**Written evidence submitted by DWF LLP**

DWF LLP is a leading business law firm, with over 2,000 people working across 13 offices in a wide range of sectors. We carry out substantial litigation and advocacy services in all types of proceedings. We have one of the largest Insurance teams in the UK with nearly 900 people, including 94 partners and over 600 legal advisers. We have over 250 people in our Litigation teams including 59 partners and over 150 legal advisers.

We make our submission from the standpoint of our expertise in insurance and civil litigation and we comment specifically on the impact of the increased court fees which came into force in March 2015 and the recent consultation on the further proposals to increase court fees. We do not comment on the introduction of employment tribunal fees or the criminal courts charge.

**Executive Summary**

- We believe that the increased court fees in civil litigation amount to a system of taxation on court users and that this is wrong in principle when it is the Government’s responsibility to provide an effective and efficient Civil Justice System to ensure the resolution of disputes at proportionate cost.

- Given the significant increases in the court fees, we believe the Government should have provided the strongest justification and explanation for them and we do not believe it has done so.

- We believe the Government has underestimated the impact of the increases on access to justice as the use of litigation to enforce rights has become unaffordable. For claimants the court fee will now often become the largest disbursement in a case and as the fee is an upfront payment to the court, the increases will be not only an impediment but also a bar to the commencement of proceedings and will deprive claimants of access to justice.

- We also believe the Government has given insufficient consideration to how claimants will fund the increased fees. The availability of fee remissions or Legal Aid is limited and a "No Win No Fee" Conditional Fee Agreement does not provide by itself a means of funding court fees.

- For defendants, there will be pressure pre-litigation to settle claims which are unmeritorious or in which the claimant holds unrealistic expectations simply to avoid the risk of exposure to the increased court fees.

- In litigated claims assuming the claim is successful, the liability for the further increased issue fee will pass to the defendant, so transferring the burden of these increased costs, and often that defendant will be publicly funded so adding to costs paid by the public purse.

- Throughout the consultations we believe the Government has oversimplified and erroneously identified the types of litigants likely to be affected by the proposals. In reality, the litigants affected would not be limited to only large multinational organisations or wealthy individuals as has been stated. Those affected would include individuals of limited or moderate means, and SMEs of limited resource. We believe it is also inaccurate to suggest that parties are choosing to use English law to govern their disputes; the majority of litigants have no choice.

- In cases where litigants do have a choice of law we believe that the enhanced fees will over time reduce the competitiveness of the legal services market in England and Wales.

- There is currently little evidence to suggest that the recent fee increases have improved the courts’ services levels and indeed there is recent evidence of deterioration in those levels.
An effective and efficient Civil Justice System at proportionate cost

1. We believe that it is the responsibility of Government to ensure that the State is able to provide an effective and efficient Civil Justice System to ensure the resolution of disputes at proportionate cost. Increased court fees had already been introduced in 2014 to reach a position whereby the fee income is used to recover the full cost of the court system. The March 2015 enhanced court fee increases and the recent proposals for further increases prescribe fees in excess of cost. This is in effect a system of taxation on court users and in our view it is wrong in principle. It should be recalled that much of the increased cost falls on the public purse as a significant number of claims are brought against Government departments, local authorities and the NHS.

2. In neither of the consultations on proposals for enhanced court fees have we seen any acknowledgment from the Government that the size of the increases is very significant indeed. In the March 2015 increases, for a claim valued at £200,000, the fee to issue proceedings went up from £1,315 to £10,000, an increase of 660%. The percentage increase of the new proposals at 5% of the quantum of the claim without limitation is even more significant when compared with the position before March 2015. We believe that, given those significant increases, the Government should have provided the strongest possible justification and explanation for them and in our view it has provided neither.

Insufficient assessment of impact

3. We have maintained the view that the Government has underestimated the potentially significant effects of its proposals and that it has provided insufficient evidence to support the MoJ’s impact assessment. Even in the most recent consultation on further proposed increases there has been no assessment of the impact of the March 2015 increases.

4. Prior to the March 2015 increases the MoJ's impact assessment made the assumption that the effects of the proposed change on the amount of litigation would only be marginal at 0-2%. In our consultation response we compared the increase in fees for bringing claims to Employment Tribunals. In those cases, issue fees were raised to up to £1,250, and caused a reduction of well over 50% in the number of claims brought. As the civil court fees have been increased to a much higher level, we would expect these increases to have a much greater effect on a reduction of litigation than the Government anticipates. This will in turn significantly inhibit access to justice.

5. The proposal to significantly increase the level of court fees means that in a substantial number of claims, the court fee will now be the highest external cost incurred in the claim. We have seen no evidence for, and disagree with, the Government's proposition that if these significantly increased court fees are implemented, that they "will remain a very small fraction of the overall costs of litigation".

6. In our view, the Government has given insufficient consideration to how claimant litigants will in fact fund enhanced court fees. It has made reference to the availability of fee remissions and, in limited circumstances, Legal Aid, but these will be of assistance in an extremely small minority of claims. Otherwise, the Government notes that "money claims can be brought under a "No Win No Fee" Conditional Fee Agreement". This is of course a means by which a litigant can engage a solicitor on the basis that the litigant may only be responsible for the solicitor's own direct costs in the event of a particular outcome. It does not provide, by itself, a means of funding external costs such as court fees.

7. Therefore is the Government expecting that the substantially increased fees will be paid by litigants themselves, or by their solicitors, or some external funding mechanism such as ATE insurance? In the case of ATE insurance, the reforms introduced by the implementation of the recommendations of Lord Justice Jackson through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 involved recognition that changes were being made to the civil litigation
process that would remove the need for litigants to incur the costs of ATE insurance. Is the Government now expecting litigants to resume taking out ATE insurance purely to pay the enhanced court fees? The Government's thinking in this area is unclear, and has not dealt with the important issue of how the enhanced fees would be paid at the outset.

Access to justice issues

8. A statutory duty exists under Section 92(3) of the Courts Act 2003 to have regard to the principle that access to justice must not be denied.

9. As was our position when we responded to the consultation prior to the March 2015 increases, we believe that the current proposals further increase the existing significant access to justice concerns, not only to claimants but also to defendants (assuming as will be the case in the majority of claims, that those claims succeed so passing the ultimate costs liability onto the defendant) including publicly funded defendants and insurers.

10. For claimants, the increases will mean that the issue fee can amount to a significant part of the cost of the claim and will regularly become the largest disbursement which has to be discharged throughout the case. Additionally, as the fee in question needs to be paid over to HMCTS, there is of course a funding requirement in relation to that fee, which is essentially an upfront payment for anticipated services from the court. As we have indicated above, we do not believe that sufficient consideration has been given to how the enhanced fees would be paid, and so, depending on the financial circumstances of the claimant, the proposed further increased court fee can be not only an impediment but a bar to the commencement of proceedings, so depriving those claimants of access to justice.

11. As far as the position of defendants is concerned, whilst they will not need to incur a court fee at the outset of litigation (though they would need to pay the same enhanced fee if they were issuing a counterclaim), they too will be unfairly affected by the proposed further increase. The further enhanced fees will create pressure on defendants to settle claims either which are unmeritorious, or cases where the claimant holds unrealistic expectations of quantum, simply to avoid the risk of being exposed to the increased level of court fee. Then, at the end of the case, assuming the claim is successful, the liability for the further increased issue fee will pass to the defendant to pay it. That defendant will often be publicly funded either in the form of the Government (in its own role as a major compensator), local authority, the NHSLA or indeed insurers. In the case of insurers, additional costs of this type will need to be passed on to consumers in the form of increased insurance premiums.

The type of claimants affected

12. Throughout the consultation process the Government’s view has been that “many of the claims being brought for the higher values will involve large multinational organisations or wealthy individuals” and that it is “reasonable to ask those parties who are able to make a greater contribution to do so.”

13. It seems to us that the identification of multinational organisations and wealthy individuals as the type of claimant likely to be affected is erroneous and an oversimplification. In reality, the litigants affected by the proposals would include individuals of limited or moderate means, and SMEs of limited resource. For instance, they may include an individual who has been badly advised in connection with their pension investment, or an individual home owner who engaged a surveyor who undervalued their property. The need to fund the court fee can arise in the worst of circumstances where an individual or an SME has incurred a loss which is to be the subject of the litigation itself. The proposed further increased court fees will frequently amount to an unsurmountable barrier for those intending litigants.
14. We have seen no evidence from Government as to the types of litigants who would be affected by these proposed further changes. We are confident though that the Government’s assessment which has enabled it only to identify large multinational organisations or wealthy individuals is inaccurate. Additionally, the consultation makes no reference at all to the ability of the types of unsuccessful defendants who will ultimately be required to pay the fees, to be able to do so: it has seemingly not been considered.

The suggestion that the parties affected have a choice of jurisdiction

15. In addition to the above inaccuracy, the most recent consultation goes on to state that the large multinational organisations or wealthy individuals bringing the claims in question, “are parties who have chosen to have their commercial affairs governed by English law, and to have their disputes decided through the English Courts.”

16. Again there is no evidence in support of this analysis and we believe it is simply wrong to suggest that all of those parties “have chosen” to use English law and English Courts for their affairs. In fact, a choice of jurisdiction will arise only in a minority of claims of this type. The majority of those claims will concern claimants and defendants who are based in England and Wales, and whose affairs will necessarily and indeed automatically be governed by the law of England and Wales.

Cases where there is a choice of jurisdiction

17. For litigants who are based overseas a choice of jurisdiction may well arise. One of the requirements of Section 92(3) of the Courts Act 2003 is that in considering whether to proceed with these proposals, the Lord Chancellor must have regard to the competitiveness of the legal services market.

18. The recent consultation makes reference to the study undertaken by the British Institute for International Comparative Law leading to a report published in January 2015 when the previous enhanced court fees were introduced. That report indicated that almost two thirds of respondents, 61%, anticipated adverse consequences from increased Court fees on London as a litigation centre. The survey was 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”.

19. During the preceding consultation, the judiciary including the Master of the Rolls expressed “deep concerns” at the proposal then under consideration, noting that the fees would be 25 to 100 times greater than those charged in the rival jurisdiction of New York. The current proposal would increase those fees yet further, so reducing further the competitiveness of England and Wales.

20. The Government has argued that the views expressed in the BIICL report “were based on perceptions and no evidence could be produced to support them”. It seems to us that this is a surprising observation where it would surely be seen that before a proposed change took place, it would be impossible to produce evidence of what effect that change was likely to have, as a matter of logic. Instead, having selected the Institute to carry out an independent survey, it is surely appropriate that the Government should have regard to its conclusions and the weight of them which advised against the significant increases of March 2015 and can be taken to similarly oppose the current proposals.

Consumer choice

21. There is a further competition issue to take into account because the enhanced fees brought in in March 2015 are already having an effect in reducing consumer choice in this area. Where claimants’ solicitors are able to offer to their clients to assist them by carrying the costs of the
issue fee until the case settles, the substantially increased financial commitment which arises as a result is leading to the position where only larger firms have the financial resource to be able to continue to meet this cost in the short term. Smaller claimant law firms do not have the financial resource to be able to meet this cost for their clients across a range of claims, and any further increased fees for personal injury claimants would worsen the position as to choice for claimants and competition between claimant law firms will reduce.

The deficiencies in service levels from the courts

22. The power to introduce enhanced fees under Section 180 of the Anti-Social Behaviour, Crime and Policing Act 2014 requires that the income obtained must be used “to provide an efficient and effective system of Courts and tribunals”.

23. It is clear that in key respects the increased fees which have been introduced over recent years, including the enhanced fees introduced in March 2015, have not provided that type of system. Indeed, when one analyses the position in relation to the enhanced fees of March 2015, there is recent evidence of systemic deterioration in the level of service provided by the Courts.

24. One example is the hear-by dates for hearings in the Civil Division of the Court of Appeal. Practice Guidance was issued on 17 June 2015 by the Master of the Rolls. Up until then, the longest hear-by date for any type of appeal was nine months. The current position is that new sets of hear-by dates have been given, which extend, at their longest, in relation to appeals against final orders, to periods between 11 and 19 months. This represents a doubling of the period over which parties would be expected to wait for hearing dates from that Court. We note that the Court of Appeal has had to deal with an increasing volume of work, but the resources available to it are currently clearly being limited by Government notwithstanding the introduction of enhanced fees. We suggest that a wait of up to 19 months for an appeal to be heard does not constitute an efficient and effective system.

25. Secondly, issues have arisen recently in relation to costs budgeting and management, a cornerstone of the reforms advocated by Lord Justice Jackson. The costs budgeting regime has been examined by Mr Justice Coulson and by the CPRC, but it is clear that the Court Service cannot deliver the resources to carry out costs budgeting effectively across a range of cases. In relation to clinical negligence claims at the Royal Courts of Justice, there has been a nine month waiting time for a first costs and case management conference, and this has led to a temporary exclusion for clinical negligence cases of that type from costs budgeting. Again, an efficient and effective system is not being provided.

Conclusion

26. We sympathise with the Government’s current predicament and the requirements to reduce the deficit. We oppose though the argument that the current economic situation justifies the Government to require the users of the civil courts to pay enhanced fees that not only cover the costs of the civil courts, but also of the family and criminal courts. It is unfair and unreasonable to propose court fees at a level which effectively amounts to taxation on those unfortunate enough to have a civil dispute. The majority of those litigating civil disputes do not choose to have them, but look to rely on the State to provide a process which allows them to determine those disputes at reasonable and proportionate cost. Neither the enhanced fees introduced in March 2015 nor the current proposed further increased fees allow that to happen.

30 September 2015