



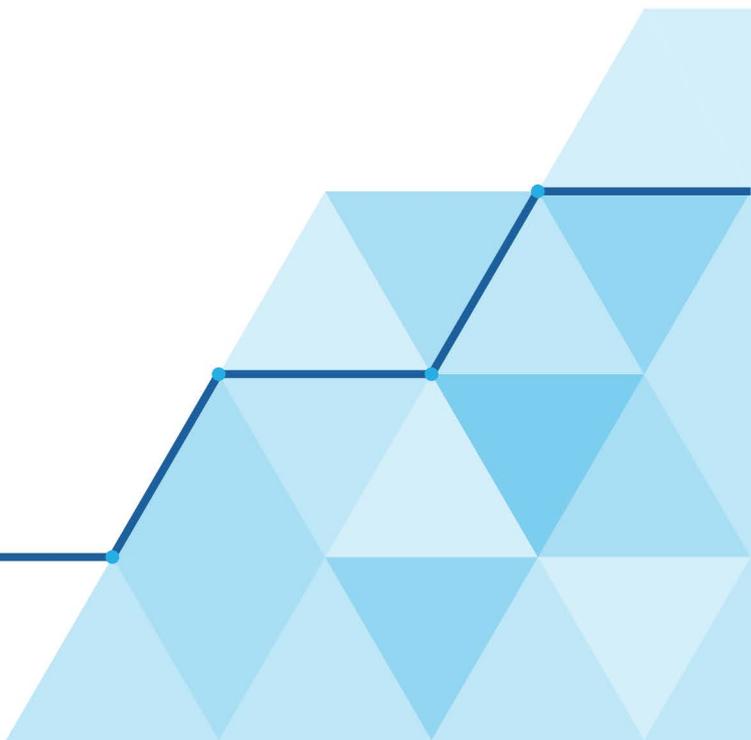
Ministry
of Justice

Proposal for reform:

Aligning the Fees for Grants of Probate to Cost Recovery

This consultation begins on 8 July 2021

This consultation ends on 23 September 2021





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of Justice

Proposal for reform

Aligning the Fees for Grants of Probate to Cost Recovery

**A consultation produced by the Ministry of Justice. It is also available at
<https://consult.justice.gov.uk/>**

About this consultation

- To:** This consultation is aimed at users of the probate service, the legal profession, the judiciary, the advice sector, and all those with an interest in the family court system.
- Duration:** From 08/07/21 to 23/09/21
- Enquiries (including requests for the paper in an alternative format) to:** Fees Policy Team
Ministry of Justice
102 Petty France
London SW1H 9AJ
Email: mojfeespolicy@justice.gov.uk
- How to respond:** Please send your response by 23/09/21 to:
Fees Policy Team
Ministry of Justice
102 Petty France
London SW1H 9AJ
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Contents

Ministerial Foreword	2
1. The Proposal	3
Background	3
The proposal	5
Impact of the changes	6
Previous consultations	7
Consultation period	7
2. Questionnaire	8
3. Impact Assessment, Equalities and Welsh Language	9
Impact Assessment	9
Equalities	9
Welsh Language	9
About you	10
Contact details/How to respond	11
Complaints or comments	11
Extra copies	11
Publication of response	11
Representative groups	11
Confidentiality	12
Consultation principles	13

Ministerial Foreword

We have a world class justice system, second to none. As a Minister in the Ministry of Justice, I am proud of our mission to run an efficient and effective justice system, protecting the rule of law and ensuring access to justice. It is an essential public service, relied upon by millions of people across the country to deliver the justice outcomes that matter to them.

Nowhere is this more apparent than in the probate service, which provides a crucial service to the public at one of the most difficult times in someone's life. It seeks to ease the burden of people who are grieving, by making the process of applying for probate as straightforward as possible. This consultation seeks views on a proposal to support Her Majesty's Courts & Tribunals Service (HMCTS) and the probate service in its important objectives.

We are looking to align the fee payable for probate applications with the cost of providing that service for all users. This would result in a fee increase to £273 for both professional users (£155) and non-professional users (£215). This is a far more modest increase than previous proposals and directly tied to the cost of providing the service. In doing so, the proposal achieves three key aims. Firstly, it removes a now unjustified discrepancy in the way that fees are charged, which differs depending on who applies. Secondly, it will eliminate the public subsidy for the probate application process – it currently costs HMCTS more to process applications than the fees it receives. Finally, it raises crucial income for HMCTS, in support of the Lord Chancellor's statutory and constitutional duty to ensure access to justice. We estimate that in a typical year, we will raise an additional £23–25m for the courts and tribunals service.

This proposal will play a part in preserving access to justice for all and maintaining our world class justice system. It is also markedly different to the Government's previous proposals to raise income from probate fees. I hope it is clear that this Government has listened to the previous concerns of stakeholders, and has proposed a fair and proportionate approach to funding an important service, whilst reducing the burden on the taxpayer.

Chris Philp

Parliamentary Under Secretary of State
(Minister for Immigration Compliance and the Courts)

1. The Proposal

Background

1. Obtaining a grant of probate is the process by which a personal representative demonstrates their authority to deal with the property, money and other possessions (an “estate”) of the deceased after their death. An application is made to the probate service, which is part of Her Majesty’s Courts & Tribunals Service (HMCTS). The application is usually made by the executor of the deceased’s will or a person acting on their behalf, often at around the same time as the payment of inheritance tax is due. Dealing with someone’s estate can be a process that is spread out over a long period of time. The probate service provides support to applicants going through the process, including via telephone at Courts and Tribunals Service Centres (CTSCs), and correspondence.
2. It is not a requirement that every estate must go through probate. This might be because the value of the assets of the deceased is very low (i.e. below the threshold for probate), or the nature of them means that they can be released straight away: for example, a bank might be willing to release money in a bank account without a grant of probate. It is, however, not always the case that the low value of a deceased person’s assets means that their estate does not require a grant of probate. A probate application for an estate valued at less than £5,000 does not attract a fee.
3. A grant of probate (or a “letter of administration” which is provided when there is no will) is also not required for any assets that are owned by the deceased with other persons as ‘beneficial joint tenants’. This form of ownership, for example between a husband and wife over the marital home, means that the property would pass automatically to the remaining spouse without the need for probate to be obtained. Property owned in this way does not form part of a person’s legal estate and probate is not required to transfer any interest in it. Some people will have a mix of assets, meaning that some fall within their estate and require a grant of probate before they can be released, while others will not.
4. In some cases, there might be a dispute about the will or process for administering the estate; this may only come to light after the initial application for a grant of probate has been made. For the purposes of this consultation, we are concerned only with the fee that is paid for applications for a grant of probate as set out in the Non-Contentious Probate Fees Order 2004 (as amended in 2014).

Who can apply for a grant of probate?

5. The person entitled to a grant of probate is the person appointed as executor in the will. If the will does not appoint an executor or if there is no will, the law states who is entitled to apply as an administrator.¹ If an individual is named as an executor in someone's will and takes up the appointment (or is appointed an administrator), he/she can either administer the estate themselves, or may appoint a professional (usually a solicitor) to advise them. There is an average of 270,000 applications that attract a fee for a grant of probate each year, around 40% of which are made by individuals, and around 60% by professional probate practitioners.²
6. The executor has responsibilities that may include making payments for probate fees, funeral expenses, and inheritance tax. Executors are fully reimbursed for their reasonable costs from the estate, meaning they are not left personally out of pocket. Whether or not the costs incurred are reasonable is decided as a matter of law. In this respect, fees for grants of probate are different to other civil and family fees charged by HMCTS as the fee is guaranteed to be recovered from the estate.
7. The affordability of fees should therefore not pose a challenge to executors when administering the estate. Executors may initially face a short-term cash-flow problem with regards to paying the fee, however there are facilities available which would mitigate this. In particular, many banks and building societies will allow the executor to access funds in the accounts of the deceased for the purpose of paying funeral costs, inheritance tax, and probate fees, as well as potentially offering a bridging loan secured against the assets within the estate.

The Current Fee System

8. The Lord Chancellor has a statutory and constitutional duty to protect access to justice, and to ensure that the courts and tribunals can operate effectively and efficiently. Court fees are an important element of running an effective and efficient courts and tribunals system. A simple and rational fee structure offers the best way to have a properly funded and efficient justice system that protects access to justice in the long term. This is why we endeavour to consistently assess the developing costs of the courts and tribunals and review the fees that users pay. In 2019/20, there was a net fee income of £724 million against the £2 billion running costs of HMCTS.
9. The legislation governing probate fees was last amended 7 years ago, when the fees were last updated to recover the full cost of service at that time. The present dual fee structure for applications to issue grants of probate differentiates between the type of

¹ Non-Contentious Probate Rules 1987

² Family Court Statistics Quarterly: October to December 2020 – GOV.UK (www.gov.uk) (<https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2020>)

applicant seeking probate. A grant of probate sought by a professional probate practitioner attracts a £155 fee, whereas an application made by an individual in a personal capacity is subject to a £215 fee. When these fees were last updated, it was still the case that the higher fee for non-professional applicants reflected some of the additional administrative work that was required from the Probate Service to process them.

10. Chapter 6 of the HM Treasury Handbook *Managing Public Money* outlines the general policy principles on the setting of fees by public sector organisations. It states that the standard approach is to set charges and fees to recover full costs. This is intended to make sure that the Government “neither profits at the expense of consumers nor makes a loss for taxpayers to subsidise”. It states that different charges can apply to different categories of service if there are “structural differences, where it costs more to supply some users”, but says that “different groups of customers should not be charged different amounts for a service costing the same.”
11. Based on the most recent cost recovery exercise undertaken by the Ministry of Justice, the cost of providing this service has been found to have increased and the divergence in cost between processing professional and non-professional applicants has substantially diminished. In 2018/19, the unit cost (which also takes into account inflation since 2014) of processing probate applications was £260 for a legal professional and £265 for a personal application, in comparison to fees of £155 and £215 respectively. In effect, this amounted to a public subsidy by the taxpayer. The average unit cost was assessed as £262 (£273 when inflated to 2021/22 prices).

The proposal

12. Our proposal seeks to establish a single consolidated fee of £273 for all users, which is the amount that reflects the full cost of processing probate applications. The objectives of the proposal are:
 - a) to bring the fee structure into alignment with *Managing Public Money* principles, where the same fee should be charged for all users of the same service. There is an unjustified discrepancy between different categories of user, as the costs of processing applications from the two user groups is now broadly equivalent;
 - b) to set the fee at a level that recovers the cost of providing the service, which would better align with the standard approach to charging fees under *Managing Public Money* principles (see paragraph 10 above);
 - c) and to protect access to justice by ensuring that courts and tribunals are adequately resourced in accordance with the Lord Chancellor’s statutory and constitutional duty, while also reducing the overall taxpayer subsidy to HMCTS.

13. As the probate fee is ultimately recovered from the estate, we believe it is appropriate and fair to alleviate the burden placed upon the taxpayer in the form of subsidising the processing of probate applications. Subject to the outcome of the consultation, the new fee structure will be introduced in early 2022. Probate applications for estates below £5,000 would continue to be exempt from paying a fee and applicants would still have the opportunity to apply for a remission through the Help with Fees scheme when eligible. For applicants who are ineligible but still believe a fee remission would be warranted, they have the opportunity to request the use of the Lord Chancellor's exceptional power to waive fees.
14. These changes would be given effect by amending the Non-Contentious Probate Fees Order 2004, which sets out the fees payable for probate applications in England and Wales. Section 92 of the Courts Act 2003 grants the Lord Chancellor the power to set court and tribunal fees, including fees for the Probate Service.
15. The Government is seeking views from users of the probate service, the legal profession, the judiciary, the advice sector and all those with an interest in the work of HMCTS.

Impact of the changes

16. As stated above, the income raised from a number of courts and tribunal fees, including probate, do not currently meet the cost of providing that service. In 2019/20, the total operating cost of HMCTS was £2 billion, with expenditure on the family jurisdiction services alone (which includes the Probate Service) accounting for approximately £251 million. Comparatively, the fee income generated by the family jurisdiction in 2019/20 (after remissions) was £166 million, which left the general taxpayer funding the deficit of £85m in the family jurisdiction.
17. Our proposals in this consultation are estimated to raise additional income of £5–6 million in 2021/22 and £23–25 million p.a. in 2022/23 onwards. This income is crucial for HMCTS and will allow it to run an efficient and effective courts system. It will allow the probate service to recover the costs of processing probate applications from its users.
18. Along with this consultation, we have published an impact assessment which outlines the impact of the proposed change.

Previous consultations

19. The Government previously consulted on reforming the probate fee structure in 2016. The previous consultation focused on reforms that were far broader in scope than the proposal considered within this consultation. The previously proposed fee structure differentiated the fee for grants of probate across seven distinct bands, with the fee increasing in line with the value of the estate (with the maximum band charging £20,000 for estates comprised of over £2 million). Following the feedback on the 2016 proposals, the Government reconsidered the proposals and put forward a revised banded structure in 2018 with more modest fees (where the new maximum band attracted a £6,000 fee instead). After receiving further feedback, the Government ultimately withdrew these proposals in 2019. Following this, the Lord Chancellor committed to reviewing options to align probate fees in the future, taking into account the importance of cost recovery.
20. In light of both the need to secure appropriate funding for HMCTS and the considerations raised prior to 2019, the Government now proposes a far more modest fee for all users (with an estate above £5,000) that directly corresponds to the cost of service provided to them.

Consultation period

21. This consultation seeks views on the proposal to introduce a single fee of £273 for probate applications, payable by both personal and professional applicants. The closing date for responses is 23 September 2020.

2. Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

22. The HM Treasury handbook on Managing Public Money specifies that the standard approach to charging fees is that the same charge should apply to all users of a defined category of service. While charging different cohorts different fees is permissible when there are structural differences that lead to different costs, the evidence presented in the proposal demonstrate that there is no longer a structural difference between the cost of providing grants of probate to professional applicants and personal ones. Our proposal is therefore to remove this discrepancy in legislation and charge the same fee for an application for all users.

Question 1: Do you agree that the fee payable for a grant of representation should be the same for all users, regardless of whether the application is from a professional probate practitioner or a personal applicant?

23. Managing Public Money also states that fees should be set so as to recover the cost of the service. This is not currently the case in probate. We estimate that a single fee of £273 is required to fund the cost of the service.

Question 2: Do you agree with the proposal to raise the fee payable for probate applications to recover the cost of providing the service? Please give reasons for your answer.

24. Please refer to our accompanying Impact Assessment and the Equality Statement.

Question 3: Do you consider whether the proposal will have a disproportionate impact on individuals with protected characteristics? Are there any potential modifications that we should consider to mitigate this impact?

3. Impact Assessment, Equalities and Welsh Language

Impact Assessment

25. A formal Impact Assessment has been prepared for this proposal and has been published alongside this consultation.

Equalities

26. Under the Equality Act 2010, the Government is required, as part of policy development, to consider the equalities impact of our proposal. In summary, public authorities subject to the equality duty must have regard to the following when exercising their functions:
- eliminate discrimination, harassment and victimisation and other conduct prohibited by the Act;
 - advance equality of opportunity between people who share a protected characteristic and those who do not;
 - foster good relations between people who share a protected characteristic and those who do not.
27. For the purposes of the equality assessment the relevant protected characteristics under the Equality Act are: race; sex; disability; sexual orientation; religion and belief; age; marriage and civil partnership; gender reassignment; pregnancy and maternity.
28. An Equality Statement has been prepared for this proposal and has been published alongside this consultation.

Welsh Language

29. This proposal, if implemented, would also impact those who speak the Welsh Language. This proposal includes changes to fees which also impacts users of the courts who speak the Welsh Language, although should not impair their understanding of fees disproportionately.
30. A Welsh version of this document can be found at: <https://www.gov.uk/government/consultations/aligning-the-fees-for-grants-of-probate-to-cost-recovery>
31. A Welsh language copy of the Impact Assessment and the Equality Statement will be provided on request.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 23 September 2021 to:

Fees Policy

Ministry of Justice
102 Petty France
London SW1H 9AJ

Email: MOJ Fees Policy mojfeespolicy@justice.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/>.

Alternative format versions of this publication can be requested by emailing MOJ Fees Policy at mojfeespolicy@Justice.gov.uk

Publication of response

A paper summarising the responses to this consultation will be published in due course. The response paper will be available on-line at <https://consult.justice.gov.uk/>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), the UK General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

If you do not wish your name/corporate identity to be made public in this way then you are advised to provide a response in an anonymous fashion (for example 'local business owner', 'member of public').

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

For more information see the Ministry of Justice Personal Information Charter.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018 that can be found here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf



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