



The Bar Council

Bar Council response to the Ministry of Justice consultation on Reforming Fees in the United Kingdom Supreme Court

1. This is the response of the General Council of the Bar of England and Wales (“the Bar Council”) to the Ministry of Justice consultation on Reforming Fees in the United Kingdom Supreme Court.¹

2. The Bar Council represents approximately 17,000 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 (“BSB”).

Question 1: Do you agree with the proposed changes to simplify and streamline Supreme Court fees?

4. No, the Bar Council strongly disagrees with the current proposals. Although simplifying and streamlining fees is a desirable objective, the proposal results in very significant increases in fees which will inevitably and unfortunately have the effect of reducing access to justice, in breach of both the common law and human rights law.

¹ <https://assets.publishing.service.gov.uk/media/652cfc2d6972600014ccf846/reforming-fees-united-kingdom-supreme-court-consultation.pdf>

5. As explicitly recognised in the consultation, the principle of mixed funding is fundamental to the operation of the Supreme Court. It was agreed, when the Supreme Court was established, that the costs of civil appeals in the Supreme Court should be borne by both the taxpayer through contributions from HMCTS, the Northern Ireland Court and Tribunals Service, the Scottish Government, HM Treasury and Supreme Court litigants.

6. The Bar Council agrees that the Supreme Court should maintain a mixed model of funding. The Bar Council also agrees that, given its constitutional importance, the Supreme Court's funding should continue to come primarily from contributions from the different jurisdictions of the United Kingdom, as well as directly from HM Treasury.

7. The consultation states that in 2021/22, fees accounted for £0.53M in income against £13.8m in running costs for the Supreme Court.

8. However, there is no statement in the consultation of what the split between government and fee funding was when the Court was established and the important principle of mixed funding was established. If the fees are to be increased in line with inflation, as proposed, the Bar Council considers that the government funding should likewise increase, or, alternatively, that the percentage split between the two should remain the same as it was when the Supreme Court was established. The Bar Council is concerned whether a disproportionate part of the increase in running costs will be borne by the fee increase. The Bar Council is also concerned that there has not been an analysis of what percentage of the court's running costs will be borne by litigants' fees after the increase.

9. The Bar Council requests that the original 2011 split between litigants' fees and government sources of revenue be provided to enable a valid comparison to be made with the 2021-22 figures in the consultation. The Bar Council remains concerned that a pro rata increase with inflation still results in a fee which serves as a barrier to access to justice for litigants on a low wage.

10. The constitutional right of unimpeded access to the courts was recognised by Lord Diplock in *Attorney General v Times Newspapers Ltd* [1974] AC 273, 310 and also in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909, 977 and can only be curtailed by clear statutory enactment.

11. As held in *R v Lord Chancellor, Ex p Witham* [1998] QB 575, as per Laws J (as he then was), with whom Rose LJ agreed, there was a variety of situations in which persons on very low incomes were in practice denied access to the courts.

12. The legal test is whether there is a real risk that persons will effectively be prevented from having access to justice.

13. As per *Stankov v Bulgaria* (2009) 49 EHRR 7, even a fee which the litigant can afford can violate the right of access to justice.

14. As per *Unison v Lord Chancellor* [2017] UKSC 51 at [29]:

14.1. "...the right of access to justice ... is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication."

14.2. At [66]: "The constitutional right of access to the courts is inherent in the rule of law."

14.3. [78]: "... impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible."

15. Even with a 50% reduction, the fees proposed would probably serve to dissuade a litigant from bringing an appeal, for example (before applying a 50% deduction, if applicable):

15.1. On filing notice under rule 18(1)(c) of the 2009 Rules of an intention to proceed with an appeal: £7,855, and

15.2. On filing a notice of appeal: £8,975.

16. The individual threshold for a single applicant is £1,420, which is below the Living Wage both inside and outside London. The Bar Council considers that the proposed increases in Supreme Court fees constitutes a significant and unlawful barrier to access to justice, in breach of both the common law and human rights law. The level of fees for such a low-income litigant is likely to have the effect of serving as a significant barrier to access to justice.

Question 2: Apart from fee 2.3, do you agree that the fee structure for devolution cases should be removed, so that the same fee is payable for these cases as with other civil appeals? Please give reasons for your answer.

17. No, the Bar Council disagrees. The answer to Question 1 is repeated.

Question 3: Do you agree that the fee for devolution reference cases (fee 2.3) should be increased to allow the Supreme Court to recover more of the costs involved to

administer such cases? Do you agree that the scope of this fee should be widened so that it also applies to references on retained EU case law?

18. No, the Bar Council disagrees. The answer to Question 1 is repeated.

Question 4: Do you agree that we should seek to increase the value of Supreme Court fees by inflation to support the Supreme Court's operation? Please give reasons for your answer.

19. No, the Bar Council strongly disagrees with the current proposals. The answer to Question 1 is repeated.

Question 5: Are there any fees outlined in this paper that should not be increased by historic inflation?

20. Yes, all the fees outlined in this paper should not be increased by historic inflation. The answer to Question 1 is repeated.

Question 6: Do you agree with the principle that Supreme Court fees should be adjusted by inflation on a routine basis to support the long-term financial stability of the Supreme Court? Please give reasons for your answer.

21. No, the Bar Council strongly disagrees. The answer to Question 1 is repeated. By subsequently increasing fees by inflation, the situation will simply be exacerbated.

Question 7: Following analysis of available evidence we have concluded that the proposed fee increases will not impact disproportionately on any group due to the fee remission policy currently in place at the Supreme Court. Do you consider that the proposal will have a disproportionate impact on individual with protected characteristics? Please give reasons for your answer.

22. Yes, the Bar Council does agree that it will have a disproportionate impact on individuals with protected characteristics. Where individuals with protected characteristics have been discriminated against, lost their employment and had to take employment at the level of the Living Wage, such an individual would not be able to claim a fee remission, and so would not be able to challenge their discrimination which resulted in their employment at the level of the Living Wage.

Bar Council²

November 2023

² Prepared by the Legal Services Committee.

For further information please contact
Enehuwa Adagu, Policy Analyst: Legal Practice and Remuneration
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Email: EAdagu@BarCouncil.org.uk