



### **Court Fees. Consultation on proposals to reform fees for grants of probate**

ICAEW welcomes the opportunity to comment on the *Court Fees. Consultation on proposals to reform fees for grants of probate* published by Ministry of Justice on 18 February 2016, a copy of which is available from this [link](#).

This ICAEW response of 31 March 2016 reflects consultation with the Business Law Committee and the Tax Faculty. The Business Law Committee includes representatives from public practice and the business community and is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies. The Tax Faculty is internationally recognised as a source of expertise and leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. The Appendix sets out the ICAEW Tax Faculty's *Ten Tenets for a Better Tax System*, by which we benchmark proposals for changes to the tax system.

ICAEW has both regulatory and membership functions which operate in a single unitary body. On occasions representations are asked from both the regulatory and membership arm and this is one of those occasions. This response of 31 March 2016 is made by the membership arm through the Business Law Committee. We understand that a separate response in addition to this has been made by Professional Standards, the regulatory arm of ICAEW.

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ICAEW members operate across a wide range of areas in business, practice and the public sector, including acting as probate practitioners, tax advisors, estate administrators and executors in a professional capacity. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

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## MAJOR POINTS

1. We are seriously concerned that these proposals are inappropriate, effectively representing the levying of tax by a government department which is not responsible for that function. Our reasons for reaching these conclusions are that:
  - a) The consultation acknowledges that the increase in fees for the clearance of applications for non-contentious probate is largely intended to reduce the Ministry of Justice deficit in relation to the Courts. Since non-contentious probate, by definition, does not require any action by the Courts, this increase therefore represents a pure revenue raising exercise, unrelated to the costs of the service provided.
  - b) The fee structure proposed has strong elements of redistribution of wealth, with fees being levied on the basis of the value of estates rather than their complexity or other factors which might influence the costs borne by the Probate Office before they can grant clearance.

Both the functions of taxation for the raising of revenue and for the redistribution of wealth are matters that are best dealt with by HM Treasury and the Cabinet, not by fee levying departments. The extension of the valid and sensible policy of charging appropriate fees for the provision of services should not be extended in this way.

2. We address below the unfairness, inconsistencies and administrative burdens which would result from levying this specific additional tax on the administration estates by a graduated increase in probate clearance fees rather than by an amendment of the Inheritance Tax (IHT) Regime. There is also the general issue, that the raising of (effective) taxation by individual government departments will lead to a huge and unnecessary increase in the complexity of the tax system, at a time when the Government is trying to reduce just that aspect of the UK's financial system. Enormous inconsistencies will inevitably emerge, undermining the logic and fairness of Government policy in relation to revenue collection.
3. The issues that we have identified, were the Ministry of Justice to implement these charges as proposed, include the following:
  - a) There are no proposals for any graduation between the fee bands, with the result that a marginal increase in the value of an estate (between say £299,000 and £300,000) will result in an increase in fees far exceeding that amount.
  - b) The basis on which the valuation of the estate is to be carried out, for fees purposes, has not been made clear, and could be subject to very wide variation. We assume that IHT valuation principles will be used, but the fact that this has not been clarified leaves this in doubt.
  - c) It is also not clear whether the valuation will be before or after the IHT exemptions.
  - d) The apparent lack of any exemption for the family home is inconsistent with Government policy in relation to IHT.
  - e) The seemingly arbitrary cut-off point of the maximum fee of £20,000, lacks logic and is inconsistent with IHT.
  - f) Although executors will be able to reclaim probate fees from the estate, such are the proposed sums involved there is a risk that it may be difficult for executors to obtain bank funding for this expense. The need to apply for funding, from whatever source, can only increase the administrative complexity for executors. See paragraph 12 for more detail on this issue.

- g) The consultation is misleading (paragraph 38 in particular) and disingenuous with regard to its assertion that the increase in probate fees is justified in that it will be offset by the reductions in IHT – if this is the case, then it would appear that the Ministry of Justice is undermining the Government's intentions in this area.

We note that none of these inconsistencies or flaws are present in the IHT Regime – which is not surprising in view of the long experience of HM Treasury in the design of taxes. Rather, it re-emphasises the inappropriateness of less experienced government departments attempting a function which is both specialised and difficult.

## RESPONSES TO SPECIFIC QUESTIONS

**Q1: Do you agree it would be fairer to charge a fee that is proportionate to the value of the estate compared with charging a fixed fee for all applications for a grant of probate applications? Please give reasons.**

4. No. It is fair for larger estates to bear a heavier burden of taxation, but this should be imposed in a transparent manner, through the general taxation system. It is not fair for this to be done through the imposition of fees which do not reflect the value of the service received.
5. In paragraph 71 of the government's response to the 2014 consultation (available [here](#)) on an increase in fees, the government stated that the Probate Service was 'changing some of its processes as part of its ongoing modernisation process to meet the changing needs of its customers and in order to look at more efficient ways of working.' The current consultation does not specify whether this process has resulted in cost efficiencies that should be passed on to the users, which increases our disquiet over these proposals.
6. We note that in the 2014 consultation response (available [here](#)) the minister explained that the government were looking at the case for increasing fees to levels that exceeded the cost of the proceedings involved as a way to reduce the cost to the taxpayer of the court system as a whole. It is clear that the proposed fee increase for probate fits into this category but the consultation does not explain why this should be so.

**Q2: Do you agree with the proposal to increase the threshold from £5,000 to £50,000? Please give reasons.**

7. We agree with the proposal to increase the threshold and welcome the fact that this rise will exempt a substantial number of estates from paying the grant of probate fee.

**Q3: Do you agree with the government's proposals to charge fees for probate applications as set out in Table 1? Please give reasons.**

8. We welcome the removal of the difference in fee charged according to who applies for the grant of probate. This is in part because we welcome the recognition that solicitors are not the only professionals that can apply for probate but also because the professional status of the person applying for the grant is not necessarily indicative of the complexity of the estate and therefore the work required by the probate office when approving the grant.
9. Other than this, we have serious reservations over the government's proposals. As we state in paragraphs 1 to 3, 'Major Points' above, unfairness, inconsistencies and administrative burdens would result from levying this specific additional tax on the administration of estates by a graduated increase in probate clearance fees rather than by an amendment of the IHT Regime.
10. Valuing an estate is not always straightforward and guidance would be needed as to whether the assets of an estate should be valued at the open market value or in accordance with IHT principles and before or after IHT exemptions. If the IHT principles are not used, then inevitably some valuations (such as those for household chattels or unusual items) could be subject to

widely varying estimates. This not only builds into the system an arbitrary element but the potential for manipulation of the system is increased and the cost to the justice system to rectify such manipulations could prove higher than the fee generated. It seems to us that any system that is open to abuse in such a way is not fit for purpose.

11. We are concerned that the consultation is silent on if and when fees will be reviewed in future. This aspect of the proposals would also benefit from consistency with all other revenue raising policies – that is, with the general system of taxation.

**Q4: Are there other ways that executors should be supported to make payment of the fee and /or examples of banks or funding institutions that regularly assist with finances before the grant of probate? Please provide details.**

12. We suggest that there should be a mechanism for delayed payment or payment by instalment for estates that are cash poor but asset rich to reduce the risk of detriment to executors. This is because although it is true that executors can recover from the estate any fees paid or expenses incurred and so ultimately will not suffer detriment, we are concerned that the proposed fees for larger estates are sufficiently large (up to £20,000) that some executors, including professionals such as solicitors and authorised probate practitioners, as well as private individuals, may not have immediate access to such sums. Executors should be able to borrow any such fees from banks but this is assuming that all executors are sufficiently credit worthy and that banks and other lending institutions are willing to lend such sums for the purpose of paying the fee for a grant of probate. Furthermore as any lending charges would be recovered from the estate (quite rightly) this would only diminish the value of the estate to the beneficiaries. It is not clear whether any interest paid on such a loan will be tax deductible as is currently the case with interest paid on a loan to pay IHT.

**Q5: Do you agree with the proposal to remove the grant of probate fees from the fee remissions scheme? Please give reasons.**

13. As noted in our answer to Q4 whilst it is true that executors can recover fees, some may not have ready access to funds to pay the fee upfront. We would therefore suggest that the proposal to remove the grant of probate fees from the fee remission scheme should be reconsidered.

**Q6: We would welcome views on our assessment of the proposals set out in Chapter 1 on those with protected characteristics. We would in particular welcome any data or evidence which would help support these views.**

We would argue that the proposed fee structure is unfair to all. Those with protected characteristics, as well as all other citizens, would benefit from the changes we suggest.

## **OTHER POINTS NOT ADDRESSED IN CONSULTATION QUESTIONS**

### **Graduated Probate Fees as a Tax**

14. We agree that court fees should be reviewed on a regular basis to ensure that that the fees represent value for money to the consumer and reflect the cost of the service provided. However, any increases should reflect increases in the cost of the service provided. The consultation does not address this and our members are not aware of any change in the service offered by the Probate Office that suggest such an increase is necessary or deserved. We also note that fees were increased in 2014 and this was supposed to be at a level sufficient to meet any increase in cost.
15. The consultation notes, in paragraph 3, that the probate service is self-financing and explains that the need for the increase in the fees is to fund future developments and to cut the deficit. It is not clear from the consultation how the proposed increase in probate fees has been

matched to the spending on future developments (such as improving the IT infrastructure of the probate service) and how much is to reduce a more general deficit. The consultation notes that an investment of £700m was allocated to the justice and court system in the Spending Review but this is apparently insufficient to improve the service as a whole and there remains a funding gap across the justice system of £1.1bn. The consultation is silent on how the extra investment will be allocated but does acknowledge that there is no funding gap for the Probate Service.

16. If as stated in the consultation the proposed probate fee increases will raise an estimated £250m a year, it would seem that the users of the Probate Service are bearing a disproportionate share of the overall cost. The consultation does not indicate how or whether the remaining cost centres within the court and justice system as a whole are contributing as much or less than the Probate Service. Furthermore the consultation offers no justification as to why the Probate Service in particular should 'play its part in reducing the deficit and putting Her Majesty's Courts and Tribunals Service's (HMCT) funding on a long-term sustainable footing' over and above any other part of the service. There is no evidence to suggest that the users of the Probate Service are more able to bear an increase in cost than any others.
17. To obtain a grant of non-contentious probate is a very simple process; it is essentially a form filling process, much like applying for a passport or filing a company's annual return. The checking needed varies with both, but the fee for neither is not based on the estimated worth of the individual or company applying but merely reflects the administrative work involved. We cannot see why this principle is acknowledged by some government departments but not by all.
18. If the increase in fees are simply to enable the automation of the probate system this raises the question of whether the fees will be reduced once the new system is up and running. As one of the aims of an automated system is to cut costs, it would seem only fair to cut the fees once the installation is complete; the consultation does not consider this eventuality.
19. We note that in 2014 when probate fees were last revised, the justification for this was that it was due to a change in costing methodology and that consequently fee increases, across the board, were necessary. In the 2014 consultation response (available [here](#)) the government rejected, however, the suggestion that probate fees should be linked to the value of the estate. The 2014 consultation response notes the Government concluded 'that as one of the objectives ... is to simplify fees, it does not feel that introducing a more complex fee structure aligns with that goal.' We ask why the government has revised their view and note that this seems at odds with the government's aim to reduce red tape and regulatory complexity as a whole.

## APPENDIX

### ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

#### The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document (available [here](#)).