes to the structure and level of fees for proceedings in the Employment Tribunals and the Employment Appeals Tribunal, including recommendations for streamlining procedures to reduce costs.

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