

<b>Title:</b> Reduce court fees where MoJ are currently over-recovering. <b>IA No:</b> MoJ033/2019 <b>RPC Reference No:</b> N/A <b>Lead department or agency:</b> Ministry of Justice (MoJ) <b>Other departments or agencies:</b> HM Courts and Tribunals Service (HMCTS)	<b>Impact assessment (IA)</b>			
	<b>Date:</b> 26/06/2019			
	<b>Stage:</b> Final			
	<b>Source of intervention:</b> Domestic			
	<b>Type of measure:</b> Secondary Legislation			
<b>Contact for enquiries:</b> mojfeespolicy@Justice.gov.uk				
<b>Summary: Intervention and Options</b>				<b>RPC Opinion:</b> N/A

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB on 2014 prices)	In scope of One-In, Three-Out?	Measure qualifies as
£-0.2M	N/A	N/A	Not in scope	Not a regulatory provision

**What is the problem under consideration? Why is Government intervention necessary?**

The Ministry of Justice (MoJ) has undertaken the annual review of the fees charged for proceedings in the civil and family courts compared with the costs of those proceedings. This review, using data for 2017/18, identified a number of fees charged in the magistrates' courts, High Court and Court of Protection (for a full list see Annex A) that are currently set above the full costs of those proceedings without the necessary parliamentary authority. Prompt Government intervention is necessary to reduce these fees to cost-recovery level using the power to set fees (s. 92 Courts Act 2003).

**What are the policy objectives and the intended effects?**

The policy objective is to set fees at full cost recovery level for these proceedings and applications, and the intended effect of the policy is therefore to reduce the fees for those affected services to cost-recovery level.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option.**

The following options are considered in this Impact Assessment (IA):

- Option 0: Do Nothing. Maintain the current fee structure.
- Option 1: Reduce court fees where MoJ is currently over-recovering and merge fees relating to the assessment of costs of proceedings in the Court of Protection and fees relating to High Court judges sitting as arbitrators. In addition, reduce the probate copy document fee.

The Government's preferred option is to implement Option 1. The fees which are the subject of the Statutory Instrument (SI) are currently above cost without explicit parliamentary authority and immediate action is necessary to ensure the fees are prescribed lawfully. To deliver this, an SI is necessary to provide the requisite parliamentary authority.

**Will the policy be reviewed? Fees are regularly reviewed as part of the internal ongoing monitoring process. If applicable, set review date:** N/A

Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro No	< 20 No	Small No	Medium No	Large No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> N/A		<b>Non-traded:</b> N/A

***I have read the Impact assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible Minister: Paul Maynard Date: 26/06/2019

## Summary: Analysis and Evidence

## Policy Option 1

**Description:** Reducing court fees where MoJ are currently over-recovering.

Price Base Year 2019/20	PV Base Year 2019/20	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: -£0.2m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low		1	N/A	N/A
High			N/A	N/A
<b>Best Estimate</b>	<b>£0.2m</b>		N/A	-£0.2

### Description and scale of key monetised costs by 'main affected groups'

Transitional costs to HMCTS (from making minor adjustments to IT systems and reissuing forms and guidance) are expected to be up to £0.2m.

The ongoing cost to MoJ from lowering the fees is estimated to be around an average of £1.7m per annum (annual average in 2019/2020 prices). This represents a direct transfer from HMCTS to court users and does not form part of the NPV. Any refunds of fees have not been included in the NPV.

### Other key non-monetised costs by 'main affected groups'

Due to uncertainty, the impact on income from lowering the probate copy document fee cannot be monetised and is expected to be minimal.

There may be some minor transitional costs related to familiarisation with the reduced fees for HMCTS staff, legal professionals, and customers. These costs cannot be monetised and are expected to be minimal.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low		1	N/A	N/A
High			N/A	N/A
<b>Best Estimate</b>	<b>0</b>		N/A	None

### Description and scale of key monetised benefits by 'main affected groups'

On an on-going basis, users of these court services would benefit from the lower fees by around £1.7m per annum (annual average in 2019/20 prices).

### Other key non-monetised benefits by 'main affected groups'

None.

### Key assumptions/sensitivities/risks

- It is assumed that these fee changes will not result in a change in demand for services. However, sensitivity analysis estimates that a 5% and 10% increase in demand by court users due to lower court fees will result in annual lost income of £1.1m and £0.4m in steady state respectively, compared to the £1.7m estimated in a no demand change scenario.
- It is assumed that there will be no change to the fee levels over the appraisal period.
- An annual remissions rate of; 6% in the Court of Protection, 0.4% in the magistrate's court, 6% for the assessment of costs of proceedings in the Court of Protection and 0% for High Court judges sitting as arbitrators has been applied over the appraisal period.

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m
Costs: N/A	Benefits: N/A	Net: N/A	N/A

## Evidence Base

### A. Background

1. HM Courts and Tribunals Service (HMCTS) delivers a benefit for courts users and the general public by providing a place where people can enforce and defend their rights. A large number of people use the services of HMCTS every year. Whether it be disputing parents in a family court, a vulnerable witness to a crime, or someone appealing a benefits decision, people interact with HMCTS at some of the most difficult times in their lives.
2. Fees are an important source of funding for the courts and tribunals, and a reasonable means of making resources available to secure access to justice. This is because an effective court and tribunal service needs to be funded appropriately in order to protect access to justice in the longer term. Under s92 of the Courts Act 2003, the Lord Chancellor has the power to prescribe fees which helps to ensure he fulfils his statutory duty to ensure *an efficient and effective* courts and tribunal system.<sup>1</sup>
3. Within HMCTS, there are well over 300 separate fees charged for civil and family proceedings in the courts of England and Wales. Because the Ministry of Justice (MoJ) takes access to justice seriously it therefore conducts an annual review of court fees. In the course of the review of court fees for 2017/18, the MoJ have identified a number of fees which have recovered above cost without the necessary Parliamentary approval.
4. The Government has decided to reduce these fees to cost-recovery level. This is driven by the general legal principle that Courts and Tribunals fees should not be set at a level that exceeds the cost of the service provided without express parliamentary approval. Presently, the only fees that may be set at a level that exceeds costs are those set by way of affirmative SI under the enhanced fee power (section 180 of the Anti-Social Behaviour, Crime and Policing Act 2014).
5. Annex A provides full details of the fees which are currently set above full cost recovery levels. In summary, these fees relate to:
  - i. Certain civil proceedings in the magistrate's court;
  - ii. Starting proceedings, appeals and hearings in the Court of Protection;
  - iii. Requests for the detailed assessment of costs of proceedings in the Court of Protection;
  - iv. High Court judges sitting as arbitrators – initial and daily hearing fee.
6. The fees listed in iii and iv above - assessment of costs and High Court judges sitting as arbitrators - currently comprise of two separate fees each. These are to be merged into a singular fee. The rationale and methodology for combining these fees is explained further in section C.

This IA is concerned with those fees, where following a review of costs, it has been identified that we are charging above cost without Parliamentary approval. In addition to this, the probate document copy fee will be reduced from £10 to £1.50p, the rationale for which is explained in section C.

7. This Impact Assessment (IA) describes the impacts of the proposed fee changes.

### B. Policy Rationale and Objectives

8. The conventional economic approach to government intervention is based on efficiency or equity arguments. Governments may consider intervening if there are strong enough failures in the way markets operate, e.g. monopolies overcharging debtors, or if there are strong enough failures in existing government interventions, e.g. outdated regulations generating inefficiencies. In all cases the proposed intervention should avoid generating a further set of disproportionate costs and distortions. Governments may also intervene for reasons of equity (fairness) and for re-distributional reasons (e.g. reallocating resources from one group in society to another).

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<sup>1</sup> S1(1) Courts Act 2003 – “The Lord Chancellor is under a duty to ensure that there is an efficient and effective system to support the carrying on of the business of the Senior Courts, the Court of Protection, the county court, the family court and magistrates’ courts, and that appropriate services are provided for those courts.” See also s6A Promissory Oaths Act 1868 and s180(3)(a) of the Anti-Social Behaviour Crime and Policing Act 2014.

9. In this case however, the principle rationale for intervention is legal compliance. The fees charged by HMCTS are driven by the general legal principle that Courts and Tribunals fees should not be set at a level that exceeds the cost of the service provided without express Parliamentary approval. If no action is taken, the Government would therefore be acting unlawfully.
10. Likewise, the normal rule, set out in *Managing Public Money*<sup>2</sup>, is that fees to access public services should be set at a level designed to recover the full cost, but no more, of those services. Our review of unit costs has however identified that some of these fees are in fact above cost.
11. Our policy objective is therefore to ensure that these fees are set in accordance with the legislation under which they are made (i.e. section 92 of the Courts Act 2003). Full details of the changes are set out in Annex A.

## C. Description of Options Considered

12. To meet these policy objectives, the following options are considered in this Impact Assessment (IA):
  - **Option 0 – Do Nothing. Maintain the current fee structure.**
  - **Option 1 – Reduce court fees to full cost-recovery level for those services for which MoJ is currently over-recovering and merge fees relating to the assessment of costs of proceedings in the Court of Protection and fees relating to High Court judges sitting as arbitrators. In addition, reduce the probate copy document fee.**
13. Option 1 is the governments preferred option as immediate action is required to regularise the currently unlawful fees.

### Option 0

14. Under the Do Nothing option the current fee structure would remain in place.
15. The fees under consideration for change are currently above full cost recovery levels without express parliamentary approval. If no action is taken, the Government would therefore be acting unlawfully.

### Option 1

16. Under this option, a new fee structure will be introduced at cost-recovery level for the services set out in Annex A. The fees that are to be combined into a singular fee are also listed in Annex A and will also be set at cost-recovery level. The reasons for merging these fees are described below.
17. These fee changes are driven by the general legal principle that Courts and Tribunals fees should not be set at a level that exceeds the cost of the service provided without express Parliamentary approval.
18. In addition to the above, the probate hard and electronic copy fee for documents will be reduced from £10 to 50p. The rationale for setting the fee at this level is to simplify the fee structure by consolidating two hard copy fees into a single fee (the first copy fee of £10 and subsequent copy fee of 50p), eliminate the over recovery and maximise overall income by setting the fee at a rate below full cost recovery. This would distinguish probate copy fees from copy fees in other civil and family jurisdictions, generally set at £10. However, a justification for the lower fee in this context is the wider public value derived from the information in these documents, particularly as a way of confirming that an estate is being distributed in accordance with a will.

### Merging of fees

#### *Court of Protection 'Assessment of Costs'*

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<sup>2</sup> 'Managing Public Money', Chapter 6 (Fees, Charges and Levies). July 2013.

19. The filing of a request for a detailed assessment of costs of proceedings in the Court of Protection is currently charged as two separate fees: where the amount of cost (excluding VAT and disbursements) to be assessed does not exceed £3000 and all other cases. Data on costs from HMCTS does not differentiate between the two fees and therefore there is a single unit cost encompassing both. As a result, the two assessment of cost fees have been identified as over recovering and it is proposed that rather than reduce both fees to cost recovery levels, they are merged into a singular fee and then reduced. The single fee will remove differentiation based on the value of the costs.
20. These fees were previously not set on the basis of reasonable predictive estimates and therefore the amount over-recovered will need to be refunded.

#### *High Court judge sitting as an arbitrator*

21. Where a High Court judge is 'released' by the LCJ to sit as an arbitrator in a private arbitration under s93 of the Arbitration Act 1996; s93(4) provides that the fees payable for the services of such judge are taken by the High Court. Currently four fees are charged, two separate fees for the initial appointment of a judge of the Technology and Construction Court or the Commercial Court and two separate daily hearing fees for those judges. The fees charged for those judges sitting as arbitrators tend to fluctuate in terms of the level of over or under-recovery. This is due to changing costs and there being a low volume of applications for relatively high fees. As resources are shared between these areas, it is proposed that they are combined into a single appointment and single daily hearing fee, mitigating the extent of fluctuations around over and under-recovery. It is calculated as a weighted average fee based on the unit costs of the two fees. The fee is also being amended to reflect that, following amendments to the 1996 Act made by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018, any eligible High Court judge may now sit as an arbitrator, rather than only judges of those two jurisdictions.

## **D. Affected Stakeholder Groups, Organisations and Sectors**

22. These options assessed in this IA will primarily affect users of the services where fees are changing. A list of all the main groups that would be affected is shown below:
  - HMCTS users – those who use the services for which fees in Annex A are changed. Such court users include individuals, Local Authorities, and businesses;
  - HMCTS – who operate the services;
  - Taxpayers – who subsidise HMCTS as overall HMCTS income falls below its overall costs;
  - Legal services providers – who provide service to users of HMCTS;
  - MoJ – who sponsor HMCTS (which provides the services for which fees are charged).

## **E. Cost and Benefit Analysis**

23. This IA follows the procedures and criteria set out in the IA Guidance and is consistent with the HM Treasury Green Book.
24. Where possible, IAs identify both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales with the aim of understanding what the overall impact on society might be from the proposals under consideration. IAs place a strong focus on monetisation of costs and benefits. There are often, however, important impacts which cannot sensibly be monetised. These might be impacts on certain groups of society or data privacy impacts, both positive and negative. Impacts in this IA are therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are not monetised.
25. The costs and benefits of each proposal are compared to option 0, the counterfactual or "do nothing" scenario, where Court and Tribunal fees are maintained at their current levels. As the counterfactual is compared to itself, the costs and benefits are necessarily zero, as is its net present value (NPV).

## Key Assumptions

26. The impacts described in this IA are based on modelling and assumptions. These are described below. The risks associated with these assumptions are described in section F.

## Methodology

27. To estimate the change in fee income from Option 1, we have used MoJ internal court caseload data from 2017/18, which is the most recent data available. We have assumed that caseload will remain constant at 2017/18 levels for the ten-year appraisal period.

28. In order to calculate the impact on HMCTS fee income, the change in fees has been multiplied by the expected volumes of users of the services, for each fee that is to change.

29. We present the results using a ten-year appraisal period to show the impacts in steady state.

## Demand

30. Court user behaviour (demand) may change in response to changes in court fees. The estimated financial impacts in this IA assumes that the changes in court fees will have a nil or negligible impact on court demand. Due to data availability limitations, the demand impact arising from previous changes in court fees has not been used as a suitable proxy, as it is not possible to estimate these with a relative degree of certainty.

31. However, a sensitivity analysis has been carried out to assess the financial impacts in the event of there being a demand response from court users. The scenarios modelled are a 5% and 10% increase in court demand arising from the reduced fees. The results of the analysis are presented and discussed further in Section F.

## Limited Access and Remissions

32. We assume that the current fee remissions scheme will remain in place and that eligibility for remissions remains unchanged.

33. A remissions rate has been applied to account for instances where court users are exempt from paying a fee. Income is not collected in these cases and thus it is subtracted from the total income. This is 6% per annum for the Court of Protection and 0.4% per annum for the magistrate's court. For the Civil Proceedings Fee Order, a 6% remissions rate has been applied for the assessment of costs of proceedings in the Court of Protection and 0% for High Court judges sitting as arbitrators. The remissions rates have been calculated from 2017/18 data. We have assumed that the remissions rate will remain constant at 2017/18 levels over the ten-year appraisal period.

## Net Present Value

34. The NPV is calculated over a ten-year period, under the assumption that the proposed fees do not increase in line with inflation. The fee changes are not included in the overall NPV as they represent a transfer payment between the individuals who use court services and HMCTS. Instead, the NPV is only calculated on the basis of the costs to the affected parties of implementing the new fee structure.

**Option 1 – Reduce fees to cost-recovery levels for those services for which MoJ is currently over-recovering and merge fees relating to the assessment of costs of proceedings in the Court of Protection and fees relating to High Court judges sitting as arbitrators. In addition, reduce the probate copy document fee.**

## **Costs of Option 1**

### Transitional costs

## *HMCTS*

35. HMCTS is expected to incur costs of approximately £0.2m for making amendments to IT systems, staff guidance and publications for the public. There may also be costs related to HMCTS staff having to familiarise themselves with the new fees.

### *HMCTS users and the providers of legal services*

36. There may be familiarisation and awareness costs incurred by individuals and legal services providers who use the court services where these fees are being changed. These have not been monetised but are not expected to be significant.

### Ongoing costs

#### *MoJ*

37. Because of the fee changes described in Annex A, we estimate that MoJ will face a loss in income of £1.7m per annum (averaged over a ten-year appraisal period and in 2019/20 prices). This figure does not include any refunds required for assessment of costs for proceedings in the Court of Protection. Our best estimate for refunds is approximately £2.6m, however there is a relative degree of uncertainty surrounding this and is not included in the NPV.

38. The impact on income from the change in probate copy fees is uncertain, but is expected to be minimal. Therefore, it has not been possible to assess the monetised impact of reducing this fee.

## **Benefits of Option 1**

### Transitional Benefits

39. No transitional benefits are expected.

### Ongoing benefits

#### *Users of HMCTS services*

40. As a result of the fee changes, we estimate that HMCTS users will benefit by around £1.7m per annum (averaged over a ten-year appraisal period and in 2019/20 prices).

41. Due to uncertainty, it has not been possible to monetise the benefit to HMCTS users from the reduction in probate copy fees.

## **Net impact of Option 1**

42. HMCTS is expected to incur transitional costs from implementing the new fee regime (estimated at up to £0.2m). Individuals and legal service providers are expected to incur negligible costs from familiarising themselves with the new fee structure.

43. On an ongoing basis the change in fees is expected to result in a loss on fee income of around £1.7m per year. This cost to MoJ will be offset by the benefit to HMCTS users, and therefore the ongoing net impact of this proposal is expected to be minimal.

## **F. Risks and Sensitivity Analysis**

44. As the impacts described in this IA are based on certain assumptions, there are also some associated risks. These risks, and their potential impacts, are described below.

### *Volumes*

45. There are potential behavioural effects that may occur as a result of reducing these fees. In theory, a reduction in the price of court services could be expected to lead to an increase in demand.
46. Table 1 below shows the income we would expect if demand by court users was to increase by 5% and 10% because of the fee reduction. If demand were to increase by 5% or 10%, income would be higher and therefore the lost income from setting fees at full cost recovery would fall from £1.7m to £1.1m or £0.4m per annum in steady state. An increase in demand could also lead to increased cost which would partially or fully offset the impact of higher income but we have not estimated this.

**Table 1: Court User Demand Sensitivity Analysis**

Demand scenario	Income at current levels (£m)	Income at 100% cost recovery (£m)	Lost income (£m)
No change	15.0	13.3	1.7
5% increase		13.9	1.1
10% increase		14.6	0.4

*Note: figures are presented in steady state and may not sum due to rounding.*

47. Regardless of any potential changes in volume, the on-going net impact of changing fees remains zero as the cost to MoJ is offset by the benefit to HMCTS users.

#### *Push Back Effect*

48. There is the possibility of a 'push-back' effect whereby users may delay their use of court services and wait for the new lower fee. The impact of this would be a reduction in demand just before the new fee is introduced, and an increase just after the fee change. This risk has not been modelled.

## **G. Enforcement and Implementation**

49. All fees are payable in advance of the service being provided. The sanction for non-payment is that the service, where appropriate, will not be provided and the application would not be permitted to proceed. This would continue to apply under the options being considered.

## **H. Monitoring and Evaluation**

50. These fees were identified as over-recovering as part of the monitoring framework implemented by the MoJ to ensure that fees are charged at the correct level. The MoJ will continue to conduct these reviews in future.

## **I. Better Regulation**

51. This measure is not classed as a regulatory provision under the Small Business Enterprise and Employment Act 2015 and so does not score against the department's business impact target.



**Annex A: Schedule of fees set above cost without Parliamentary approval (based on 2017/18 costs and volumes)**

Fee	Description	Current	New
<b>NON-CONTENTIOUS PROBATE FEES ORDER 2004</b>			
	<b>8 Copy documents</b>		
	On a request for a copy of any document whether or not provided as a certified copy:		
8(a)	for the first copy;	£10	Fees to be merged £1.50
8(b)	for every subsequent copy of the same document if supplied at the same time;	50p	
8(c)	where copies of any document are made available on a computer disk or in other electronic form, for each such copy;	£10	£1.50
<b>COURT OF PROTECTION FEES ORDER 2007</b>			
	Application fee (article 4)	£385	£365
	Appeal fee (article 5)	£320	£230
	Hearing Fee (article 6)	£500	£485
<b>CIVIL PROCEEDINGS FEES ORDER 2008</b>			
	<b>Determination in the Senior Courts of costs incurred in the Court of Protection</b>		
6.1(a)	Filing of a request for detailed assessment where the amount of the costs to be assessed (excluding VAT and disbursements) does not exceed £3,000.	£115	Fees to be merged £85
6.1(b)	Filing of a requested for detailed assessment in all other cases.	£225	
	<b>Judge sitting as arbitrator</b>		
10.4	On the appointment of:		
(a)	a judge of the Commercial Court as an arbitrator or umpire under section 93 of the Arbitration Act 1996; or	£2,275	Fees to be merged £610
(b)	a judge of the Technology and Construction Court as an arbitrator or umpire under section 93 of the Arbitration Act 1996.	£1,800	
10.5	For every day or part of a day (after the first day) of the hearing before:		
(a)	a judge of the Commercial Court; or	£2,275	

<b>Fee</b>	<b>Description</b>	<b>Current</b>	<b>New</b>
(b)	a judge of the Technology and Construction Court, so appointed as arbitrator or umpire.	£1,800	Fees to be merged £610
<b>MAGISTRATES' COURTS FEES ORDER 2008</b>			
	<b>Attendance</b>		
1.1	On an application which requires a justice of the peace to perform a function away from the court premises.	£30	£25
	<b>Appeals</b>		
2.1	On an application to state a case for the opinion of the High Court under section 111(1) of the Magistrates Court Act 1980.	£155	£135
2.3	Proceedings under Schedule 5 to the Licensing Act 2003 — on commencing an appeal under paragraph 1, 2(2), 3(2)(a), 4(2), 7(2), 8(2)(b), 8A(2)(b), 10, 11(2), 12(2), 13(2)(b), 14, 16(2), 17(1) and (4) or 18(2)(a) of Schedule 5 to the Licensing Act 2003.	£70	£60
2.4	On commencing an appeal where no other fee is specified.	£70	£60
	<b>Certificates and Certified Documents</b>		
3.3	On a request for a certified copy of a memorandum of conviction.	£25	£20
3.4	On a request for a certificate or certified document where no other fee is specified.	£25	£20
	<b>Commitment</b>		
10.2	On an application for a warrant for commitment made in proceedings under the Child Support Act 1991	£45	£40