

THE **LAW SOCIETY**
OF NORTHERN IRELAND



PROPOSED INCREASE TO COURT FEES

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Introduction

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (Northern Ireland) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,700 solicitors working in approximately 530 firms, based in over 74 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients, government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which local politicians have responsibility for the development of justice policy and law reform, this role is as important as ever.

The solicitor's profession, which operates as the interface between the justice system and the general public, is uniquely placed to comment on the particular circumstances of the Northern Irish justice system and to assess the practical out workings of policy proposals.

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Funding the Courts System: General Principles

1. The Society notes in the Consultation Paper that NICTS quote the DFP's *Managing Public Money* document on the importance of achieving full cost recovery for public sector bodies charging for services. Courts Service will be aware however that the same document notes an exception at paragraph 6.1, whereby Departments or bodies may seek to subsidise the provision of certain services in order to lower costs for users. As a consequence, it is not strictly accurate to state that NICTS is "obliged" to seek full cost recovery, rather this is a policy decision being made in a specific context. On that basis, it is important to note that access to justice is a key policy consideration for the Northern Ireland Executive and any proposals to alter court fees should be weighed against this imperative in a stable and cohesive society. This is principally because impartial conflict resolution through the courts serves the dual purpose of avoiding social strife and clarifying the law to prevent future disputes arising. On that basis, there remains a compelling argument that the costs of running the civil justice system should not fall exclusively on litigants, as this is a public service benefiting society as a whole. The credible threat of legal proceedings acts as a web of protection which fastens responsibility on organisations and individuals to comply with the rule of law.
2. Moreover, it is clear that such subsidy can extend beyond an exemptions or remissions policy to encompass partial overall funding, if the case for doing so is compelling. Schools are not paid for by pupils and hospitals are not paid for by patients, as there is a collective recognition that frontline public services should be funded through general taxation. As a result, there is a strong argument in favour of a level of subsidy continuing to apply when funding the operation of the courts. Although the Consultation Paper states that court users would also have been impacted by any decision not to increase fees in terms of service delivery, it is clear that fee increases will have a direct impact on those seeking to access justice and this should not be equated with more indirect pressures. In addition, it is important that the NICTS maximises its revenue streams from other sources outside of court fees. For example, a Report by the National Audit Office in 2014 set out the value of outstanding fines and charges from court orders, which accounted for a larger sum than

the gap between the income and running costs for administering civil court business.¹

Evidence of Impact

3. Although running costs are recurrent, the above example illustrates the importance of maximising revenues and efficiencies in all areas before taking steps which could damage access to justice. Another key point to be taken into account is that there will be many complex cases in which fees can mount, for example in a family case with multiple orders on contact, residence and other specific issues. This underscores the importance of caution in assessing the impact on the burden on litigants due to increasing court fees. Some analysis should be undertaken in terms of the number of cases with multiple fees and how this will impact on litigants and their readiness to issue proceedings.
4. Recent research by the Advisory, Conciliation and Arbitration Service on the introduction of Employment Tribunal fees in England and Wales is instructive. That study found that 20% of cases withdrawn were directly attributable to the introduction of fees and that 37% of users would withdraw their case if a fee remission was not available.² Overall, following the introduction of Employment Tribunal fees there was a 60% drop in the number of cases brought during a period of two years according to official MOJ statistics.³ It is thus entirely logical to suppose that as fees rise it will further squeeze those who are not eligible for a remission or an exception and will lead to the withdrawal of otherwise meritorious litigation. It is in this respect that a full and thorough assessment of the impact that the proposed fee increases should be undertaken prior to proceeding with these proposals.

¹ See Public Accounts Committee, 2015, *Report on Northern Ireland Courts and Tribunals Service Trust Statement for the Year Ended 31 March 2013*.

² ACAS, 2016, *Research Paper: Evaluation of ACAS Conciliation in Employment Tribunal Applications 2016*, p. 8.

³ MOJ, June 2015, *Tribunals and Gender Recognition Certificate Statistics Quarterly*, p. 9.



5. Furthermore, the Consultation Paper refers to the Modernisation Programme being undertaken, but does not provide any assessment as to what extent efficiencies and improved IT will exert downward pressure on administration costs moving forward. This is clearly relevant to the subject under discussion, as any reforms which hold down or reduce costs will likely impact on any assessment of the level of fees being charged to court users. In addition, the Consultation Paper refers to the intention to review the operation of exemptions and remissions from court fees as part of the fundamental fee review. The Society would stress that it is imperative, not least in the context of proposals for fee increases, that a system of exemptions and remissions remains in place to protect the most vulnerable within our society. This is a key component of ensuring we do not operate a two tier justice system, with quality of access dependent on level of income. On that basis, we would welcome the opportunity to review the figures for total applications and the proportion of these which are successful in order to determine the overall operation of the policy. These would measure the knowledge, awareness and effectiveness of the policy.
6. A recent Report has set out that households in Northern Ireland possess the lowest average disposable income in the United Kingdom on a weekly basis.⁴ It is against this economic context that a robust Regulatory Impact Assessment should be conducted assessing proposals for fee increases, which takes into account the lower ability to pay in Northern Ireland. When taken into account alongside a consistent picture of lower average wages in Northern Ireland, it is very likely that there will be an increasing section of the population on relatively low/moderate incomes who may not qualify for exemptions or remissions and who will struggle to meet increased court costs. The impact on access to justice for individuals and small businesses should be thoroughly considered prior to adopting a policy of increasing fees. The lack of an evidence base for increasing fees was a key aspect of criticism of the Ministry of Justice in England and Wales, as reflected in the evidence of Lord Dyson at the Justice Select Committee.⁵ Although the context in England and Wales is notably injurious, with so-called “enhanced fees” being charged (effectively running the civil courts at a profit), the general principle on access remains sound.

⁴ Centre for Economics and Business Research/ASDA, 2016, *ASDA Income Tracker*.

⁵ Select Committee for Justice, *Courts and Tribunals Fees and Charges Inquiry, Oral Evidence*, 26 January 2016.

7. Furthermore, it is important to recognise the cumulative impact of the introduction of a new system of CFAs recently consulted on by the Department. The potential benefits for access to justice by a carefully implemented scheme of CFAs with success fees should not be diminished by creating a situation in which complex and meritorious cases face a significant additional disincentive to being taken. Equally, a context of increasing court fees only strengthens the case that RTAs should be included within the scope of the system of success fees as part of the wider picture of ensuring access to justice. Equally, the importance of clinical negligence actions remaining in scope is further confirmed, as high disbursements and funding in such cases make them extremely difficult to fund without appropriate payment guarantees.
8. Increasing court fees would represent an additional burden in terms of outlay for solicitors' practices, as payment is required prior to any potential remission or exemption. Furthermore, there is no equivalent timetable for receipt of fees and remissions which means that in practice solicitors have to fund these pressures through use of their overdraft across their case load. Consequently, in business terms it is the totality of how these fees work across a business, rather than taking individual fees in isolation which is the relevant barometer of impact which must be assessed. Any Regulatory Impact Assessment should have a focus on the relationship between the effective ability of solicitors to absorb outlays and how this is affected by the introduction of increasing cost pressures. Measuring access to justice must reflect the *credibility* of access to a solicitor of the client's choice to take forward their case.
9. Similarly, the reference in the Consultation Paper to the additional pressure for the legal aid fund due to the proposed fee increases should be clearly signposted and not masked as a further increase in the overall legal aid pressure. Although level of need is greater in Northern Ireland, the overall demand picture has been relatively stable in recent years and this should be acknowledged. Another important criticism noted by the Civil Justice Council of England and Wales in relation to increasing fees is that they should not be proceeded by a flimsy evidence base and a simple assumption that costs will



simply be met by clients/solicitors and will not impact access to justice for individuals and small businesses.⁶

10. If the Department opts to proceed with Option 3 as set out in the Consultation Paper, they should seek to analyse the impact on access to justice at each stage of the process in terms of figures of cases. A review mechanism should then be built in to analyse whether the level at which fees are being set is striking the correct balance between paying for administration, whilst effectively promoting access to justice. In that regard it is concerning that the only discussion within the Consultation document about fundamental review of the system places this in the context of the introduction of further charges on top of the proposed increases. The Society believes that reviews of fees should be based objectively on the impact on access to justice and should not have a pre-determined outcome or direction of travel as stated above.
11. The Society notes the fee ranges detailed in Table 7 and the assertion that 96% of fees fall below £300, however we note this does address the issue of multiple fee orders in individual cases and we further note the existence of some 50 court fees directly linked to the monetary value of the claim. Working on the assumption that these fees are included within the proposals for increases, it is clear that the percentage increases proposed will significantly increase fees in complex cases of high value. The Society would welcome further clarification on this point in terms of the income projections and would strongly caution against the risks of damaging access to justice in cases where percentage fees can rise dramatically. Accordingly, we believe that a robust modelling exercise should be undertaken to determine the impact of such increases and the types of cases in which they will have the greatest impact. At present savings figures are being provided and impacts discussed without any comprehensive mapping of the weight of the increases and their impacts on particular types of litigants.
12. Accordingly, the Society has serious reservations about the proposals outlined in the Consultation Paper. To the extent that the DOJ/Courts Service are committed to proceeding with these increases, it should be set at a level to avoid damaging access to justice. Furthermore, we do not feel the

⁶ Civil Justice Council, 2014, *Response to the Ministry of Justice Consultation: Further Reform of Court Fees*.

Department have adequately assessed how this would be measured under any of the options provided.

Conclusion

The Society welcomes the opportunity to submit a response in respect of the Consultation on “Proposed Increases to Court Fees”.

We trust our contribution is constructive and we are happy to meet with the DOJ to discuss any of the issues raised in our response.

We would like to be kept informed of any subsequent proposals formed as a result of this consultation and also any changes to the overall policy direction of the topic under discussion along with a stated rationale.