



ICAEW REPRESENTATION 66/16 REGULATORY REPRESENTATION

Proposals to reform fees for grants of probate

ICAEW Professional Standards welcomes the opportunity to comment on the *Consultation on proposals to reform fees for grants of probate* published by the Ministry of Justice (MoJ) on 12 January 2016, a copy of which is available from this [link](#).

ICAEW has both regulatory and membership functions which operate independently in a single unitary body. On occasions representations are asked from both the regulatory and membership arms and this is one of those occasions. This response dated 1 April 2016 is made by Professional Standards, the regulatory arm. A separate representation in addition to this one has been made by the membership arm through their Business Law Committee.

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 145,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. 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.

ICAEW was granted status as an Approved Regulator and Licensing Authority for the reserved legal service of probate in August 2014, and since that time has both authorised accountancy and other firms and licensed them as Alternative Business Structures (ABSs) for probate services.

In addition ICAEW as a regulatory body is;

- (a) the largest Recognised Supervisory Body (RSB) and Recognised Qualifying Body (RQB) for statutory audit in the UK, registering approximately 3,300 firms and 8,400 responsible individuals under the Companies Act 1989 and 2006.
- (b) the largest Prescribed Accountancy Body (PAB) and Recognised Accountancy Body (RAB) for statutory audit in Ireland, registering approximately 3,300 firms and 7,500 responsible individuals under the Companies Act 1990.
- (c) the largest single insolvency regulator licensing some 750 insolvency practitioners as a Recognised Professional Body (RPB) under the Insolvency Act 1986 out of a total UK population of 1,700.
- (d) a Designated Professional Body (DPB) under the Financial Services and Markets Act 2000 currently licensing approximately 2,300 firms to undertake exempt regulated activities under that Act.
- (e) a Supervisory Body recognised by HM Treasury for the purposes of the Money Laundering Regulations 2007 dealing with approximately 13,000 member firms.
- (f) an accredited body under the Financial Conduct Authority (FCA) Retail Distribution Review (RDR) arrangements.

In discharging these duties ICAEW are subject to oversight by the FRC's Conduct Committee, the Irish Auditing and Accounting Supervisory Authority (IAASA), the Insolvency Service, the Financial Conduct Authority and the Legal Services Board.

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MAJOR POINTS

1. We welcome this review of the probate fee structure and the steps the MoJ are taking to innovate in the supply of this service. The mechanism of probate has lingered too long in the 19th century and the steps and possibilities available through automation are ideal to make this a far less arduous task for the executor and at the same time provide speed and integrity for stakeholders in the probate process. .
2. We would agree that it is appropriate for the Probate Service to reconsider its fees structures and to take advantage of the powers given to it under the Anti-Social Behaviour Crime and Policing Act 2014 to raise additional funds towards this investment. Where we find some discomfort however is the proposal to use these charges as well to cover other elements of the court service not associated with probate, and to charge 5 times the cost of the underlying service in doing so.
3. We also believe the approach taken does not sit comfortably with the rules and regulations surrounding those who supply probate services and the obligations of executors and trustees under the Trustee Act 2000. It is of course the right of government to levy through taxation the funds needed to support the activities of state, and this receives due debate and scrutiny in Parliament as part of the legislative process. The levying of excess charges for government services through statutory instrument, which these proposals involve, would not seem to be as transparent and accountable a process in raising funds for the exchequer.

RESPONSES TO SPECIFIC QUESTIONS

Question 1: Do you agree that 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. The concept of fairness is a subjective one and it depends greatly from which direction the fairness is being approached. The core basis of fairness in the provision of a service is that it should be for fair value and the consumer should not be overcharged. The flat scheme currently in place raises c£45m and this effectively recovers the costs of the Probate Office as it stands. As the administrative input is broadly the same whether it be for a large estate or for a small one, there is some rationale for the current flat based charges.
5. We are however mindful of the need to be proportionate in the way these charges are raised, and we can see the merit in having a sliding scale according to estate size, especially to accommodate the raising of the threshold. This enables the Probate Office to be more efficient in the collection of the monies and is proportionate to recognise the limited means to cover this charge in the smaller estates. It is, as noted in the consultation document, consistent with the principle applied to estate charges prior to 1999.
6. We are not sure however how the principles of fairness apply to a charge that raises 5 times the underlying cost and applies the excess to another part of the Ministry of Justice's jurisdiction. In this case an excess charge of £200m is being applied not to the costs of probate but to the management of HMCTS. Although administratively probate is part of HMCTS it is a function that operates in a different fashion. We note that powers given under section 82 of the Anti-Social Behaviour and Policing Act 2014 do facilitate the raising of income above cost, and could perhaps see a 20% to 50% levy being applied above the base cost, pursuant to that, but in this case it is a 400% surcharge.
7. We also wonder how the levy applied is consistent with the obligations imposed under sub-section 8 of section 82 which requires that any excess charge is levied in an environment that is encouraging efficiency and effectiveness in the parts being funded. We were unable to discern a great deal of evidence of such an environment in the consultation document and nothing in the impact statement. In the absence of this the proposals would potentially appear

to be straying into the area of unauthorised fiscal management that has been successfully challenged in the courts through R v Camden (ex parte Cran) 1995.

Question 2: Do you agree with the proposal to increase the threshold from £5,000 to £50,000? Please give reasons.

8. We do not have a difficulty with this in principle. As we understand it from the proposals the act of probate itself with its procedures and controls would not change and would still be granted subject to the relevant compliance.

Question 3: Do you agree with the government's proposals to charge fees for probate applications as set out in Table 1? Please give reasons.

9. The charges set out in table 1 range from zero for estates below the threshold to £20,000 for estates in excess of £2m. In practical terms this change represents an increase of just under 10,000% for the larger estates. Although the scheme operating before 1999 had a series of steps, estates of £2m would have had a charge of c£2,000 so this is even 10 times that original formula. Taken in isolation therefore these charges appear to be inequitable.
10. There is a further ethical issue for the executor in these circumstances. Under the Trustee Act 2000 he is only authorised to expend "reasonable cost" for any professional service he might commission as part of his distribution of an estate. Paying £20,000 for a probate service that is known to only cost c£250 sits uncomfortably with this obligation, the approval of parliament for these charges notwithstanding. In the case of the payment of Inheritance Tax this is different; that tax is voted on and approved by act of parliament; however this set of charges is being operated with lower parliamentary scrutiny through statutory instrument which may or may not be the subject of debate and could be viewed as taxation without proper representation.
11. Firms licensed to provide the service of probate and the bodies designated to license or approve them both have obligations under section 1 of the Legal Services Act 2007 to meet and balance a set of statutory objectives. Whilst those licensed for the full range of reserved legal services may acknowledge the requirements of the other parts of HMCTS as part of their obligations, those licensed purely for probate only have an interest in the probate service and to that extent the charges do not seem to be consistent with the statutory objectives of consumer interest, access to justice or diversity. The consultation does refer to the public interest and indirectly to access to justice in the context of paying for the courts service, but makes no reference to the other 6 obligations.
12. We consider the approach and mechanisms in the table inappropriate for the reasons noted above and consider that additional charges for services not related to probate should be applied through direct charges for the relevant services or through the tax system and not through an excessive levy on niche operations.

Question 4: Are there other ways that executors should be supported to make payment of the fee and/or examples of banks or funding institutions who regularly assist with finances before the grant of probate? Please provide details.

13. Whilst we are aware that banks will on occasion support executors where there is a funding gap pending the sale of a property in order to pay the relevant Inheritance Tax, separate arrangements would be needed to pay this additional element for probate fees where they are significant. In the payment of the IHT we are aware that HMRC at times will allow flexibility in how the tax is settled, being pragmatic to recognise there is a limit on an executor's room for manoeuvrability when the estate largely constitutes property.

14. We note that there are no such flexible proposals offered for the larger probate fees in the consultation paper so the executor could be faced with an impasse or find it simpler not to file for probate till the latest opportunity – perhaps linked to the filing requirement of within 12 months after death required for the IHT400. This delay would not be in the best interests of the beneficiaries or the creditors to the estate.

Question 5: Do you agree with the proposal to remove grant of probate fees from the fee remissions scheme? Please give reasons.

15. We cautiously agree with the approach being taken with regard to the removal of probate fees from the remissions scheme to the extent that ultimately the estate should bear the cost of the probate fees. However this does remove some elasticity to cover the position noted above where the cashflow of the estate does not allow the release of funds to pay the probate fees to secure the probate. There is an assumption in the consultation document that the banks and building societies will quite happily step in to the gap, but this willingness is tempered by anti-money laundering rules and external credit agency reports. These can act as a barrier to the availability of temporary funds – for example in relation to those based overseas or who have had a criminal record or a poor credit record.
16. We do note however the retention by the Lord Chancellor of the ability to grant remission in exceptional circumstances and this should address any significant hardship brought about by the withdrawal of probate from the grant remission scheme.

Question 6: We would welcome views on our assessment of the impacts 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 to support these views.

17. We note the equality impact analysis and the conclusions drawn that the proposals do not have a disproportionate impact on any group with a protected characteristic compared with those not in that group. We note that part of the detailed analysis supporting this conclusion are based on users of the county court rather than those seeking probate. Such statistics do not readily support arguments around probate, as death is a more objective measure than litigant.
18. We are not convinced that sufficient consideration has been given to the regional characteristics or the marital status of the deceased in the impact assessments. These we believe have significant impacts on certain types of consumers which could be detrimental to some whilst leaving others untouched. These are discussed below.
19. Although regionalism is not itself a protected characteristic, the population densities associated with BAME are weighted towards London and the South East. In these areas the average cost of a house is reported by Nationwide at March 2016 as £456,000 for inner London and £345,000 for the outer metropolitan area. This contrasts with say £145,000 for Yorkshire and £124,000 for the north of England. So those in London and the south east inevitably are coming within the scope of the increased probate charges as well as Inheritance Tax purely because of the region they live in, whilst those in the provinces escape with no charges at all. This is disproportionate and not conducive to equality, though we concede market forces to a certain extent influence this. Nevertheless it is a feature of the market which has not been considered.
20. Secondly the marital status and the impact of the new proposed Inheritance Tax rules on the transfer of property are considered in paragraphs 37 to 39 of the consultation document in the context of question 1 and fairness. The argument flows that as there will substantial savings for a family on the IHT associated with the property as a result of the £175,000 property allowance, this will more than compensate for the increased probate fees. However this summary does not include the nicities such as the relief only applying to the spouses and children of the deceased, not those in unmarried partnerships. The Law Commission in 2011 reported there were more than 2.3 million unmarried couples in the UK and that this figure was

likely to rise to 4million in 2033. Those in such relationships would not secure the IHT property relief as currently outlined and yet would pay the increased probate charges. These couples are already discriminated against on the IHT rules in that they do not qualify for the spouse relief. The proposed new probate charges would be further disadvantageous to this group.