



Bar Council response to the court fees consultation on proposals to reform fees for grants of probate

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice's (MoJ's) consultation paper entitled "Court Fees Consultation on proposals to reform fees for grants of probate".¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council believes that a fair, efficient and accessible civil justice system is one of the fundamental prerequisites to an effective democratic society. Crucially, it is not only those accessing the justice system who benefit from the existence, availability and proper administration of such a system, but all members of society, and society as a whole. It is therefore right that a significant proportion of the costs of the system should be borne by the taxpayer. We remain concerned about the continued shift in paying for the justice system away from the state and towards those who use the justice system and appear before the courts to resolve their legal issues. The Bar Council has previously put forward this position in its responses to the Ministry of Justice's consultations: "Consultation on Further Fees Proposals"² and "Court Fees: Proposals for Reform".³

¹ Ministry of Justice (2016) Court Fees Consultation on proposals to reform fees for grants of probate. Available at: <https://consult.justice.gov.uk/digital-communications/fee-proposals-for-grants-of-probate>

² Available on the Bar Council website: http://www.barcouncil.org.uk/media/396406/2015.09.15_bar_council_response_to_moj_consultation_on_further_fees_prop....pdf

5. We note that the Ministry of Justice hopes to save £250 million by implementing the consultation proposals. It follows that this amount must transfer to those making applications for grants of probate. Specifically, under these proposals it will fall to a small number of applicants to bear the bulk of this cost, while the majority of applicants bear much less, or none. Given that the state has an obligation to provide a functioning justice system to society, and that the burden of this system should therefore not fall on those who choose or are required to access the system, it is even more objectionable that government savings are sought by imposing a significant financial burden on a small category of court users rather than on society as a whole. It is our view that these proposals are not being weighed appropriately against the risks to access to justice.

6. As previously stated by the Bar Council,⁴ we continue to be concerned about the impact of further fee increases on high value litigation conducted in London. The Lord Chancellor has criticised the ‘creaking’ nature of court administration,⁵ and given that London’s court fees are already the most expensive in the world,⁶ the Bar Council is concerned about that court users are being asked to pay increasingly higher fees without an equivalent service being provided.

7. We also regard the Ministry of Justice’s approach as unwisely blinkered. The inevitable result of a substantial rise in court fees is a drop in litigation itself. That can be demonstrated, if proof is required, in the sudden fall in employment tribunal claims when higher fees were introduced there. A drop in claims litigated will result in a substantial drop in VAT and income tax receipts on lawyers’ fees generated by the litigation. It is therefore likely that there will be a net loss to the public purse, rather than any gain.

8. The Bar Council is also concerned that the Ministry of Justice misunderstands grants of probate. While the probate registry is historically part of the England and Wales court system, the grant of probate itself is not in reality a judicial or court act at all. It is a simple but authoritative piece of paper, bearing a stamp, produced by a civil servant on a relatively low pay grade in a relatively short period of time, the average cost of which is £166. There are only one or two registrars left in the probate registry, who now cover the entire country. The real scrutiny given to grants of probate is by HMRC. While the probate is not quite a rubber stamp, it is little more. We note that it is only when probate cases become contentious

³ Available on the Bar Council website:

http://www.barcouncil.org.uk/media/275349/bar_council_response_to_moj_consultation_on_court_fees_proposals_for_reform_300114.pdf

⁴ See paragraph 7 of the Bar Council’s 2015 response to the MoJ’s consultation “Consultation on Further Fees Proposals”:

http://www.barcouncil.org.uk/media/396406/2015.09.15_bar_council_response_to_moj_consultation_on_further_fees_prop....pdf

⁵ The Rt Hon Michael Gove MP (23 June 2015) ‘What does a one nation justice policy look like?’

Available at: <https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like>

⁶ Centre for Commercial Law Studies School of International Arbitration, Queen Mary University of London (2013) ‘Competitiveness of fees charged for Commercial Court Services: An overview of selected jurisdictions’. Available at: <http://www.law.qmul.ac.uk/docs/news/118693.pdf>

that they use up court time, at which point separate court proceedings are issued, generating separate fees.

9. Probate fees were trebled in 2014, the result being that they now cover the entire cost, (£45 million, as stated in the consultation paper), of the probate registries. We do not see how the mere fact that probate registries come (essentially for historic and administrative reasons) within the Courts and Tribunal Service can justify applicants for probate paying more than the actual cost of providing probates. Yet estates are being asked to pay an extra £250m; approximately 6.5 times the cost to the Government of providing those estates with probates.

10. As mentioned in the previous paragraph, according to the consultation paper, the cost of running the probate registries is £45m. The Bar Council has doubts over that figure. The 2014-15 figures produced by HMCTS states approximately £174m⁷ as the entire cost of running the Family courts, including the Court of Protection and probate registries. We would be surprised if one quarter of that was the probate registry. But even accepting the £45m figure, it still represents only 5.5% of the entire HMCTS expenditure. Yet that tiny department which already covers its own costs, is now expected also to cover the entire shortfall of the HMCTS (and eight times the shortfall of the Family courts).

11. If these proposals are taken forward, the bereaved, who apply to the probate registries for a single sheet of paper, produced with very little scrutiny by a small division of a government department, will end up paying a tax which covers the entire annual shortfall of the family courts, the civil courts, the asylum and immigration tribunals, the employment tribunals, and all other tribunals. The Bar Council does not consider this just.

Question 1: Do you agree that it would be fairer to charge a fee that is proportionate to the value of the estate compared with charging a fixed fee for all applications for a grant of probate? Please give reasons.

12. No.

13. As set out above, the Bar Council does not agree that the justice system should pay for itself. Rather, as an effectively functioning justice system is critical to the functioning of society as a whole, it is right that the cost be borne by the taxpayer.

14. The Bar Council does not agree with the premise that the value of the estate should be relevant to the fee charged to gain control of that estate, when there is no corresponding variation to the work required by the court.

15. We are greatly concerned by the astronomical increase for the highest category of executors who will be required to pay a £20,000 fee; an increase of over 9200% from the current flat fee (£215 for all estates valued at over £5,000). Imposing such a great cost is not considered appropriate at the best of times, and requiring executors to pay such a fee,

⁷ HMCTS Annual Report 2014-15. Available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/433948/hmcts-annual-report-accounts-2014-15.pdf

especially during bereavement and when they have no other option in order to obtain the grant of probate is even more objectionable.

16. Furthermore, we disagree with the reasoning that increasing these fees up to £20,000 becomes appropriate if the fee can be recovered from the estate itself. Cost recovery should not be a basis for implementation of higher fees. In reasoning that much or all of the fee may come from the estate itself “at no personal cost to the executor” (as stated in the consultation materials) it follows that deductions must be made from the estate or its parts which individuals would otherwise acquire.

17. If some executors are charged high levels of fees for grants of probate because the value of the estate is high, they will consequently be paying these greater fees to allow other executors to be charged a much lower or no fee at all. The Bar Council disagrees with the reasoning that despite the same amount of work being conducted by the Probate Registry for each application, the right to execute someone’s estate should be granted after payment of differing fees which are dependent on the value of the estate in question.

18. Nor can the proposals legitimately claim to charge “proportionate” fees. A block-step-up system is proposed which imposed disproportionate fees. Such a system applied to Stamp Duty for over 100 years and was universally agreed as indefensible, and recently scrapped⁸. It is therefore surprising to see a similar system proposed here.

Question 2: Do you agree with the proposal to increase the threshold above which the fee is payable from £5,000 to £50,000? Please give reasons.

19. No.

20. While a higher threshold for payable fees sounds attractive in and of itself, in the context of the wider issue the Bar Council is aware that raising the threshold would cause a much greater financial burden to be placed on those seeking grants of probate for higher value estates. Lower value estates, if they need a grant of probate, are receiving an advantage when the grant is issued. It is wholly unclear why that advantage should be subsidised by other users of the system. We also note that estates up to £50,000 may have little need of grants, since banks will usually pay out up to that amount without the need for a grant.

Question 3: Do you agree with the government’s proposals to charge fees for probate applications as set out in Table 1? Please give reasons.

21. No.

22. For the reasons set out above at paragraphs 4-20, the Bar Council is against the proposals to charge probate fees on a graduated scheme rather than a fixed flat-fee scheme.

⁸ HM Treasury Budget 2016. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508193/HMT_Budget_2016_Web_Accessible.pdf

23. We regard the proposal as potentially self-defeating. A huge number of individuals will adopt strategies to avoid the necessity for probate, or to reduce legitimately the value of their estates for probate fee purposes (but not for tax), such as bare trusts, nominee-ships and joint ownership of assets and accounts. At the top end, banks and insurance companies will quickly offer indemnities or guarantees at prices which undercut the probate fees. As well as impacting fee-income, that will have the undesirable result of moving a substantial amount of asset-holding into grey areas, whereas by contrast probate produces transparency and therefore reduces fraud.

24. We also regard the idea that the probate system has to cross-subsidise the effectively separate courts and tribunal service as completely indefensible. Court and tribunal costs bear absolutely no relation to probate costs, and have no real connection with them at all. The proposals are, instead, a new tax on estates, where there is already a tax in place – inheritance tax (which itself raises much more than 10 times the MoJ’s shortfall). As a tax, however, the proposed fee system fails to reflect the exemptions in favour of charity, spouses and civil partners which inheritance tax itself recognises, for good societal reasons.

Question 4: Are there other ways that executors should be supported to make payment of the fee and/or examples of banks or funding institutions who regularly assist with finances before the grant of probate? Please provide details.

25. The Bar Council is of the view that fee remissions should be provided to support executors. Our position on this subject is set out in our answer to Question 5.

Question 5: Do you agree with the proposal to remove grant of probate fees from the fee remissions scheme? Please give reasons.

26. No.

27. The Bar Council notes that in the context of the current consultation, the question of fee remissions is less relevant than the MoJ puts forward. Where probate is necessary, it is because proof is needed to gain access to assets. Payment after probate would be a welcome option, working perfectly well with instalment payments of inheritance tax. If the threshold for probate fees is lifted to £50,000, however, even the current consultation’s superficial arguments in favour of remissions become less impressive.

28. In response to the statements as to why the MoJ does not believe that the proportion of estates which will attract a significantly higher fee will cause the executor financial hardship:

29. The Bar Council does not agree that because some banks and building societies may allow the executor to use funds from the deceased’s accounts to meet the cost of the probate fee, that this is a reasonable basis to refuse fee remissions to the executor. This will not be the case for every applicant placed in this position by the proposed increases, and the MoJ cannot guarantee that any such policies currently in existence will not be subject to future change.

30. The MoJ’s consultation paper states that where there are insufficient liquid assets to meet the probate fee, the executor should have little difficulty in securing short-term

financing to meet the cost of the fee. It is not clear where this short-term financing is proposed to come from, or whether the MoJ has any evidence to support this statement. It should also be noted that any short-term financing will incur costs of its own from interest and other fees, which must further deplete the value of the estate.

31. The MoJ states itself it in its consultation paper that the “Help with Fees” scheme ensures that those of limited financial means are not prevented from bringing proceedings in court because they cannot afford to pay the fee. Stating that the executor will always be able to recover the fee from the estate, however, does not take into account the time taken before the estate is released, during which time the executor may come into financial hardship from payment of such high fees. It should also be noted that inheritance tax is payable even before an application for grant of probate is made. If applicant is unable to afford the fee in the first instance, this has significant implications for access to justice if the applicant is discouraged from bringing their claim to the courts at all, because of the value of the estate in question. The MoJ has not yet addressed what will happen to the executor’s application or indeed to the estate if the executor simply cannot produce the funds to pay the fee. Furthermore, where the executor recovers the fee from the estate, this still amounts to individual estates rather than the state paying for the administration of justice.

32. At the very least, there should be a mechanism to postpone payment until the estate has been realised and the executor is in a position to pay.

Question 6: We would welcome views on our assessment of the impacts of the proposals set out in Chapter 1 on those with protected characteristics. We would in particular welcome any data or evidence which would help to support these views.

33. The Bar Council does not have any data or evidence to assist in the analysis of the equality impact on applicants for probate.

**Bar Council
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