

Probate Fee Structure: Equality Statement

1. Introduction

- 1.1. This Equality Statement considers the impact of the Government's plans to increase fees for certain proceedings against the duties in the Equality Act 2010. The proposals as set out in the document, *the Consultation on fee proposals for grants of probate*¹ were to introduce a banded fee structure for applications for a grant of probate. The Government response to this consultation confirms that these changes will be implemented.
- 1.2. These fee changes will set fees above cost recovery levels and are therefore made under the enhanced fee charging power provided by section 180 of the Anti-Social Behaviour, Crime and Policing Act 2014. This power enables the Lord Chancellor, by order, to prescribe fees in excess of cost of the proceedings to which they relate.

2. Policy objective:

- 2.1. *The Consultation on fee proposals for grants of probate*, and subsequent Government response set out the rationale for introducing the non-contentious probate fee changes. The main policy objectives are:
 - to make sure that HM Courts and Tribunals Service ('HMCTS') is adequately resourced, to ensure access to justice is protected in the long-term; and
 - to ask for a greater contribution from estates that can afford to pay, thereby transferring a proportion of the cost of the courts and tribunals from to the taxpayer to users.

3. Equality duties

- 3.1. Section 149 of the Equality Act 2010 ("the Act") requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:
 - eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;
 - advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
 - foster good relations between different groups (those who share a relevant protected characteristic and those who do not).
- 3.2. In carrying out this duty Ministers and the department must pay "due regard" to the nine "protected characteristics" set out in the Act, namely: race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

4. Summary

- 4.1. In the initial equalities statement, we specifically considered the impact on personal representatives (executor or administrators), who pay the fee upfront, but we also recognise that as the fee paid is recoverable from the estate, increased fees will also have an impact on the beneficiaries of an estate.

Personal representatives

- 4.2. In our previous equalities statement, we used data from the Civil Court User Survey, as no data is routinely collected on personal representatives and this was seen to be the only data set that could be used as a proxy at the time. Having considered further during the course of the consultation, we can see how this data set might not be seen as appropriate or meaningful for these purposes. As set out previously, a personal representative can be anyone over 18 years old, and there is no reason to believe that the data from the Civil Court User Survey is likely to have any significant relevance for this separate group of people. This makes it difficult to determine what the impact of these proposals is likely to be. As reform and digitalisation of the Probate Service continues, including the introduction of an online application form, we will be able to collect this type of data more consistently for applicants.
- 4.3. We have considered in developing these proposals how personal representatives will fund payment of the fee, and we believe there is a range of options for them to do so, including from their own savings, asking banks or building societies to release funds from the accounts of the estate to pay the fee, appointing a solicitor or agent who can pay the fee upfront, or by taking out either personal loans or specialist “executor” loans, which are secured on the assets in the estate. We recognise that individuals with a comparatively lower financial worth may find it more difficult to pay the fee upfront from their own pockets, and may also have less favourable credit ratings that limit their opportunity to take out bank loans. Using information on the population as a whole, we have found that individuals with some protected characteristics are more likely to have lower levels of disposable household income than those who do not share those characteristics, and therefore potentially more likely to experience difficulties in funding the initial fee.
- 4.4. Any difficulty in funding the application fee should be resolved relatively easily even if the personal representative is unable to fund the fee themselves or via a loan, through one of the many options available detailed in the consultation response. As a last resort, we have also retained the Lord Chancellor’s power to remit the fee in exceptional circumstances, so nobody will be unable to make an application because of their financial circumstances. Moreover, as the fee is ultimately recoverable from the estate, the personal representative would not be permanently out of pocket as a result of having to pay the fee. Even assuming therefore, for the purposes of this analysis, that the requirement to pay the fee upfront amounts to a particular disadvantage to a personal representative, such disadvantage should only be temporary.

Beneficiaries

- 4.5. We also recognise that as the fee paid is recoverable from the estate, increased fees will have an impact on the beneficiaries of an estate. Beneficiaries are not limited to a particular class of person, and they can include family members, friends and charities. We do not collect any data on beneficiaries, and do not have any data that could be used as a proxy to help us assess the impact of these proposals on beneficiaries.
- 4.6. None of the responses to the consultation provided any substantive data or evidence on the impacts these plans may have on those with protected characteristics.

- 4.7. Overall, and in the absence of any data that we can meaningfully use to assess the likely characteristics of either personal representatives or beneficiaries, we do not consider that these proposals would be discriminatory.
- 4.8. **Direct discrimination:** Our assessment is that the planned increases in fees are not directly discriminatory within the meaning of the Act as they will apply to all parties affected (both as a personal representative and beneficiary) and are not considered to result in people being treated less favourably because of their protected characteristic.
- 4.9. **Indirect discrimination:** We do not believe that individuals with protected characteristics would be particularly disadvantaged by these plans, but we have considered whether applicants with lower financial incomes could find it more difficult to fund the fee in the first instance. Analysing data from the DWP Household Income Survey, shown in table 1, it indicates that individuals with some protected characteristics are more likely to have comparatively lower household disposable income. The main results can be summarised as follows:
- **Sex:** There is no substantial difference between the percentages of men and women in relation to their household income quintiles,
 - **Ethnic Group:** Those living in households from a black, Asian, mixed or minority ethnic group are much more likely to live in a household in the bottom quintile compared to those from a white ethnic background;
 - **Disability:** Adults with a disability are more likely to live in a household in the bottom two quintiles compared to adults with no disability; and
 - **Age:** Individuals under 25 years of age are more likely to live in a household in the bottom income quintile.
- 4.10. It is likely, therefore, that individuals sharing some or all of these protected characteristics may find it more difficult to fund the increased application fee from their own pockets, and they may also be more likely to find it difficult to secure credit to fund the fee. However, a personal representative has a range of options to fund the initial fee other than from their own savings or personal loans. This includes banks and building societies releasing funds from the estate to pay the fee (this is frequently allowed to pay reasonable expenses on death, such as funeral costs), appointing a solicitor or agent who may be willing to pay the fee upfront and recover it from the estate, or securing a specialist “executor” loan that is secured on assets in the estate, rather than personal assets. Although personal representatives sharing some protected characteristics may therefore find it slightly more difficult to fund the fee immediately, there are enough options that they should ultimately be able to pay the fee, and they will be only temporarily out of pocket, as the fee is recoverable from the estate.
- 4.11. Any further unexpected impact will also be mitigated by the availability of the fee remissions scheme. Although we plan to remove persons applying for non-contentious probate from “Help with Fees”, the general HMCTS fee remissions scheme, the Lord Chancellor will retain the power to remit fees in full or part in exceptional cases. We also plan to increase the value of the estate threshold below which no fee is payable for the grant of probate, from £5,000 to £50,000, which will take 30,000 estates out of the requirement to pay a fee. This will save lower value estates up to £215 each, based on the current fee for a personal application.

- 4.12. Moreover, the new fees are proportionate to the value of the estate in question and the cost is recoverable from the estate. Even assuming, for the purposes of this analysis, that the impacts described above do amount to a particular disadvantage, we believe that these changes to fees are a proportionate means of achieving the legitimate aim of protecting access to justice, by asking for a greater contribution from estates that can afford to pay and thereby transferring a proportion of the cost of HMCTS from taxpayers to the user to make sure that it continues to be properly funded in the long term.
- 4.13. ***Discrimination arising from disability and duty to make reasonable adjustments:*** We do not consider that the planned changes will result in any individuals who share the protected characteristic of disability being treated unfavourably because of something arising in consequence of their disability. We will continue, however, to monitor any potential impacts and provide reasonable adjustments for users with disabilities to make sure that appropriate support is provided in protecting access to justice.
- 4.14. ***Harassment and victimisation:*** We do not consider there to be a risk of harassment or victimisation in implementing these changes.
- 4.15. ***Advancing equality of opportunity:*** We have considered how these planned changes might impact on the duty to advance equality of opportunity by meeting the needs of those making an application for a grant of probate, who share a particular protected characteristic, where those needs are different from the needs of those who do not share that particular protected characteristic.
- 4.16. Having identified as above that individuals with some protected characteristics may be more likely to have comparatively lower household income, and may therefore find it more difficult to pay the fee, we consider that the availability of exception fee remissions will help to make sure that equality of opportunity is advanced for those persons making an application for a grant of probate who share particular protected characteristics. We consider that this will be the case even when such applications are taken out of the general HMCTS fee remissions scheme, as the Lord Chancellor's power to remit fees in full or part will remain in place. The Lord Chancellor will be able to exercise this power where there are exceptional circumstances for doing so.
- 4.17. ***Fostering good relations:*** We do not consider that there is scope within the policy of setting and charging court and tribunal fees to promote measures that foster good relations. For this reason, we do not consider that these changes are relevant to this obligation.

5. Mitigation

- 5.1. As set out in Chapter 2 of the consultation response, we plan to remove grant of probate applications from the general fee remissions scheme as personal representatives should have access to a number of options to fund the application fee. The discretionary power of the Lord Chancellor to grant exceptional remissions will, however, remain in place as a safeguard where the payee simply cannot afford to pay the fee. There are also other practical options that the Probate Service are exploring for personal representatives to have limited access to the estate, to make sure that no one is denied a grant of probate due to inability to pay the fee.

- 5.2. It is also important to note that in most cases, the applicant will be able to recover the fee from the estate and, moreover, the fee charged to the applicant will always be proportionate to the value of the estate.
- 5.3. We acknowledge that in regards to the impact on beneficiaries, there is no mitigation as the fee will need to be paid out of the estate, but the fee will never be more than 1% of the total value of the estate, which we consider a small cost in comparison to the benefit received.

6. *Equality Impact analysis*

- 6.1. Finally, as the equality duty is an ongoing duty, we will continue to monitor and review the increased fees for any potential impacts on persons with protected characteristics, and will make sure that access to justice is maintained.

Table 1: Distribution of Income by Protected Characteristics

% Individuals	Net equivalised disposable household income (after housing costs)					
	Bottom quintile	Second quintile	Middle quintile	Fourth quintile	Top quintile	All (millions)
Gender						
Adult male	18	17	20	22	23	24.1
Adult female	19	20	20	21	21	25.5
Ethnic Group						
White	18	20	21	21	21	55.7
Non-White	33	23	16	14	14	7.2
Disability						
Disabled	25	24	22	17	11	11.9
Non-Disabled	19	19	19	21	22	51.0
Age						
16-24	28	20	18	20	14	5.4
25-29	19	19	21	24	17	4.1
30-39	20	16	19	21	25	8.3
40-49	18	17	19	21	25	9.2
50 to Retirement Age	19	15	18	21	27	10.8
Pensioners	13	23	24	21	19	12.8
All individuals	20	20	20	20	20	63.0
Source: MoJ calculations based on DWP (2015) Households Below Average Income 2013-14, Tables 3.1db & 5.2db.						