



The Bar Council

Bar Council response to the “Implementing increases to selected court and tribunal fees” consultation

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 “Implementing increases to selected court and tribunal fees”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 principle that fees should be increased periodically to reflect rising costs to HMCTS as a result of changes in the general level of prices? Please give reasons for your answer.

Yes. The Bar Council recognises that an adequately funded and resourced justice system is essential for upholding the rule of law, ensuring access to justice and maintaining England & Wales as the preferred jurisdiction for dispute resolution and

¹<https://consult.justice.gov.uk/digital-communications/increases-selected-court-tribunal-fees/>

asserts that these principles should also be applied to fee increases for advocacy for the publicly funded Bar to reflect the same inflationary pressures.

However, the Bar Council is concerned that there is over-recovery of civil court fees, which may in substance be enhanced as defined under section 180 of the Anti-Social Behaviour, Crime and Policing Act 2014. The consultation does not allow the Bar Council adequately to assess (a) the cost of the civil justice system; (b) the extent to which, if at all, the proposed civil fees are enhanced; and/or (c) the income from fees proposed to be derived from the increase in fees for the civil justice sector and then to compare that to the cost of civil justice system.

If there is over-recovery of civil justice fees, the Bar Council does not accept that the income from civil justice fees should be used, in effect, to cross-subsidise the rest of the justice system. That would amount to an indirect tax on civil justice users and significantly and negatively impact access to justice and/or maintaining England & Wales as the preferred jurisdiction for dispute resolution.

Question 2: Do you agree with the principle that a fee increase of 10% for up to 202 fees, to partially reflect increases in CPI from March 2021 is appropriate? Please give reasons for your answer.

No, the Bar Council does not agree that the proposed increase is appropriate without further details in the consultation. Paragraphs 2 and 3 of Answer 1 are repeated.

Question 3: Are there any fees outlined in Annex A that should not be increased by 10% as part of this proposal? Please give reasons for your answer.

The Bar Council is unable to answer this question without further details in the consultation.

Paragraphs 2 and 3 of Answer 1 are repeated.

The Bar Council is concerned that the proposed fee increases will have a disproportionate impact on individuals employed at the level of the Living Wage (and/or the London Living Wage) who would not be able to claim a fee remission.

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 increase in fees in the civil jurisdiction claim 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 claimant in the civil jurisdiction is likely to have the effect of serving as a significant barrier to access to justice.

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 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.

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.

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

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.

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

- i. “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.”
- ii. At [66]: “The constitutional right of access to the courts is inherent in the rule of law.”
- iii. [78]: “... impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible.”

Question 4: Do you agree with the proposal on making more regular, incremental inflation and cost-based increases to court and tribunal fees every two years, as opposed to more infrequent but more significant changes on an ad hoc basis? Please give reasons for your answer.

Yes. The answer to Question 1 is repeated.

Question 5: What are your views on the proposal to enhance the council tax liability order fee, retaining its current value of £0.50p?

The Bar Council is neutral as to this proposal.

Question 6: What do you consider to be the equalities impacts on individuals with protected characteristics of the proposals? Are there forms of mitigation in relation to equality impacts that we have not considered? Please give reasons for your answer.

The answer to Question 2 above is repeated. The consultation does not appear to assess adequately or at all whether claimants in the civil jurisdiction on the Living

Wage (whether inside or outside London) disproportionately have protected characteristics and therefore are disproportionality impacted by the proposed increase in claimant fees in the civil jurisdiction.

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