Written evidence submitted by the Judicial Executive Board (JEB)

Introduction

1. This written evidence to the Justice Committee’s inquiry into courts and tribunals fees and charges is submitted by the Judicial Executive Board (JEB). We welcome the Committee’s decision to hold this inquiry and to regard this as an extremely important issue, with a major impact on access to justice for individuals, companies and organisations.

2. The Committee has highlighted four aspects of this issue on which it would welcome comments, and we address those in detail below. The judiciary has commented extensively on the succession of fee reform proposals which the Ministry has issued and implemented in the last two years, and the Committee’s attention is drawn to those submissions. We have appended a list of web links to those response documents for ease of reference.

3. It is worth setting out the context of the general position of the judiciary on court and tribunal fees. The judiciary has never accepted the policy principle that courts and the justice system should be self-financing. Lord Scott described this approach as “profoundly and dangerously (mistaking) the nature of the system and its constitutional function”. A justice system is a fundamental part of a democratic and civilised society committed to the rule of law. While the judiciary would agree and support part of the costs of the justice system being borne by users of the system, the justice system is a public good that all society benefits from, and it warrants and requires the support of public funding.

4. Parliament has approved the option for Government not just to pursue full-cost recovery, but the use of above-cost recovery through enhanced fees. This legislation has been brought into immediate force with reforms introduced with effect from April 2014, and further proposals to increase the income through enhanced court fees in the recently concluded consultation.

5. A similarly significant shift in policy was the adoption of a criminal courts charge, using the principle that convicted adult offenders should pay a fee with the aim of recovering some of the costs of the criminal courts.

6. A further policy development has been the introduction of fees to the Employment Tribunal and the current proposals for fees to be introduced or significantly increased to a number of other tribunal jurisdictions.

7. The judiciary fully accepts the economic and public spending climate in which the recent sets of court and tribunal fees have been advanced. However, as this submission will illustrate, the judiciary has grave concerns about the scale and pace of the reforms which have been implemented or proposed, the evidence base on which those reforms have been justified and the implications for access to justice of individuals, businesses and organisations.

8. A major difficulty in drawing up evidence for this inquiry is the paucity of readily available statistical data on the impact of recent court and tribunal fee reforms, in part as so many have been so recent and successive. Our concern that further proposals are being pursued before

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1 Section 180, Anti-social Behaviour, Crime and Policing Act 2014
2 Section 54, Criminal Justice and Courts Act 2015
there has been a proper analysis and evaluation of the effects on workload, demand and access to justice is a theme to which we will return below.

**Answers to specific questions**

- *How have the increased court fees and the introduction of employment tribunal fees affected access to justice? How have they affected the volume and quality of cases brought?*

9. The effects on access to justice of the introduction of fees for the Employment Tribunal are stark and well recorded. The overall reduction in cases brought is considered to be almost 70% since fees were brought in.³ Although other factors may have had a partial impact on these figures (e.g. changes to employment law) the consensus of the tribunal’s judiciary is that the dramatic fall in claims is primarily linked to fees having been introduced. The fall has been most marked in cases involving disputes about unpaid wages, notice pay and redundancy pay.

10. The Employment Tribunal experience, which is subject to a current Government review, gives obvious rise to concerns about access to justice, and that people with meritorious claims are being deterred from bringing them by the fees involved. The experience also suggests that the Government’s impact assessment of the fee reforms, which assumes there will be no fall in demand in cases in any court or tribunal is highly questionable.

11. More generally across the justice system, statistical data on the impact of fee increases in the courts is very hard to find. In the civil courts the most recent material publicly available only runs to June 2014,⁴ and indicates a fall in cases from April-June 2014. In the family court the number of cases commenced in April-June 2014 represented a 19% fall compared to the equivalent period in 2013. Provisional figures for the Intellectual Property Enterprise Court (IPEC) point to a fall of 25% in the five months following April 2015 compared to the five months preceding March 2015. It is too early to be able to assess how much of a factor large court fee increases were in these falls in workload and what the longer term trends will be.

12. The very limited nature of the data available underlines our central concern that significant changes are being made to fee levels without there having been proper time to monitor and assess the effects of fee increases on demand. This is critical, as the projections of future fee income have been made the basis for the continued funding of our justice system following the adoption of a policy of pursuing full cost recovery for operating and administrative expenses.

13. In the absence of statistical data on the courts, the judiciary fears that the scale and range of fee reforms will inevitably have had or will have an impact on claims brought and thus impair access to justice. Reforms to the fee remission system, reducing the numbers of people able to seek remissions were implemented in October 2013. In April 2014 a sweeping set of fee increases in civil and family cases was brought in, with an inflationary uplift on the figures consulted upon. Those reforms were designed to achieve greater cost recovery. In March 2015 enhanced fees were introduced, using the formula that fees could be set at 5% of the value of a money claim (to a maximum of £10,000) – this had the effect of raising some fees sixfold and taking court fees to five figure sums to be found by parties at the outset of

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³ House of Commons library briefing paper (7081), September 2015
proceedings. Increases for possession claims and general applications in civil cases, and an increase in the divorce fee have been confirmed for implementation. A further set of fee increases have been the subject of consultation this summer. The cumulative effect of all these increases will, in our view, have had an adverse effect on access to justice.

14. We have major reservations that the effect of these proposals will be to diminish significantly the prospects for a number of court and tribunal users in accessing access to justice, by pricing them out of the system. The impact on major litigators will be significant, but court and tribunal fees will always represent, for them, just a proportion of the overall litigation or legal costs. For litigants in person and smaller businesses the court fee often represents a major component in the costs of pursuing their claim, and such fees have to be found – in full – at the outset. The fact that they may be recoverable does not necessarily assist in overcoming that initial cost barrier, which may prove an effective barrier given the large sums that can now be involved (e.g. the fee for a claim to the value of £90,000 is £4,500, which represented a 395% increase on the former fee of £910). Wider reforms in the justice system are seeing cases increasingly being dealt with at lower levels of the court system, and cases with a value of £300,000 may be dealt with in the County Court attracting a potential fee of £20,000 under current proposals.

15. We also have significant reservations about the strength of the evidence base for the reforms as set out in the impact assessments published alongside each set of proposals. Our consultation response in September 2015,\(^5\) listed a range of supporting research publications employed to support and justify the assumptions made on case numbers being unaffected by sharp fee increases. In that response we have highlighted the inadequacy of that material in terms of the current set of proposals. Some of that material is outdated given the pace and scale of fee increases, and there are also problems to varying degrees in respect of the size of the sample used.

16. There appears to the senior judiciary a danger of a vicious cycle developing where, as fees rise, so numbers of cases inevitably fall, and the following year sees another rise to compensate for the loss of income from those lost cases which then drives further cases out of the system.

- **How has the court fees regime affected the competitiveness of the legal services market in England and Wales, particularly in an international context?**

17. In the judiciary’s consultation response to enhanced fees in January 2014 we drew attention to the “fundamental misunderstandings of commercial proceedings ... which would have undesirable and unintended consequences”. Although the Government did not proceed with the original suggestion of daily hearing fees, enhanced fees were introduced, but subject to a cap of £10,000 for cases exceeding £200,000. The present proposals now suggest this cap should be raised to “at least” £20,000.

18. These figures help illustrate that the levels of increase and the sums of money involved in the latest proposals are significant. There appears to be an assumption in the policy hypothesis that the domestic and international markets will bear much higher costs without any loss of business or revenue. The reality is that there are alternatives and the international legal dispute resolution market is an intensely and increasingly competitive one. Domestically, the arbitration industry is actively marketing its cost effectiveness in the context of court fees. The excellence and highly specialist skills of the United Kingdom’s judiciary and legal services

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\(^5\) Appended to this submission.
sector are widely recognised, but research commissioned by the Government shows clearly that heavy commercial and international litigators are understandably weighing up the strengths of the market with its costs and those of its alternatives and competitors. The following extracts from that research (conducted by the British Institute for International Comparative Law (BIICL) demonstrate this very clearly:

- “Two thirds of respondents anticipated adverse consequences of increased court fees on London as a litigation centre” (page 3). Reasons cited were fees being set too high, representing a ‘tax-like’ payment, high upfront fees being seen as inappropriate with so many cases settling early, over time English commercial law gaining less exposure to international dispute resolution and losing market ascendancy.

- “Respondents advocated a precautionary approach to reform” (page 4) with upfront costs kept low – the current proposals do not represent such an approach.

- Competitiveness – “the increase in fees as suggested in the reform proposals will make English courts the most expensive” (page 3).

- “The suggested value-dependent issue fees (5%) would be too high” (page 19).

- Cross-subsidisation – “Many respondents could not find any justification as to why users of the Commercial Court should finance the shortfall of, for example, the English family courts” (page 20).

19. It is clear from this important research that care and caution should be the watchwords for reform in this area, and the effect on business since the introduction of the enhanced fees needs to be carefully monitored and analysed prior to embarking on a fresh round of significant fee increases. The attractiveness of London and the UK as a centre for resolving national and international legal disputes is not confined to the court system and it is operating in an increasingly competitive market. The balances to be struck are becoming finer, and we regard it as imperative that a properly thorough review takes place on the effects of the first phase of enhanced fee reforms before a second phase is implemented.

- What have been the effects on defendants of the introduction of the criminal courts charge? Has the criminal courts charge been set at a reasonable and proportionate level? Is the imposition and collection of the charge practicable and, if not, how could that be rectified?

20. The rationale for this reform is that adult offenders who are found guilty should contribute to the costs of the court system that prosecutes and penalises them. The notion that taxpayers are “subsidising” the criminal justice system, however, appears to the judiciary to undermine the fundamental principle that the protection of victims and the prosecution and punishment of offenders is an integral part of a civilised society from which all members benefit. Another reservation in the implementation of the reform is the mandatory nature of the charge - it removes all discretion from the sentencing court.

21. In terms of the effects on defendants, it is too early to form a meaningful assessment; the cost per case is unknown, and the level of charges that will be paid and the numbers and costs of the enforcement process for non-payment is not known. However, a large number of criminal defendants are on very low income and/or state benefits – courts are required to

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take account of a defendant’s means – the aim is for a fine to be a hardship but not force the offender below a reasonable subsistence level. There is a danger that the charge undermines the principle of sentencing that punishment is determined and then adjusted to reflect the individual circumstances of offender and offence. Another danger is that the charges and other financial penalties may influence a guilty plea where defendants are concerned about the high costs.

22. In terms of the setting of the charge, the Government did not consult on the levels, which were introduced via secondary legislation. Such a consultation would have ensured that levels could have been set at an appropriate level having regard to the views that would have been provided from the full spectrum of those involved in the criminal justice system. The facts that it has no relationship with the means and culpability of the offender, and that no judicial discretion is allowed are concerning in terms of proportionality. There is a rather unprincipled mix of discretion and compulsion – the court has no option but to impose the charge, so it is not part of the sentencing process. However, the defendant can come back and have it removed if they have stayed out of trouble as though it had been part of the sentence.

23. With regard to the practicability of the charge we have already raised concerns in relation to the lack of discretion for a court and the difficulties in assessing a defendant’s ability to pay the charge, which should be of a lower priority to them paying compensation to victims, the victim surcharge and any fine imposed for the offence.

24. The charge may be applied by the full court. If the application is renewed to, and dismissed by the full court, the applicant will be liable to pay a charge of £150; if leave to appeal is granted and the full court dismisses the appeal the appellant is liable to pay £200. This means that if a judge thinks an appeal is arguable but the appellant loses they pay more than if the judge thinks it is unarguable and renews it anyway. This is illogical and defies the whole point of trying to prevent hopeless appeals.

- How will the increases to courts and tribunals fees announced in Cm. 9123, "Court and Tribunal Fees", published on 22 July 2015, and the further proposals for introducing or increasing fees included for consultation in Cm. 9123, affect access to justice?

25. The judiciary submitted a comprehensive response to this set of further fee increases, and we have drawn from that response in preparing this written evidence submission. A number of the key points have been made in the preceding paragraphs.

26. The new set of proposals will have a profound and adverse effect on many parts of the tribunal system. The impact assessment provided for the fee reforms of the tribunal states that the assumption is that caseload will remain after the introduction or increase in fees across various tribunals. This is despite the experience of the Employment Tribunal (see paragraph 9 above). The impact assessment fails to cite any tribunal-specific research in relation to the effects of fee setting, and indeed none has been commissioned by the Government in advance of these proposals. The judiciary will be very interested in the findings of the post-implementation review of the Employment Tribunal fee reforms.7

27. The current set of reforms has not taken an even-handed approach. While the Government has accepted that the client base for many tribunals (for example in the Social Entitlement chamber, with many benefit recipients pursuing claims) is such that the prospect of large

scale remissions reduces the case for introducing fees, in other areas, such as immigration and asylum, a more aggressive approach to fees is being taken. There is a lack of consistency in the costs being sought for recovery from tribunal fees across the different jurisdictions, and with different pricing – e.g. a £500 fee for General Regulatory Chamber cases, but £200 for Property.

28. The impact assessment does not contain sufficient information, in our view, on the likely costs of introducing and increasing fees in tribunals. New forms and electronic systems and training for staff will be required to administer the new fees structure, and the inevitable and time consuming process of administering the receipt of fee, applications and assessment of remissions etc.

29. In relation to the civil jurisdiction, in the senior judiciary’s January 2014 consultation response we set out at length our concerns on the civil justice system fee income being used to subsidise family justice. The current set of proposals exacerbate and virtually institutionalise this change – indeed paragraph 50 of the Government’s paper makes the policy objective explicit – “(The Lord Chancellor) may use surplus fee income generated in a wide range of proceedings to finance the costs of HMCTS as a whole”. Specific reference is then made to funding criminal courts. The approach being taken is deeply worrying, with an implication that over time civil (in particular) fees will continue to rise to support the operation of a full range of courts and tribunals, absolving the taxpayer of any responsibility for funding a core public service which is integral to the functioning of a civilised democratic society based on the rule of law.

30. We have set out our deep reservations about the raising of the enhanced fee cap in the absence of statistical data and analysis of the effects on the domestic and international market of the major increases being pursued. Even in purely economic terms (quite aside from the concerns over access to justice) the current relentless pace of reform appears risky.

31. In relation to the family jurisdiction, the new set of fee proposals does not apply, although the Government’s response does reverse the decision made only in January 2015 not to increase the fee for divorces. The proposal is now to increase the fee by 34% from £410 to £550. While it is recognised that this is not as large an increase as was proposed in December 2013 (£750), there are a number of concerns about the implications and effects of a fee that is in excess of the cost of the service (£270). These include the potential for unhappy marriages to continue, with adverse effects on partners and children due to the size of the fee to get a divorce, the disproportionate effect on women (who form around three quarters of petitioners). There is something unappetising about the State making a growing profit on a legal necessity and a source of unhappiness for many people.

13 October 2015
APPENDIX A

Links to judicial consultation responses on court and tribunal fees


2. December 2014 – Response by the Lord Chief Justice to the MoJ consultation letter “Court fees: enhanced charging”:


3. September 2015 – Response by the senior judiciary to the MoJ consultation paper “Court and Tribunal fees – consultation on further fees proposals”

(Appended)

A number of groups of judges and individual judicial office holders have made responses to these consultations, and the Ministry of Justice will hold the records.