



**Court and Tribunal Fees: Consultation on further fees  
proposals  
(Cm 9124)**

**JUSTICE response**

**September 2015**

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## **INTRODUCTION**

1. Established in 1957, JUSTICE is an independent, all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. JUSTICE believes that providing meaningful redress for individuals with complaints against public bodies is a critical aspect of ensuring access to justice, the protection of individual rights and a fair relationship between the individual and the state. We have worked actively on issues of good administration, oversight and accountability since our inception.
2. We are grateful for this opportunity to respond to the Government’s consultation on further fee proposals, first published in July 2015 (“the Consultation Document”).<sup>1</sup>
3. This document sets out JUSTICE’s response to the consultation. We acknowledge and are grateful to Anita Davies and Jessica Jones of Matrix Chambers for their assistance in the preparation of this response.
4. We limit our comments to our areas of expertise. Silence on a specific consultation question should not be read as approval.

## **JUSTICE Response to the Consultation**

4. JUSTICE is deeply concerned by the Government’s failure to take an evidence-based approach to court fees and, more broadly, to reforms which impact on the justice system and access to justice. The Ministry of Justice has recently been criticised by both the National Audit Office and the Public Accounts Committee for its limited understanding of the evidence base for reforms to legal aid.<sup>2</sup> In both cases, this criticism was particularly concerned about the limited nature of the impact assessment performed and the impact of the measures both on access to justice and on the wider budgets of other departments. We consider that, in circumstances where reform may impact negatively on access to the justice system and in light of the important constitutional function which the justice system serves, there is a particular imperative for the impact of measures to be fully explored before they are introduced.
5. While the Consultation Document rightly acknowledges the need to protect access to justice, it focuses on generating from court and tribunal users the income required to fully fund the court and tribunal service without considering any evidence of:
  - the effect of those fees already introduced; and
  - the likely effect of the current proposals.

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<sup>1</sup> *Court and Tribunal Fees: Consultation on further fees proposals*, August 2015, Cm 9124.

<sup>2</sup> NAO, *Implementing reforms to civil legal aid*, November 2014; Public Accounts Committee, Thirty-sixth Report of Session 2014–15, *Implementing reforms to civil legal aid*, HC 808.

6. To date there has been no proper evidence-based evaluation of the impact of fees on access to justice. Until such an evaluation is carried out, it is inappropriate for the Government to be considering the introduction of further fees.
7. The proposals are, in that respect, premature since they fail to take into consideration evidence that might become available following the Ministry of Justice's own evaluation of the effect of fees in the Employment Tribunal<sup>3</sup> and the inquiry currently being undertaken by the Justice Select Committee.<sup>4</sup>
8. Further, other changes to the justice system introduced by this and the last Government have had, or have the potential to have, an impact on access to justice. Without evidence of the cumulative effect on access to justice of those measures and these proposed reforms, the impact of current proposals cannot be effectively assessed.
9. Without sufficient regard to evidence, it is impossible to be confident that the further proposals will not have an unacceptable adverse impact on access to justice. JUSTICE is concerned the proposed fees may indeed have such an effect. Without a proper evidence based approach the Government is at real risk of breaching the principle under section 92 (3) of the Courts Act 2003 that access to justice must not be denied, the common law right of access to the courts (and tribunals)<sup>5</sup> and, where applicable, Article 6 of the European Convention on Human Rights.
10. The Government's questions are addressed below, in the groupings contained in the Consultation Document.

### **Questions 1-5: raising the maximum fee for money claims**

#### Questions 1 and 2 - Raising the maximum fee

11. The Government proposes to increase the cap on fees payable in civil claims (being 5% of the sums recoverable) from £10,000 to at least £20,000, thereby affecting all claims for recovery of sums greater than £200,000.
12. In the absence of any evidence that access to justice will be preserved if the proposal is introduced, it is impossible for JUSTICE to support the proposed fee increase.
13. Although many parties to proceedings for recovery of sums greater than £200,000 may indeed be large multi-national organisations or wealthy individuals, it is not exclusively such entities that bring high-value money claims. JUSTICE is concerned that individuals who would otherwise bring a claim for over £200,000

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<sup>3</sup> <https://www.gov.uk/government/publications/employment-tribunal-fees-post-implementation-review>

<sup>4</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news-parliament-20151/courts-tribunals-fees-charges-inquiry/>

<sup>5</sup> R v. Lord Chancellor ex parte Witham [1997] QB 575

would be prevented from doing so by court fees in excess of £10,000. While we are pleased to see that personal injury claims would be excluded from the higher cap, other high value claims (such as where a small businessman makes a claim for a significant loss) may also be brought by individuals without the means to pay a substantial court fee at the outset of proceedings. The impact of being unable to bring such a claim would effectively deny such individuals access to justice and could lead to serious financial consequences for them.

14. The “access to justice” considerations set out by the Government at paragraphs 62 and 63 of the Consultation Document fail to take into account factors that would affect access to justice and continue to focus on the relationship between the fee charged and the amount claimed, rather than on a claimant’s ability to pay the fee up front (which is unrelated to the value of damages they may later be awarded in the proceedings).
15. JUSTICE is not satisfied that the Government has properly considered the impact that raising the maximum fee would have on access to justice. In the absence of any evidence suggesting that access to justice would be maintained despite an increase in the maximum fee payable, JUSTICE cannot support a raise in the maximum fee to £20,000 or to any other level above that currently in place.
16. The current fee of 5% of the value recoverable in civil claims, subject to a maximum of £10,000, is only recently in place and JUSTICE considers that the effect of the current fee should be monitored and analysed before increasing the fee for high value claims.

### Question 3 - The exemption of personal injury claims

17. JUSTICE agrees with the proposal to exempt personal injury claims from the higher cap. High-value claims for personal injury may be brought by individuals with limited funds who, nonetheless, would not qualify for a fee remission.
18. However, without a detailed analysis of the impact of existing fees the Government may overlook other categories of claimants currently effectively denied access to justice to whom the exemption should also be applied.

### Questions 4 and 5 - Amending the disposable capital test

19. The Government proposes that, should the maximum fee in civil claims be raised, the current disposable capital test – under which an individual cannot apply for a remission if they have in excess of £16,000 disposable capital – would be amended to avoid situations where individuals would have to contribute all of their savings and other capital for the payment of fees.
20. JUSTICE agrees that, if the cap on fees is raised, the disposable capital test should be amended. In fact, if the test remained unchanged, a situation could arise in which a claimant would be required to pay a fee greater than their disposable

capital, or to exhaust their disposal capital on a court fee. Such a situation would pose a prohibitive threat to access to justice and clearly could not be justified.

21. If, despite JUSTICE's concerns, the Government's proposal to increase the maximum fee in money claims is introduced, it is clear that there should be a corollary increase in the disposable capital threshold at which a claimant is entitled to a remission.
22. However, prior to amending the fee remission scheme JUSTICE would urge the Government to conduct a proper evaluation of the current scheme, which was only introduced in October 2013.

#### **Question 6: the proposed 10% uplift on all civil fees**

23. The Government proposes to introduce a 10% uplift on all court fees in civil proceedings other than those already increased above cost.
24. JUSTICE notes with concern that the Government's proposal does not appear to be derived from any evidence base and amounts to requiring civil court users to subsidise other areas of HMCTS. In addition, many of the areas of law that would be subject to the uplift have already undergone changes that affect access to justice. In judicial review claims, for example, this means that, since April 2014, hearing fees have increased from £215 to £700<sup>6</sup> and now the Government proposes a further rise to £770. JUSTICE is deeply concerned that this proposal is being made in the absence of any evidence of the impact on access to justice of those changes and of the likely impact of the current proposal.

#### **Questions 7-10: Tribunal fees**

##### Question 7: Increasing fees in the First-tier Tribunal (Immigration and Asylum Chamber)

25. JUSTICE does not agree with the Government's proposal to double fees in the First-tier Tribunal (Immigration and Asylum Chamber). Firstly, immigration claims concern individuals challenging state decisions. Such individuals, who may well be vulnerable and often do not speak English as a first language, already face considerable inequality of arms in bringing claims. Secondly, where the state is alleged to have been at fault, individuals should not have to pay a significant fee to challenge such mistakes: to do so effectively penalises the individual twice for the state's mistakes. This is particularly the case where there are already hefty visa application fees.
26. Furthermore, many of the individuals who bring claims in the First-tier Tribunal (Immigration and Asylum Chamber), and who would not be exempt from the fees, may not have access to considerable capital. JUSTICE is not persuaded by the Government's assurances in paragraph 109 that the rise in fees will not pose an

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<sup>6</sup> The Civil Proceedings Fees (Amendment) Order 2014

obstacle to access to justice as the analysis provided is flawed. In particular, the first two factors listed – that most appellants should be able to afford the fee because they have already had to commit to higher visa fees and had to show that they are able to be maintained and accommodated – appear to be based on general assumptions rather than evidential analysis. In addition, there does not appear to have been any evidential analysis of the affordability of the higher fees proposed for individuals who fall just outside the exempt categories. JUSTICE considers there to be a real risk that raising fees will have a serious adverse impact on access to justice.

27. JUSTICE would recommend that until the Government has collated and analysed the evidence regarding the effect of current fees in courts and tribunals and evaluated the impact of such fees on access to justice, it should not be proposing to raise fees further. JUSTICE notes, in that regard, the evidence of the effect of fees in the Employment Tribunal since their introduction in July 2013. A comparison between April and June 2013 (before fees were introduced) and April and June 2014 (after fees were introduced) shows a drop in the number of claims by 81%.<sup>7</sup> Until the Government has completed its proposed Employment Tribunal Fees Post Implementation Review, which will consider how effective the introduction of fees has been at meeting its original objectives while maintaining access to justice, it cannot rule out the very real possibility that fees are denying applicants with meritorious claims access to justice.
28. It is concerning that the Government has stated their intention to introduce higher fees across a wider range of areas before a full evaluation of the impact of existing fees and in the face of figures from the Employment Tribunal suggesting that such fees have a direct and considerable impact on the ability of aggrieved parties to bring claims and have their rights vindicated. Any further fees should not be introduced before the impact of existing fees on access to justice has been evaluated; at the very least, the Government should await the report of the Justice Select Committee's court and tribunals fees and charges inquiry and reconsider its proposals in the light of its findings.

#### Question 8: The 10% discount for applications lodged online

29. JUSTICE agrees with the proposal to apply a 10% discount for online applications in so far as it will reduce the fees payable for some users and could reduce the administrative burden on HMCTS. However, JUSTICE does have concerns that restricting a discount to online users may disadvantage those who do not have ready access to online facilities, for example the elderly and individuals without secure accommodation. The impact on these vulnerable groups does not appear to have been considered in the consultation impact assessment or equalities statement.

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<sup>7</sup> *Unison, R (On the Application Of) v The Lord Chancellor* [2015] EWCA Civ 935, paragraph 62

#### Question 9: Revising the exemptions

30. The Government proposes to remove from the list of categories of claimants that are exempt from paying fees those relating to rights of appeal that no longer exist and to introduce a new fee exemption for those appealing against a decision to revoke a person's refugee and humanitarian protection status under the Immigration Act 2014.
31. JUSTICE agrees with the proposed revisions. Exemptions that apply to areas in which there is no longer a right of appeal are now redundant and need not be maintained. Conversely, an exemption for individuals challenging the removal of their refugee status or humanitarian protection is clearly necessary to protect access to justice in challenges which, by their very nature, will necessarily have a profound bearing on the rights of a potentially vulnerable individual.
32. However, without a detailed analysis of the impact of existing fees in Immigration and Asylum the Government may overlook other categories of claimants currently effectively denied access to justice to whom fee exemptions should be extended.

#### Question 10: Increasing fees for immigration judicial review applications in the Upper Tribunal

33. JUSTICE does not agree with the Government's proposal to increase fees in the Upper Tribunal for immigration judicial review applications by 10%. As with the concerns raised in relation to other proposed fees, JUSTICE is concerned about the absence of analysis regarding the impact on access to justice of the operation of existing fees and the impact of any increases. Until the Government has obtained and analysed evidence of the impact higher fees is likely to have, and is persuaded that the evidence shows that access to justice will not be denied, JUSTICE cannot agree that it is justified in raising Tribunal fees.

#### **Question 11 – 17: Property, Tax and General Regulatory Chambers**

##### Question 11: Proposal to introduce a simple fee structure for most proceedings in the Property Chamber of £100 to start proceedings and £200 for a hearing.

34. The Property Chamber deals with private property related disputes. This includes landlord and tenant disputes. JUSTICE is concerned that introducing fees to start proceedings and for hearings may disadvantage vulnerable tenants, who may not have ready access to money to pay such fees if involved in a dispute with a landlord. For example, tenants on low income may be thus prevented from bringing actions against landlords for failure to make repairs to ensure that their property is safe and habitable for them and their family.
35. Again, the proposal shows no analysis of any evidence regarding the effect of such fees on individuals using the property chamber, other than a crude analysis based on the average value of claims in leasehold enfranchisement and leasehold valuation cases.



Question 16: Proposed fee structure for the First-tier Tribunal (Tax Chamber) and the Upper Tribunal (Tax and Chancery).

36. The Government similarly proposes a new fee structure for tax claims. JUSTICE would reiterate the points made in relation to the First-tier Tribunal (Immigration and Asylum Chamber). Firstly, in cases where an individual is challenging a state decision, there is already considerable inequality of arms between such individuals and the state. Secondly, where the state is alleged to have been at fault, individuals should not have to pay a significant fee to challenge such mistakes: to do so effectively penalises the individual twice for the state's mistakes.

**Conclusion**

37. JUSTICE considers that the consultation proposals are premature and risk denying many court and tribunal users effective access to justice, contrary to section 92 (3) of the Courts Act 2003 and in breach of the common law right of access to the courts and tribunals and, where applicable, Article 6 of the European Convention on Human Rights. JUSTICE urges the Government to undertake a proper evidence based approach in assessing the impact of these proposals on access to justice and, at the very least, await the Ministry of Justice's own evaluation of the effect of fees in the Employment Tribunal and the conclusion of the inquiry currently being undertaken by the Justice Select Committee into the effects of the court and tribunal fees introduced during the course of the last Parliament.

**JUSTICE**  
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