Written evidence from the Forum of Insurance Lawyers (FOIL)

**FOIL** (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

**FOIL** represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

The consultation was drafted following consultation with the membership.

**Executive Summary**

- It should be recognised that the State has an important role in financially supporting the provision of the civil court service.
- Even if it is justified to require some court users to pay more than the cost of the service they receive, having a large claim is a crude measure of ability to pay.
- Even though increased court fees will still be a small proportion of the overall costs of litigation they are likely to impact on access to justice as they are required to be paid up front, creating a direct barrier to the bringing of proceedings.
- Higher court fees fall on individuals and SMEs as well as large multi-national organisations and will deter legitimate litigation.
- Higher court fees impact on personal injury claims: such claims should be exempted from the current proposals to remove the cap on issue fees, as the Government proposes.
- The UK’s legal services sector makes a very significant contribution to the UK economy, which is likely to be put at risk by increased court fees, as indicated by the Government’s own research.
- The current court service is neither efficient nor effective: it is not right to require court users to pay enhanced fees but the disadvantages might be more acceptable if the money obtained were being invested in improvements, which is not the case at present.

**The Principle of Enhanced Fees**

1. For several years prior to the introduction of enhanced court fees (fees which exceed the cost of providing the court service to which they apply) the Government’s overall aim, set out in its consultation paper published in November 2011, was “for fees to cover 100% of the cost of providing civil justice in the courts by the end of the current spending review period (2014/2015) minus income foregone to fee remissions. In other words, we wish for the taxpayer contribution to be limited to those who cannot afford court fees, with the user paying where it is possible for them to do so”. 

2. At that time, in 2011, the cost of the Courts Service in England and Wales was 80% funded through court fees. The remaining £121m was funded by the taxpayer. In 2014, the Government anticipated that the introduction of enhanced court fees would reduce the tax-payers contribution to £20m.

3. Whilst understanding the need for careful financial management and costs savings FOIL believes it is important to remember that, in the provision of a civil justice system, there is a balance to be effected between placing an excessive burden on the taxpayer and ensuring that the wider principles of access to justice and effective dispute resolution are preserved.

4. In setting out its rationale for enhanced court fees in 2014, the Government stated that it was not right that hardworking taxpayers should contribute £100m towards the cost of the civil court service. With respect, this approach failed to recognise the role of the State in providing a means by which citizens may resolve their disputes. It is no more ‘wrong’ for the Government to support the civil justice system than for it to meet the cost of education and health provisions which are utilised by those in need of the services provided.

5. The Government’s solution to increase revenue from the courts and reduce the cost to the taxpayer was to require some court users to pay more than the cost of the services they receive where it is perceived that they can afford to do so. In effect, enhanced fees operate as a form of taxation on some court users.

6. Even if it were justified to require some court users to pay more than the cost of the service they receive, FOIL believes that to impose fees on the basis that those who have a large claim also have large resources is a very crude measure of ability to pay. There is no reason why an individual or SME with a large claim will have significant resources: in fact, the reverse will often be true. For most individuals and SMEs with a large debt claim, a claim for an injury, or an unspecified money claim, the lack of access to the sums they are claiming will have impacted negatively upon their financial situation. They may need to be successful in the litigation to retain their home, their business or their financial stability. It is unfair to characterise such claimants as wealthy enough to subsidise the system.

7. Although the remission system provides some support it is naturally limited to those of very modest means. Under the current system SMEs have no entitlement to remission of fees.

The Impact of Increased Court Fees on Access to Justice

8. The Justice Committee will be aware that in putting forward proposals to significantly increase court fees the Government relied upon the assumption that the proposals were unlikely to impact on access to justice. Throughout the consultations on the issue of enhanced courts fees the Government has indicated that part of its rationale for believing that there will be little impact is that the fees will continue to be a small proportion of the overall litigation costs.
9. Fees will remain a small percentage of a large case which goes to trial but may represent a much larger percentage of overall costs in a claim which settles. Even if the court fees will eventually be dwarfed by the overall costs, they will still represent a very large sum to be paid up-front.

10. Although in its most recent consultation paper the Government stresses that many of the claims affected by the current proposed increase will be brought by "large multi-national organisations or wealthy individuals" this is not the whole picture. It is not unusual for SMEs or individuals who are not wealthy to have a claim for more than £200,000, for example, for professional negligence involving property or financial services. It cannot be assumed that any party wishing to commence a very substantial claim will be in a position to fund that expenditure.

11. For a company chasing a large debt there may be no need to incur any disbursements except the court fee. The need to find a significant sum will act as a direct barrier to the bringing of proceedings.

12. The court fee is disbursement payable whether the case is won or lost. Although a claimant with limited means may be able to agree with his legal representative to defer the payment of costs and disbursements until the conclusion of the case, the court fee must be paid up front. A personal injury claimant is likely to be represented under a CFA, will be protected from his opponent’s costs by QOCS, but will still be responsible for disbursements.

13. Litigation is by definition a risk, even where the claim appears strong. Even if a claim has good prospects it would be a brave person, with limited disposable capital, who would be willing to spend £10,000 (or even £20,000 under current proposals) on the court fee. In turn, it would be a brave solicitor who would advise a client to make such a financial commitment. It is inevitable that, in such claims, the high fee will have a very significant impact on access to justice.

14. It may be possible, if a large court fee cannot be paid by an SME or an individual; that it might be absorbed as a cost by a legal representative or covered by ATE, a cost which, in the case of individuals, QOCS aims to remove. All of these options have knock-on effects. Although the Government does not anticipate that the proposals will result in fewer claims being issued, this is a market subject to complex pressures which create a risk that that will be the result, actually resulting in a lowering of revenue for the Courts Service.

15. An increased court fee will have repercussions beyond issue. The need to pay a substantial issue fee will impact upon defendants’ willingness to settle, with arguments over premature issue becoming more significant. Claims will often have to be issued before they settle and, even if the claimant can afford the fees, they will then fall to be paid by the defendant. When the defendant is backed by insurance the cost will ultimately be borne by policyholders, leading to an increase in premiums.
Personal Injury Claims

16. For the reasons stated above FOIL is concerned at the impact increased court fees will have upon access to justice in personal injury claims.

17. Looking at the most recent proposals, FOIL believes that, as proposed by the Government, personal injury claims should be exempted from the July 2015 proposals to raise the cap on issue fees. The claimants involved in personal injury claims are the antithesis of the “large multi-national corporations and wealthy individuals” which are the type of claimants mentioned in the rationale for the increase. A personal injury claimant bringing a claim for more than £200,000 will almost inevitably have suffered a life-changing injury and a loss of income and, even with remission of fees, any further increase in court fees is likely to have a severe impact on access to justice.

18. An increase for personal injury claims would also raise competition issues. The introduction of enhanced court fees has made it more difficult for smaller firms to accept instructions in large claims when remission of fees does not apply and where a commitment to carry the court fee for the client has a significant impact on cash-flow. A further increase would be likely to concentrate large claims within the larger law firms, reducing the choice for consumers.

19. As court fees are normally recoverable, and most personal injury claims are successful, the cost burden will often fall on the defendant, in many cases Government (through its role as a major compensator), insurers and Local Government. If the proposals were to apply to personal injury claims a very significant proportion of the costs would fall upon the tax payer (with the Government paying the enhanced fees to subsidise other court users) or ultimately be required to be funded through insurance premiums, impacting on policyholders.

The Court Service in an International Context

20. Over recent years the Government has emphasised the importance of the UK’s legal services sector. A report produced in 2013 by the MOJ, in partnership with UK Trade and Investment, entitled ‘UK Legal Services on the International Stage’ stated that the sector contributed £20.9bn to the UK economy in 2011. The Foreword noted “...it is important that we consolidate the UK’s international standing in what is becoming an increasingly competitive field”. It goes on to state that “Effective legal services can result in a multiplier effect, supporting economic growth and UK businesses overseas”. The report describes a large number of activities across the world showcasing the strength of UK legal services, including English Law week in Moscow and the ‘Unlocking Disputes’ campaign, led by the Lord Mayor of London, which emphasised the excellence of the judges in this country with a view to promoting England and Wales as the jurisdiction of choice.
21. In assessing the likely impact of the introduction of enhanced fees for money claims earlier this year, the Government commissioned research undertaken by the British Institute for Comparative Law.

22. The Institute reported that only 26% of the participants in the research indicated that they did not think the proposed introduction of enhanced court fees would have any effect on litigants’ behaviour. Another 13% did not know whether it would have any effect.

23. With regard to the remainder, the Institute reports:

“....almost two-thirds of respondents (61%, or 97 of 158 respondents) anticipated adverse consequences of increased court fees on London as a litigation centre; 53 thought it likely there would be an impact and 44 felt such an impact was very likely.

Reasons for this view included:

- Potential for reduction in the attractiveness of the English courts for the litigation of cross-border commercial disputes: litigants might switch their preferences to foreign courts and arbitration, also potentially based abroad, triggering a potential decrease in litigation work in England.

- High upfront court fees could be a disincentive in the case of lower value claims and were perceived to be inappropriate considering the frequency of settlements.

- English law could be selected less often as the governing law in international commercial transactions. This could reduce the demand for local transactional work (with the concern that transactional work would then go to law firms based in other jurisdictions) and affect related support services.

- A decrease in international cases could, over time, negatively affect the incremental development and updating of English commercial law.”

24. The potential effect of some of these predicted outcomes is of concern, particularly the impact on the development of commercial law, and the diminution of the UK as an internationally recognised legal centre of excellence.

25. The Government’s 2015 consultation paper dismisses the concerns raised by those consulted as part of the research, indicating that the conclusions were based on perceptions.

26. The report prepared by the Institute sets out in detail the methodology adopted, which included interviewing and consulting with a significant number of individuals “active in the field of international commercial litigation. Approximately 200 contacts with highly relevant expertise and experience were invited to participate.... Interviewees included judges, barristers,
solicitors and in-house counsel with substantial experience in international commercial litigation and arbitration.” Presumably a reputable body such as the Institute selected this method of conducting the research on the basis that it was likely to deliver the most accurate results, it being unlikely that any measurable data would be available for the impact of changes which were still theoretical.

27. It is of concern that the Government appears to have dismissed research commissioned at its own request, although there appears to be no evidence for reaching a conclusion contrary to that put forward by the Institute.

28. It should be remembered that the participants were giving their view on the effect of the court fees structure in place at present: for some litigants the fees would be considerably higher if the proposals set out in the Government’s July 2015 consultation paper were introduced. With regard to these further increases, FOIL is concerned, at a broad level, that the very significant financial advantages which accrue to this country, both direct and indirect, as a result of its popularity as a jurisdiction of choice, are in danger of being damaged by measures which will result in the recovery of only £25m per annum.

29. FOIL notes that it is not alone in having concerns at the potential damage to the UK’s reputation and popularity as a dispute resolution centre. During the 2014 consultation on enhanced court fees, the judiciary expressed ‘deep concerns’ at the proposal, noting that the fees would be 25 to 100 times greater than those charged in New York.

The current Court Service

30. Under Section 180 of the Anti-social Behaviour Crime and Policing Act 2014, which allows enhanced fees to be introduced, the income thus obtained must be used “to provide an efficient and effective system of courts and tribunals.”

31. The anecdotal evidence from practitioners making regular use of the courts is that the system, at present, is neither reliably efficient nor effective. FOIL receives regular complaints from practitioners of delay and poor service.

32. By way of example, the recent changes to the rules for costs budgeting, to give the courts a chance to clear the backlog, and the need for an examination of the costs budgeting regime by Mr Justice Coulson and the CPRC, highlight the inability of the Court Service to deliver. That situation is unlikely to improve as it has been made clear that funds will not be made available to increase the number of judges to make costs budgeting, as envisaged by Lord Justice Jackson, workable. It is unacceptable that parties bearing the cost of court fees in excess of the cost of delivering the service should be further penalised by an inefficient, slow service unable to deliver on key reforms.

33. The announcement made in April 2014, of investment in the Court Service of an average of £75m pa over the next five years is considerably less than the sums
being recovered by way of enhanced and increased court fees introduced in 2014/15. Although FOIL does not believe that it is right to require court users to pay enhanced fees, it might be felt that the disadvantages should be more acceptable if the money obtained were being invested in improvements. The fact that, whilst fees increase, key aspects of the service remain inefficient is of great concern.

30 September 2015