CHANCERY BAR

Court Fees Consultation

Chancery Bar Association Draft Response

Introduction

1. This is the response of the Chancery Bar Association ("the ChBA") to the Ministry of Justice's consultation on Court Fees.

2. The ChBA is one of the longest established Specialist Bar Associations and represents the interests of some 1200 members handling the full breadth of Chancery work, both in London and throughout the country. Membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work. It is recognised by the Bar Council as a Specialist Bar Association.

3. The ChBA operates through a committee of some 17 members, covering all levels of seniority. It is also represented on the Bar Council and on various other bodies including the Chancery Division Court Users' Committee and various Bar Council committees.

4. This reply to the consultation by the Ministry of Justice on Court Fees has been produced by a sub-committee consisting of Andrew Twigger QC and Jennifer Seaman.

Question 1	**What do you consider to be the equality impacts of the proposed fee increases (when supported by a remissions system) on court users who have protected characteristics? Could you provide any evidence or sources of information that will help us to understand and assess those impacts?**
	Comments: Notwithstanding the remissions system, the extent of the proposed fee increases is such that we consider there is a risk, which the MoJ should investigate more thoroughly, that the proposals will affect individuals or groups with protected characteristics.
Question 2	**Do you agree with the premise of a single issue fee of £270 for non-money cases? Please give reasons for your answer.**
	Comments: Yes. The proposed increase, from an issue fee of £175 to £270 in the County Court, is a modest one.
Question 3	**Do you agree with the proposed fee levels for money claims? In particular, do you agree with the proposal to charge the same fee for claims issued through the Claims Production Centre that would be charged for applications lodged online? Please give reasons for your**

	answer.
	Comments: We disagree in principle that court users ought to bear the full cost of providing court services. The existence of the courts has a value to society and commerce, which is independent of their value to court users (as acknowledged by the Consultation Paper at paragraph 1). In so far as the funding deficit arises because the family courts are not self-financing, the argument that the cost should be borne by the tax-payer, rather than by imposing a subsidy on other civil court users, is particularly strong, especially where the proceedings in question involve the welfare of children. However, if the proposed fee levels for money claims are required to fund court services in full, then the relatively modest increases envisaged for issue fees for money claims appear acceptable. This includes the proposal to charge the same fee for claims issued through the Claims Production Centre as charged for applications online.
Question 4	**Do you agree with the removal of the allocation and listing fee in all cases? Please give reasons for your answer.**
	Comments: Yes. This should help to save administrative costs. (However, in respect of the new 'hearing fee', see 7 below.)
Question 5	**Do you agree that small claims track hearing fees should be maintained at their current levels, which are below cost? Please give reasons for your answer.**
	Comments: Yes. The hearing fees for small claims are already around 10% of the claim, and any further increase in the fees may prevent access to justice.
Question 6	**Do you agree that fast track and multi-track hearing fees should be maintained at their current levels, which are above cost? Please give reasons for your answer.**
	Comments: Yes, but only to the extent required to balance the effect of small-claims hearing fees being below cost. If the guiding principle is that court users should pay 100% of the costs of providing court services (contrary to our primary position set out in answer to question 3 above), it follows that there is no basis for requiring them to pay more than that. We deal further with this below in relation to the proposals on enhanced fees. If fast track and multi-track hearing fees are being kept above cost, it suggests that further enhanced fees are not necessary.
Question 7	**Do you agree with proposals to abolish the refund of hearing fees when early notice is given that a hearing is not required? Please give reasons for your answer.**

	Comments: No; especially if the parties have to pay a hearing fee at an earlier stage, when it is uncertain whether a hearing is ultimately going to be necessary. The parties should not have to pay for something which is not required and when there has been no cost incurred.
Question 8	**Do you agree with proposals to retain the current fee levels for private law family proceedings and divorce, and the proposal to no longer charge a fee for non-molestation and occupation orders? Please comment on all or any of these processes.**
	Comments: Members of the Chancery Bar Association do not regularly appear in private law family proceedings and we cannot comment on the proposals generally. However, claims under the Inheritance (Provision for Family and Dependants) Act 1975, in which our members are often instructed, can be issued in either the Chancery or Family Divisions. There does not seem to be any logical or fair basis for charging different fees for issuing an identical claim in different Divisions.
Question 9	**Do you agree with the standardisation of the fee for Children Act cases, and with the proposal that there should only be one up-front fee for public law family cases? Please give reasons for your answer.**
	Comments: We have no views on this subject.
Question 10	**Do you agree with the standardisation of general application fees and fees for applications within family proceedings? Please give reasons for your answer.**
	Comments: The proposals contained in the 2011 MoJ consultation (CP15/2011, "*Fees in the High Court and Court of Appeal Civil Division*") suggested an increase from £80 to £105 only for general applications. The increase now suggested is to £150. This new proposed increase still results in a relatively modest fee, but raises the following issues: (1) These proposals may result in a disincentive to litigants in person, deterring them from issuing applications. This is undesirable in many cases, since it would discourage applications for extensions of time or relief from sanctions which such litigants ought properly to be making, thereby denying access to justice and causing delay or complication of proceedings. (2) It is proposed to charge a lower application fee for general applications by consent/without notice (£50). On the assumption that "consent" in this context means that the parties agree what order the Court should make, many applications are issued which are not initially by consent, but are subsequently agreed by the parties. There does not seem to be any good reason in principle why the higher fee should be charged in such cases.

	(3) We suggest that the appropriate criterion to qualify for the lower fee may be that the application is dealt with on paper, without a hearing. This would cover applications which are agreed at the outset and some without notice applications, but would trigger the higher fee if a hearing is required (even for a without notice application).
Question 11	**Do you agree with the proposed fee levels for judicial review cases? Please give reasons for your answer.**
	Comments: The previous consultation suggested an increase in fees for permission to apply for judicial review from £60 to £235, and for continuation of a judicial review from £215 to £235. Although it is now proposed that the application fee for judicial review should only increase to £135, the fee proposed for a judicial review hearing or oral renewal has been substantially increased to £680. Applicants for judicial review are frequently not wealthy or involved in business and act in person. A fee of this size is likely to represent a significant cost for many (on top of the £135 application fee) and, for that reason, a more modest increase would be appropriate.
Question 12	**Do you agree with proposals to increase the fee for an application for grant of probate to full-cost levels? Please give reasons for your answer.**
	Comments: The proposed fee of £150 is modest in absolute terms, but nevertheless represents a substantial increase. We suggest that consideration should be given to the introduction of a lower cost band for smaller estates (e.g. a £75 fee for a grant in respect of estates below £250,000).
Question 13	**Do you agree with the proposed fee levels for cases taken to the Court of Appeal? Please give reasons for your answer.**
	Comments: The proposed increase to fees for permission to appeal and a respondent's notice from £235 to £465 is substantial, although we accept that £465 is not unreasonable in absolute terms. We repeat our comments from the previous consultation: *"...it is a matter for concern that there was a review as recently as 2011 and no increase was then proposed. The proposal constitutes almost a doubling of the current fee, which may adversely impact on the ability of some litigants to appeal a wrong decision successfully. There should be no further increase in fees for permission to appeal for at least several years.*" We do not agree with the proposal to increase fees for an appeal hearing from £465 to £1,090. We repeat our comments from the previous consultation: "*The increase is far too steep and runs the risk of shutting*

	out too many litigants from the appellate process. Given the role of the Court of Appeal in defining and clarifying the law for the benefit of all litigants and not just the parties themselves, there is a good argument that [the] state itself should bear proportionately more of the cost of the appellate process than is appropriate in the High Court. We can see the argument for some increase in the current appeal fee to, say, £750, which would constitute a 62% increase, but not to the level proposed." We do not agree with the proposal to charge for renewed applications for permission in the amount of £1,090. Again, we repeat our comments from the previous consultation: "*Incurring the whole of the appeal hearing fee on a renewed application for permission is disproportionate, since the full hearing if permission is granted will clearly expend even greater judicial resources. If the increases are to be justified by reference to the actual demands on resources, then payment of the full hearing fee cannot be justified. The necessary (and appropriate) deterrent effect could be achieved by requiring payment of half of the appeal fee, with the other half falling due on grant of permission to appeal.*" We do not agree with the proposal to charge £465 for filing additional applications. We repeat out comments from the previous consultation: "*The proposal seems very heavy handed – would any ancillary application really consume an equal amount of resources as the application for permission to appeal itself? Furthermore, like an application for an extension of time, an application for a stay is routinely applied for, and should not incur a separate charge, since the Lord/Lady Justice considering the permission to appeal issue will deal with any stay on a purely ancillary basis (and not at all if permission is refused).*" We acknowledge that a <u>contested</u> hearing following an additional application may raise different issues and in this instance it may be more reasonable to justify a £465 fee. We repeat our answer to question 10 above in relation to the proposed charge of £150 (or £50 if by consent/without notice) for general applications.
Question 14	**Do you agree with the government's proposed changes to the fees charged in the Court of Protection? Please give reasons for your answer.**
	Comments: We do not agree with the proposal to collect the hearing fee before the hearing, because the fee in this instance often comes out of the patient's estate following an order of the court at the end of a hearing. Collecting the fee before the hearing would place an unfair burden on an applicant who might be unable easily to afford the fee out of his or her own resources. Nothing ought to be done to discourage claims of this kind, which are brought for the benefit of the patient and

	society as a whole, rather than to vindicate the rights of the claimant. We agree with the proposal for a lower fee of £220 for simple applications. However, it would be helpful to make clear what counts as a 'simple application' for this purpose. For example, some applications to appoint a deputy for property and affairs are complex and are dealt with by judges. On the proposal to introduce a general application fee in the Court of Protection, the answer to question 10 above is repeated. On the proposal to introduce a fee for applications objecting to the registration of Enduring or Lasting Powers of Attorney, the fee of £400 suggested is very steep for all such objections. Not all objections involve complex issues, for example, an objection on a factual ground such as the donor or attorney having died. We suggest that the current distinction between objections on factual grounds and objections on 'other grounds' remain, with a reasonable fee only being introduced for objecting on 'other grounds' e.g. at the same level as a general application fee (£150 or less). We also make the general point that such fees should not be introduced to contribute to the government's cost recovery plan generally, but only if such fees are required to fund the Court of Protection services. The Court of Protection has a special role in society, to make decisions and appoint deputies to act on behalf of people who are unable to make decisions, so there is an even greater reason to not increase the fees to an unreasonable level, which may act as a disincentive to parties from applying to the Court of Protection to decide what is ultimately in the best interests of the patient.
Question 15	**Do you have any further comments to make on the government's cost recovery plans?**
	We have no further comments.

Part 2

Questions 16 – 27	**General Comments**
	We are not in favour of charging enhanced fees, either in money claims generally or in commercial cases specifically. In relation to money claims generally, our reasons include the following: (1) We do not agree with the premise that those who use the courts

		should be required to pay the full cost of the service they receive. Paragraphs 126 and 177 of the consultation paper correctly recognise the importance of the courts' role in ensuring the effective functioning of markets and the economy. Since businesses and entrepreneurs all benefit from the certainty that their bargains will be enforced by the courts, it seems just in principle that the country as a whole should bear at least some of the cost of providing them. (2) We do not agree with the reasoning that enhanced fees "*better reflect the value of proceedings to the user*" (paragraphs 119, 129 and 138 of the consultation paper). The price of a service does not generally depend on how much value a user obtains. The cost of a car wash depends on the time taken, not on whether the owner is using the car for private pleasure or as part of a profitable business. Moreover, a large claim is only worth more than a small claim if it succeeds. If a claim fails for a technical legal reason, the court user might feel he has received no value at all, whatever the size of his claim. (3) The consultation paper and accompanying Impact Assessment are vague as to the use which is to be made of the anticipated £190 million in enhanced fees, once collected. We assume that the surplus above the cost of providing the service cannot be ring-fenced to cover service improvements. If so, there is no rational justification for requiring court users to contribute to MoJ income generally (equivalent to taxation). Nor does there seem any sound basis in principle for requiring court users issuing larger money claims to subsidise the cost of fee remissions. Fee remissions are part of a package of benefits for those with very low resources: the cost of those benefits should be borne by society as a whole. (4) The amount of money claimed by a litigant does not bear any necessary correlation to the complexity of the issues or the extent of court resources necessary to resolve them. There are many simple debt claims which do not require much court time, regardless of their size. Conversely, members of the Chancery Bar Association frequently litigate claims concerning relatively small amounts of money which are legally complex. Disputes about inheritance and real property are examples. (5) Moreover, members of the Chancery Bar Association deal with a reasonable number of claims which are for £200,000 or more brought by individuals and small-to-medium sized businesses with relatively limited resources. The price of houses means that many disputes about, for example, the estate of a deceased person are worth more than £200,000. The claimants in such

		cases frequently do not have large incomes or capital resources (but have more than the relatively low threshold which would qualify them for fee remissions). There is no sound basis for requiring such claimants to pay enhanced fees as if they were multi-national corporations or banks (especially where it is often a matter of chance whether or not the claim is a money claim, as opposed to a non-money claim – see below). In so far as the MoJ has a perception that most money claims for £200,000 or more (or most claims issued in the Rolls Building) involve millionaires embroiled in long cases fighting over vast amounts of money, that perception is wrong.
	(6)	In any event, we believe that an issue fee of £10,000 is large enough in absolute terms to discourage even successful corporations and banks from bringing claims. It is certainly large enough to deter many private individuals, especially in an economic climate where many are suffering an increased strain on their resources. The fact that the fee is only 5% or less of their total potential recovery at some point in the future is likely to be of less significance than the immediate burden imposed by so large a fee. The difficulty is particularly acute where claims might otherwise be brought on the basis of a Conditional Fee Agreement (e.g. by liquidators who have limited funds and no possibility of any fee remission). The MoJ appears not to have done any research into whether solicitors or insurers would be willing, or able, to fund such large issue fees.
	(7)	The deterrent effect of the size of the fee will be particularly great where the claim is relatively small. Charging the maximum fee of £10,000 for a claim of only £200,000 is bound to affect a relatively large number of individuals and small-to-medium size businesses who will find it difficult to afford such a fee. We note that the previous proposals (CP15/2011, "*Fees in the High Court and Court of Appeal Civil Division*") contemplated that issue fees for money claims would be set at gradually increasing levels depending on the amount of the claim, in which the maximum fee of £10,000 was not reached until the claim exceeded £1 billion. The fee proposed for a claim of £200,000 was only £1,275. Even a claim of £1 million would only have attracted a fee of £3,400 under those proposals. We consider that (if enhanced fees are to be charged at all) fees calculated along those lines would be far less likely to deter potential litigants and would be more likely to ensure that substantial fees are only paid by those who can genuinely afford it, although (as previously explained) it does not necessarily follow that those with relatively large claims are wealthy (claimants who have suffered serious personal injury being an obvious example).

(8) Furthermore, whether or not justified in their assumption, many clients commence proceedings expecting that the defendant will be inclined to settle once a claim has been issued. It is certainly well documented that the majority of claims do settle before they reach trial (see paragraph 124 of the consultation paper). We believe the payment of £10,000 "up front" is likely to appear a very high price to many potential litigants, given that they start out expecting the court to do relatively little before the claim is compromised.

(9) Claimants whose resources are limited (but who do not qualify for fee remission) are less likely to instruct lawyers if they have to pay a fee of £10,000. This will have the effect of increasing the court's costs, because cases involving unrepresented parties always take up more time. Such claimants will also be put at a considerable disadvantage when the defendant has substantial resources. The defendant will be able to exploit the claimant's inability to afford a substantial issue fee in order to encourage the claimant to settle for less than is properly due.

(10) In addition to the above reasons, the proposals appear to draw an irrational and unfair distinction between money claims and non-money claims:

(a) Members of the Chancery Bar Association are commonly involved in non-money claims in which the issues require as much, if not more, court time and expertise than in money claims. The supervision of trusts, pension funds, companies and insolvencies are some obvious examples. Although claims in such cases often do not involve a claim for a sum of money, they regularly concern the administration of funds worth substantial sums. It is unfair that a claimant seeking payment of a simple debt of £200,000 should pay an issue fee of £10,000, whilst the trustees of a pension fund with assets of £200 million need only pay an issue fee of £465 for the determination of complex questions, often involving specialist knowledge.

(b) Sometimes whether a claim is a money claim or a non-money claim is a matter of chance. A claim to a half-share in a house worth £500,000 might be a non-money claim if the defendant still owns the property, but a money claim if it has been sold. The cost to the court of resolving the claim would be the same either way. Why should the claimant have to pay £9,535 more by way of issue fee if the defendant has sold the house than if he has not?

(c) There is a danger that the wide discrepancy between the issue fee for money claims and non-money claims will lead to clients instructing lawyers to devise ways of avoiding issuing a money claim, by dressing it up as a non-money claim. For example, a claimant might seek a declaration that sums are due, rather than an order for payment. Once the claim has been issued, a claim for payment might be added later by way of amendment. An incentive to obfuscate the nature of the claim is not conducive to the efficient administration of justice.

(11) In light of the preceding points, we believe that there is a serious risk that charging enhanced fees will discourage or prevent individuals and businesses alike (especially small-to-medium sized businesses) from accessing the courts, thereby breaching the duty in Section 92(3) of the Courts Act 2003.

(12) This applies to foreign parties as well as domestic ones:

(a) The consultation paper correctly records that London has an "*unrivalled reputation as the world's leading dispute resolution centre*" and that legal exports have regularly generated a substantial trade surplus (see paragraphs 156 and 173 of the consultation paper). Contrary to the confidence expressed in the consultation paper, we believe the enhanced fee proposals are likely to have a damaging effect on the attraction of the UK as a forum for dispute resolution. International litigators are normally cost conscious and well informed about the benefits of different jurisdictions (and their English lawyers have a duty to advise them about such matters). We believe it is over-optimistic to assume that they are influenced only by the proportion which court fees bear to the total potential costs incurred over the life of a case, as opposed to taking into account the size of the issue fee in absolute terms at the start of a case.

(b) £10,000 (let alone £20,000 for a commercial case) is a very substantial sum. According to the research undertaken by Queen Mary, University of London "*Competitiveness of fees charged for Commercial Court Services: An overview of selected jurisdictions*" (prepared in connection with the consultation paper), an issue fee of £10,000 would far exceed the fee charged in all other jurisdictions considered, apart from the Dubai International Financial Centre. According to that research, the court fee for issuing a claim in New York is less than £250 (and no other court fees are payable for hearings).

In addition to the courts considered in the research, the German Commercial Court has begun to hear cases in English in order to attract international business, the fees for which are understood to be less than those proposed by the consultation paper. It is hard to see how the Rolls Building can continue to compete effectively by comparison.

(c) Given the value to the UK economy of legal exports, we consider that more research is required into the impact which the loss of a relatively small number of commercial cases to other jurisdictions would have on the trade surplus. We suspect that the amount likely to be generated by the proposed enhanced fees is considerably less than the sums which would be lost to the UK economy when a few high-value disputes, which would otherwise have been litigated in London, are issued abroad instead.

(13) Nor are we persuaded that any comfort can be drawn from the cost of arbitration fees (as suggested by paragraph 177 of the consultation paper). Parties may prefer arbitration to litigation for a variety of reasons, such as confidentiality or the availability of specialist arbitrators. The amounts at stake are often considerably greater than £200,000. It does not follow from the willingness of some parties to pay high arbitration fees that there are not many who will be deterred from litigation by a very high issue fee.

(14) The principal piece of research undertaken by the MoJ to support its proposals (in the Analytical Services Insight Paper "*Potential impact of changes to court fees on volumes of cases brought to the civil and family courts*") is an unreliable basis for drawing any conclusions for the following reasons:

(a) The sample of court users interviewed was tiny: only 18 interviews were conducted.

(b) Of the 18 court users questioned, 12 were involved in making large numbers of low value debt recovery claims: 6 organisations and 2 debt recovery agencies primarily issued claims of £5,000 or less and the two debt recovery solicitors issued claims of £25,000 or less.

(c) Of the remaining 6 interviewees, 4 were practitioners in family matters (where the fee proposals discussed envisaged far more modest increases) and 2 were personal injury solicitors, who issued a relatively high

volume of claims each year.

(d) Apart from the 4 family practitioners, all the interviewees were selected from either users of the County Court Bulk Centre or the County Court Money Claims Centre in Salford.

(e) It follows that none of the interviewees were users of the courts in the Rolls Building and, with the possible exception of the family practitioners, none of them were even regular users of the High Court.

(f) Leaving aside the family practitioners, the proposals about which the interviewees were asked involved either a reduction of the existing issue fee bands to three wider bands, retaining the maximum fee of £1,670 (which has no bearing on the acceptability of enhanced fees), or charging the higher of 5% of the claim value or the existing fee. Those who expressed a preference for the latter option were the large organisations which, "*tended to favour this option because the majority of their claims were for less than £5,000, and so their claims would be affected to a lesser extent than under the alternative option*" (page 14 of the paper). In other words, their preference was based on the perception that it was the cheaper alternative for them and would not result in an enhanced fee. Since 5% of £5,000 is £250, this research establishes nothing about litigants' willingness to pay issue fees of £10,000 or £20,000.

(g) The two personal injury solicitors, who were involved in claims for more significant sums, are not reported as favouring the option involving the higher of the 5% charge or the existing fee. They are reported to have queried whether there was any justification for charging higher issue fees for claims involving larger sums, since "*the court spent the same amount of time processing high-value claims as low-value claims*" (page 11 of the paper). They felt that a cap would need to be introduced to prevent the issue fees for the high-value cases that they worked on becoming significantly more expensive (page 14 of the paper). The paper is silent as to whether a cap as high as £10,000 was discussed. The implication of one of the solicitors' commenting that, without a cap, "*fees could run into tens of thousands of pounds*" (page 14) is that he did not approve of fees at such a high level.

(h) In summary: first, the research tested the acceptability of

charging enhanced fees by reference to a very limited sample of court users and, secondly, both users who were at risk of being adversely affected by the proposals were not in favour of them and do not appear to have been told that the cap would be set at £10,000 (or more).

(15) None of the other evidence relied on in the consultation paper and the Impact Assessment supports the introduction of enhanced fees:

(a) The MoJ research paper from June 2007, "*What's cost got to do with it? The impact of changing court fees on users*", is no longer current and has an entirely different focus from the proposals now under consideration. Section 1.3.1 of the research paper records that, "*The focus of this research was individuals who bring matters to court on behalf of themselves. Therefore companies, individuals bringing claims on behalf of companies, businesses, public sector bodies etc. were excluded.*" The sample, therefore, excluded the very class of claimants who are intended to be targeted by the current proposals. The majority of those interviewed seem to have been individuals with relatively small debt claims pursued through the County Courts. The relatively minor significance to these individuals of an increase in fees no doubt followed from the fact that the highest increase they were asked about was £300 (see section 2.13.1). It is impossible to discern anything from this research about how individuals or business with complex claims of £200,000 or more would react when faced with a fee of £10,000. It is nevertheless significant that 79% of individuals questioned were in favour of decreasing fees at earlier stages of the proceedings and introducing new fees at a later stage (see section 2.14.1) and only a quarter of them considered that court users should be required to pay in full for all court services (section 2.15.1).

(b) The fact that minor increases in issue fees since 2000 have had no effect on the number of claims commenced cannot be of any significance in assessing the impact of potential fee increases of many thousands of pounds.

(c) It is equally uninformative that, in the context of the Jackson Review of Civil Litigation Costs, law firms and companies represented on the Commercial Court Users Committee provided a sample of just over 100 cases in which the fees averaged £800,000 for one side. It is unclear how representative that sample was and we

believe that a representative sample of general users of the Chancery Division would present a very different picture. In any event, it does not follow from a high average sum expended on costs throughout the life of some Commercial Court cases that there are not many commercial parties who would be put off by an issue fee of £10,000.

Much of the above reasoning applies equally to the proposals concerning money claims in commercial cases. We have the following additional reasons for rejecting these proposals:

(16) The confidence which businesses and wealthy individuals (whether based here or abroad) place in the reliability of the courts in the Rolls Building attracts and encourages commercial activity within the jurisdiction. That benefits the country as a whole. It is, therefore, just that the public purse should make a reasonable contribution towards the cost of providing the court service, and plainly unjust to require large businesses and wealthy individuals to pay more than is required to cover that cost.

(17) But the proposals will result in still greater injustice, because they do not confine the enhanced fees to large businesses and wealthy individuals. Paragraph 153 of the consultation paper states that proceedings heard in the Rolls Building "*often involve multi-national corporations or wealthy individuals*" (emphasis added). It is inherent in this statement that that such proceedings do not always involve such parties. We consider that the proposals underestimate the number of cases heard in the Rolls Building which involve parties who cannot be described as "*multi-national corporations or wealthy individuals*".

(18) In particular, the business of the Chancery Division (which is the court in which members of the Chancery Bar Association most often appear) includes many types of claim which do not necessarily involve wealthy individuals. The statistics compiled in support of Briggs LJ's recent Chancery Modernisation Review (set out in Annex 2 to that report) show only 43% of all judicial time in the Chancery Division to be spent on "*Business and Commercial*" matters, with 19% relating to personal property, 18% intellectual property, 14% company and insolvency and 6% described as "other". Within the company and insolvency category, 30% related to personal insolvency. Although the statistics do not break down the "other" category, it must include the administration of private trusts and estates, which have nothing to do with business and affect many people who could not be described as "wealthy". There is no justification for treating

	individuals litigating about their homes or the estates of their family members as if they were involved in highly profitable business ventures. Many more cases are issued in the Chancery Division than in the TCC and Commercial Court combined, so that a substantial proportion of claims issued in the Rolls Building will involve a claimant who is an individual or a small business. (19) Furthermore, some types of claim must be issued in the Chancery Division. These include many matters which are not (or not necessarily) business related, such as claims for the sale of land, mortgage claims, claims relating to the administration of trusts and the estates of deceased persons, bankruptcy matters and claims relating to charities (see Chapter 18 of the Chancery Guide for a complete list). It would unfairly discriminate against those commencing such types of action, when they wish to claim a sum of money, to require them to pay £10,000 (let alone £15,000 or £20,000) to issue proceedings (especially when a claim which is otherwise identical, but does not seek payment of a sum of money, would incur a fee of only £465). (20) Where a litigant has a claim which does not have to be brought in the Chancery Division, the enhanced fee proposals are bound to encourage him or her to issue the claim elsewhere, regardless of whether the specialist expertise of the Chancery Division could otherwise be of advantage. This further discriminates against those litigants who are least able to afford to choose where their claim is heard. (21) Furthermore, even where a litigant is wealthy, or wishes to make a claim which is business related, then unless it is the kind of action which must be brought in the Chancery Division (or the Commercial Court or TCC), he or she is free to commence the action in the Queen's Bench Division, regardless of whether that would otherwise be the litigant's preferred forum. The likely result of the proposals, therefore, will be a large-scale transfer of business related cases away from the state-of-the-art, specialist centre which was designed to hear them. Such a result would be illogical and highly undesirable.
Question 16	**Do you agree that the fee for issuing a specified money claim should be 5% of the value of the claim?**
	Comments: No; for the reasons given above.
Question 17	**Do you agree that there should be a maximum fee for issuing specified money claims, and that it should be £10,000?**

	Comments: If (contrary to our primary position) enhanced fees are to be charged for money claims, for the reasons given above the level of fees contemplated by the previous consultation are to be preferred to a charge of 5% of the value claimed (i.e. with the maximum fee of £10,000 applying only when the claim exceeds £1 billion). A high percentage with a low cap necessarily results in unfairness to claimants who are individuals or small-to-medium sized businesses. Such claimants will be required to pay high sums in absolute terms to issue relatively modest claims, whilst banks and other multinational businesses do not have to pay any more to issue very substantial claims.
Question 18	**Do you believe that unspecified claims should be subject to the same fee regime as specified money claims? Or do you believe that they should have a lower maximum fee of £5,000? Please give reasons for your answer.**
	Comments: The consultation paper correctly points out that many unspecified money claims relate to personal injuries. We agree that an issue fee of £10,000 is likely to discourage or prevent many victims of such injuries from accessing the courts. Nevertheless, members of the Chancery Bar Association are often involved in unspecified money claims (for example, claims for fraud or professional negligence). There seems no logical or fair reason for charging claimants in those kinds of case (which may result in a very substantial award of damages) a lower issue fee than those involved in specified money claims. (Nor is there any logical basis for charging lower fees for most non-money claims: see our general point (10) above).
Question 19	**Is there a risk that applying a different maximum fee could have unintended consequences? Please provide details.**
	Comments: If unspecified money claims incur a lower maximum fee, those drafting claims will be asked to formulate them for damages to be assessed, rather than specifying the sum sought. This will create artificiality and is contrary to normal commercial practice, which favours debt claims over claims for unliquidated damages. Such artificiality could result in London being perceived as uncommercial in its approach by comparison with other jurisdictions. In our view, when setting the level of issue fees, it is no safer to assume that all unspecified money claims are personal injury claims than it is to assume that all claimants bringing specified money claims of £200,000 or more are businesses or wealthy individuals.
Question 20	**Do you agree that it is reasonable to charge higher court fees for high value commercial proceedings than would apply to standard money claims?**

	Comments: The consultation paper states the normal objective as being to charge fees to court users intended to recover the full cost, but no more, of providing the services they receive (see paragraph 114). Assuming that objective is reasonable (contrary to our primary position), then we can see some force in the contention that users involved in high value commercial proceedings should pay higher fees in order to subsidise, to some extent, the cost to other users who are less able to pay. As we understand the proposals, however, there is no intention to reduce the fees paid by other users as a consequence of charging more to commercial users. We cannot see any justification for that approach, which is unfair to all users. If it is, nevertheless, decided to charge higher fees for high value commercial proceedings: (1) We disagree with the suggestion that a "high-value" claim in the context of commercial litigation is one for only £300,000 or £400,000. The threshold which might distinguish a truly high-value commercial claim would be a number of millions. (2) It is vital to distinguish claims which are "commercial" from other claims. Claims which are issued in the Rolls Building do not all qualify, as explained above. We suggest that it is impossible to devise a reliable but simple criterion which identifies a commercial claim. In particular, there is no logical reason why non-money claims should not qualify as commercial in appropriate cases (e.g. schemes of arrangement; injunctions to restrain breach of intellectual property rights; specific performance of contracts between businessmen; the determination of the rights of noteholders in a bond issue; and so on). (3) The higher fees to be charged should not be set at 5% of the claim with a cap at £300,000 or £400,000, but should resemble the fees proposed in the previous consultation.
Question 21	**We would welcome views on the alternative proposals for charging higher fees for money claims in commercial proceedings. Do you think it would be preferable to charge higher fees for hearings in commercial proceedings? Please give reasons for your answer.**
	Comments: If (contrary to our primary position) higher fees are to be charged for money claims in commercial proceedings, subject to the answer to Question 22 below Option 1 (involving an increased hearing fee) appears preferable to Option 2 (involving an increased issue fee). As explained above, the issue fee is paid at a time when the claimant contemplates or hopes that there will not need to be a hearing. £15,000 or £20,000 is a very substantial amount to pay "up front", with no chance of a refund if the case settles. By contrast, most businessmen would, in our view, consider it more reasonable in principle to be asked

	to pay for the court time actually taken to decide their case. The proposed sum of £1,000 per day does not appear unreasonable, provided it can be refunded if the hearing does not proceed or takes less time than anticipated. We note from the Impact Assessment that the additional revenue anticipated from the implementation of Option 1 is only £5 million per annum, compared with over £70 million per annum under Option 2. This clearly demonstrates that, under Option 2, the large majority of claimants will receive no tangible consideration, in terms of court time and resources spent on their cases, in return for the substantial fees they are required to pay up front. It will be impossible for advisors to provide a rational explanation to potential claimants as to how such a large fee can be justified.
Question 22	**Could the introduction of a hearing fee have unintended consequences? What measures might we put in place to ensure that the parties provided accurate time estimates for hearings, rather than minimise the cost? Please provide further details.**
	Comments: As the question implies, if the hearing fee is based on the length of the hearing, there is a risk that litigants will tend to underestimate the length of the trial in order to reduce the fee. We doubt whether this risk is very great in truly high-value cases (i.e. worth tens of millions). By the time such matters are listed for trial, substantial legal fees have already been incurred and the daily cost of legal representation throughout the trial is likely to dwarf a £1,000 court fee. The parties in such cases tend, in our experience, to be more concerned to ensure that their case is fully argued. The risk that a daily hearing fee will lead to underestimates of the time required is likely to materialise only where the case is not truly high-value. In our view, enhanced fees are inappropriate in those cases in any event and there are already opportunities for the court to review the parties' estimates at the Pre-Trial Review. Furthermore, the imposition of a hearing fee in all but the most high-value cases would be likely to have the consequence of distorting and confusing claims (e.g. by dressing up money claims as non-money claims) and encouraging claimants to consider issuing their claims in other courts, which may be less appropriate for their case.
Question 23	**If you prefer Option 2 (a higher maximum fee to issue proceedings), do you think the maximum fee should be £15,000 or £20,000? Please give reasons for your answer.**
	Comments: We do not prefer Option 2. If Option 2 were to be chosen, the maximum fee should be as low as possible. The higher the fee, the greater the disincentive to issue proceedings in the Rolls Building.

Question 24	**Do you agree that the proposals for commercial proceedings are unlikely to damage the UK's position as the leading centre for commercial dispute resolution? Are there other factors we should take into account in assessing the competitiveness of the UK's legal services?**
	Comments: We do not agree, for the reasons given above. No research appears to have been carried out with, for example, investment banks which frequently litigate internationally, or solicitors who regularly act for international clients.
Question 25	**Do you agree that the same fee structure should be applied to all money claims in the Rolls Building and at District Registries? Please give reasons for your answer.**
	Comments: If enhanced fees are to be charged for issuing money claims in the Rolls Building, the same fees should apply to the District Registries. If the fees at the District Registries are lower, it is likely that many litigants will choose to issue their claims there, rather than in the Rolls Building, which was intended to be the specialist centre for such disputes. If, however, the fees applicable to the Rolls Building were to be charged for all money claims issued in District Registries, a significant number of claims will be caught which would never have been issued in the Rolls Building. This problem highlights the difficulties inherent in using the Rolls Building as the determinant of whether the claim is "commercial".
Question 26	**What other measures should we consider (for example, using the Civil Procedure Rules) to target fees more effectively to high-value commercial proceedings while minimising the risk that the appropriate fee could be avoided?**
	Comments: We are not in favour of charging enhanced fees, but if it is necessary to designate cases as "*high-value commercial proceedings*", this is a judgment better made by the court at the first Case Management Conference (which takes place in all civil cases once the formal statements of case have been prepared). Provided suitable criteria can be produced for determining the kinds of claims which are to be classified as commercial, a determination at the CMC would enable a much subtler, and fairer, approach to be applied than simply assuming all money claims of a certain value qualify. Unspecified money claims, and non-money claims, could be included. On this model, it would not be possible to charge an increased fee at the stage of issuing proceedings, but any enhanced fee for commercial cases could be levied after the CMC.
Question 27	**Should the fee regime for commercial proceedings also apply to proceedings in the Mercantile Court? Please give reasons for your**

	answer.
	Comments: The purpose of the Mercantile Court is to deal with business disputes of all kinds not requiring the special expertise of the Commercial Court. If enhanced fees are charged in the Mercantile Court at the same level as in the Commercial Court, there would be very limited advantage to claimants in using the Mercantile Court and they would be likely to choose to issue their claims in the County Court, or the Queen's Bench Division. On the other hand, if the Mercantile Court charges a lower fee than the Commercial Court and the Chancery Division, it is likely that many claimants will be encouraged to issue their claims in the Mercantile Court, thereby diverting cases away from the court with the specialist expertise to deal with them. Again, this problem arises because of the false assumptions made in the consultation papers that <u>all</u> cases issued in the Chancery Division are commercial cases and that cases brought elsewhere are not.
Question 28	**Do you agree that the fee for a divorce petition should be set at £750? Please give reasons for your answer.**
	Comments: We have no comments.