

## **HUMAN RIGHTS ACT IMPACT ASSESSMENT PROFORMA**

This proforma will help you to articulate any human rights issues in the policy/proposal that you are working on. It is necessary for you to have read the OFMDFM guidance on human rights entitled "Get in on the Act; a practical guide to the Human Rights Act for public authorities in Northern Ireland" before completing this proforma.

If the policy/proposal is relevant to some rights but does not interfere with or limit them, your assessment must be signed off by a Senior Responsible Officer (Grade 7, equivalent or above). If you find that it does interfere with or limit one or more of the Convention rights, and your Senior Responsible Officer agrees, you must seek legal advice, even if it is considered that the interference or limitation is justified.

This proforma is available at [www.ofmdfmi.gov.uk/human-rights](http://www.ofmdfmi.gov.uk/human-rights). If you fill in the form electronically, there is no restriction as to the amount you can type in each box.

Your answers in the rest of this proforma will help you draft a clearer note to your legal advisor.

### **1. Policy title and aims**

Please state the title and objective of the policy/proposal you are working on.

**Title: Improving Cost Recovery in the Civil Courts**

The overall aim is to comply with Managing Public Money (NI) and its policy objective, to obtain full cost recovery, whilst maintaining access to justice in the civil and family court system (current cost recovery position 82%).

In summary, the purpose of the Northern Ireland Courts and Tribunals Service (NICTS) Public Consultation is to seek views on the following proposals:

- doubling the planned fee increase from a 5% uplift to a 10% uplift to be applied to all existing fees from 1 April 2019;
- an increase in the fees currently charged by NICTS for searches of the Register of Judgments within the Enforcement of Judgments Office, so as to align this to the search fees charged in other areas of NICTS business;
- the creation of a number of new fees for work that is carried out by NICTS but for which no fee currently exists; and,
- to make a number of changes to the existing Exemption and Remission Policy to ensure that it remains fit for purpose and continues to assist those who meet the qualifying criteria (those on certain 'passported' benefits or in financial hardship).

The specific detail and fee schedules for each proposal are outlined in the consultation document that this draft impact assessment supports. The consultation document can be found at [www.justice-ni.gov.uk/consultations](http://www.justice-ni.gov.uk/consultations). Views are welcomed as part of the consultation process to further refine and finalise this draft impact assessment. Responses can also be posted via NI Direct, Citizen Space at <https://consultations.nidirect.gov.uk/>

## 2. Rights which the policy/proposal engage

Go through each of the rights detailed in the table below. For each one consider whether the policy/proposal engages the right, i.e. how the policy/proposal you are working on could involve the right. Explain how the right is engaged

*Please note that the rights have been abbreviated so you should see the relevant Article in the Guide referred to above for the full title and explanation of the right.*

Right	Yes/No	Explanation
Article 2 Right to life	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the European Convention on Human Rights (ECHR).
Article 3 Prohibition of torture, inhuman and degrading treatment	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.
Article 4 Prohibition of slavery and forced labour	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.
Article 5 Right to liberty	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.
Article 6 Right to a fair trial	Yes	The proposals engage the right of access to a court that is inherent in Article 6(1).
Article 7 No punishment without law	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.
Article 8 Right to respect for private and family life	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.
Article 9 Freedom of thought conscience and religion	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.
Article 10 Freedom of expression	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.
Article 11 Freedom of assembly and association	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.
Article 12 Right to marry and found a family	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.
Article 14 Prohibition of discrimination	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.
Protocol 1, Article 1 Right to property	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.
Protocol 1, Article 2 Right to education	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.
Protocol 1, Article 3 Right to free elections	No	The scope of the civil and family court fees policy does not affect or impact upon this area of the ECHR.

If you have answered yes to any of these questions you must complete the rest of the proforma. If you have answered no to **all** of the questions, you may proceed to Question 9.

**3. Rights which the policy/proposal interferes with or limits**

Will the policy/proposal interfere with or limit any of the rights you identified as being engaged? If so, explain how the right is interfered with or limited.

*You should note that interference could be a negative impact on a right or a failure to take positive action where this is required under the Article in question. For further guidance on which Articles require positive action, please consult the Guide.*

<b>Article</b>	<b>Interfered with or limited? Yes/No</b>	<b>What is the interference/limitation?</b>
6 (1)	Yes	<p>Under the proposals, Court Users will have to pay increased fees, or pay a fee where none was payable previously (subject to any exemption or remission that may be applicable). It is to be noted that the European Court of Human Rights has held that a requirement to pay fees to civil courts in connection with civil proceedings is not in itself incompatible with Article 6(1) of the Convention - the right of access to a court under Article 6(1) is not absolute and may be subject to limitations, including financial ones, provided these are applied in such a way that the essence of the right is not impaired, they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.</p> <p>(The purpose of the proposals and proportionality are considered in sections 6 &amp; 8 of this impact assessment.)</p>

**4. Those affected by the interference/limitation**

Identify who could be affected by the interference or limitation, e.g. sections of society or people with certain beliefs or opinions, and explain how they could be affected.

*It will help in identifying interferences or limitations to think about all the people who could be affected and be seen as a victim within the Human Rights Act.*

Who could be affected?	How could they be affected?
<p>Court Users - This includes everyone who accesses the courts. It includes private individuals (urban and rural), businesses, government and other organisations that use the civil and family courts.</p>	<p>The civil courts in Northern Ireland deal with disputes covering a range of issues including non-payment of debt, personal injury, breach of contract, housing disputes, bankruptcy and family proceedings. The Civil Courts operate under a policy of full cost recovery i.e. the full costs of running the courts are recovered from fees charged for providing the service. The fees charged are based on recovering the administrative, judicial and other costs associated with proceedings.</p> <p>The proposals if implemented, will mean court users have to pay either an increased fee, or a newly introduced fee where none was payable previously, subject to any exemption or remission that may be applicable/available.</p> <p>NICTS introduced an Exemption and Remission Policy in 2007, with the aim of strengthening safeguards within the courts to protect access to justice. The aim is to help eligible court users by providing assistance; either by waiving the fee altogether, or in part, subsidising the fee.</p> <p>Individual users who fall into and can demonstrate financial hardship will be entitled to have such fees remitted and fees will be waived accordingly. Other individuals who are on designated benefits will be exempted from payment of the fees; NICTS waive the payment of such fees in order to ensure access to justice. On average 400 applications are supported annually at an estimated cost of £68,000 a year to NICTS.</p>

**5. Legal basis for interference/limitation**

Is there a law which allows you to interfere with or limit the rights identified in Question 4?

Any interference with or limitation on a Convention right must have a legal basis. You therefore need to establish whether there is a law which allows the proposed interference or limitation.

*You may need legal advice to clarify this.*

Relevant legislation:

The specific powers which enable NICTS to charge court fees are found under section 116(1) of the Judicature (Northern Ireland) Act 1978.

Section 116(1A) is the power to make provision for exemptions and remissions.

Alternatively, the policy/proposal may involve the creation of a new law which allows for the interference or limitation. If this is the case, please detail and explain in the box below:

N/A

## **6. Purpose of the policy/proposal**

Even if the interference or limitation in the policy/proposal is according to the law, there are further conditions which must be met. The purpose of the policy/proposal must pursue a legitimate aim or fall under one of the specific exceptions in the Article in question.

Consider each of the Articles which the policy/proposal will interfere with or limit, and for each one specify the exception or legitimate aim which allows the interference or limitation and explain why.

*If you are unsure of the exceptions or legitimate aims which are applicable for the rights interfered with or limited by the policy/proposal you are working on, you should refer to the text of the Convention and the Guide.*

### Article Affected

As noted above the key article affected is Article 6, the Right to a fair trial, in particular the right of access to a court which is inherent in Article 6(1).

### Explanation

A Supreme Court judgment in England and Wales regarding Employment Tribunal and Employment Appeal Tribunal fees (R (on the application of UNISON) (Appellant) -v- Lord Chancellor (Respondent)) although declared the fees in question unlawful, also accepted that charging court fees can be viewed as a means to achieve a legitimate aim, so long as there is a degree of proportionality employed. The judgment stated:

*“Fees paid by litigants can, in principle, reasonably be considered to be a justifiable way of making resources available for the justice system and so securing access to justice.”*

NICTS recognises that there will be an impact on users of the civil and family court system. However, from an economical viewpoint the application of full cost recovery (which in addition to maintaining access to justice is the main aim of the NICTS consultation) as per Managing Public Money NI guidance is to correct for ‘externalities’. Externalities exist where the user of a service does not bear the full cost or benefit that they create for others as a result of their activity; as a consequence this leads to an inefficient allocation of scarce court resources.

NICTS is mindful that not every court case creates a net social cost (some indeed no doubt create a social benefit) and that access to justice should not be prevented on the grounds of ability to pay. As such NICTS currently allows a subsidy of 50% for some fees in the family and children’s arenas and, applications arising from domestic violence related matters are taken out of the charging regime altogether. In addition, the availability of the exemption and remission scheme also allows for access to justice to be maintained for those who cannot afford to pay.

Taking this into account, NICTS has determined that if court fees are set correctly then, the aim of full cost recovery whilst maintaining access to justice is justified in that it achieves an economic objective via the best allocation of scarce court resources. It also achieves an equality objective via the subsidisation of family and children’s arenas and the availability of the exemption and remission scheme; the achievement of both objectives is considered to enhance access to justice overall, rather than cause any impairment.

**7. Necessary in a democratic society**

Articles 8, 9, 10 and 11 specify that interferences or limitations must be necessary in a democratic society. If the policy/proposal interferes with or limits one of these rights, detail in the table below how the right is necessary in a democratic society i.e. does it fulfil a pressing social need?

*You may need to speak to the Senior Responsible Officer for clarification of this*

Article affected	Explain why it is necessary in a democratic society
N/A	N/A

## **8. Proportionality**

Any interference with or limitation on a Convention right must be proportionate, i.e. the policy/proposal must interfere with or limit a right no more than is absolutely necessary to achieve its aims. For each Article which the policy/proposal interferes with or limits, explain how the interference or limitation is proportionate.

*For further information on proportionality please consult the Guide.*

### Article Affected

As noted above the key article affected is Article 6, the Right to a fair trial, in particular the right of access to a court which is inherent in Article 6(1).

### Explain why the interference / limitation is proportionate

A number of factors have been used to determine the proportionality analysis behind each fee proposal:

- Business volumes before and after the previous fee increases introduced from April 2017;
- The fee amount in comparison to the claim amount sought;
- Overall NI median household disposable incomes and inflationary rates;
- How much of a factor court fees play in the decision to pursue any court case;
- The availability of legal aid and the NICTS Exemption and Remission policy; and,
- The balance between full cost recovery compliance and maintaining access to justice overall.

### **Doubling the planned fee increase from a 5% uplift to a 10% uplift to be applied to all existing fees from 1 April 2019**

- The aim of the court fee proposals is to comply with Managing Public Money NI guidance in terms of 'full cost recovery'. It is important to note that the proposals do not exceed the running costs of the civil and family courts in totality. In order to comply with this policy NICTS is seeking to work towards full cost recovery; however over recovery is not something that is being pursued.
- Legal Aid exists for those court users who meet specific criteria; there is also a system of exemptions in place, with the specific objective of increasing access to justice for those on specific qualifying benefits or who can demonstrate financial hardship as a result of having to pay court fees.
- There has been no evidence that charging fees (even following the increases introduced in April 2017 and April 2018) have resulted in a drop in cases being brought into the judicial system. Since the 10% increase in fees in 2017/18, overall business volumes have actually generally increased.
- The majority of fees payable are set at such a low rate (in 2017/18 only 1% of all fees were greater than £300); NICTS estimates that there will continue to be a price inelastic effect as a result of the proposals i.e. increases in fees will not impact adversely on business with no evidence to show that access to justice has been affected. Court fees form a very small part of legal costs and in many cases are in fact small relative to the claim amount sought.



- Since the last round of court fee increases in 2007 and, taking into account the policy proposals, court fees are predicted to be less than the cumulative projected increase in Consumer Price Inflation by the end of 2020/21. Therefore, from an affordability perspective, court fees will have decreased in real terms.
- Following the 2007/08 financial crash, median real household disposable incomes decreased dramatically; in 2016/17 they were restored to an all-time high over this period.
- In terms of those civil and family cases which are non-monetary in nature, court is generally seen as a last resort for individuals. From conducting a court user survey, 72% of respondents stated that if fees were higher, it still would not have made a difference in their decision to go to court.
- Volumes and other related changes will be closely monitored throughout the life of the projected fee increases and, in particular, will be monitored quarterly by NICTS and at the end of each financial year when final outturn figures become available. It will be at that point when assumptions will be reviewed and re-assessed and, where necessary, adjustments made to ensure that there is no adverse impact on access to justice.

**An increase in the fees currently charged by NICTS for searches of the Register of Judgments within the Enforcement of Judgments Office, so as to align this to the search fees charged in other areas of NICTS business**

- Analysis strongly suggests that volumes are principally connected to the property market as an extremely high correlation can be observed between annual search volumes and annual NI property transactions, as per HMRC data.
- The number of searches carried out has been on a general increase for the past three financial years and despite a 12% increase in the cost of the search fee for this service, volumes have increased by 5%, between 2016/17 and 2017/18. This increase can be largely traced to an improving housing market.
- The most comparable service to this is NICTS bankruptcy searches, which are also mandatory in conveyancing and, have an extremely high correlation with the volume of EJO searches and total NI property transactions over £40k (as per HMRC data) – in 2007/08 the bankruptcy fee increased from £6 to £20. Despite this increase, this high correlation was maintained suggesting a price inelastic effect. NICTS estimates that the proposed price increase for EJO searches will have a similar price inelastic effect.
- Given that the standardised property price in Northern Ireland was £135,060 (as of November 2018, in 2015 prices), assuming a 10% deposit, this would indicate that proportionality of the fee is unlikely to be an issue for this service, as it would be less than 1% of the total cost of a property purchase.

### **Introduction of a fee for a Review Hearing in the High Court**

- Of the total volume of cases disposed in Queen's Bench Division in 2017, 10% related to businesses, 2% related to Government and 88% related to individuals. As part of the consultation exercise a Regulatory Impact Assessment has been drafted to determine the financial impact on businesses.
- NICTS has looked into the expected payoff structure associated with the current fee structure; the outcome of this concluded that the current fee structure should not prevent access to justice for claims with merit for any reasonable person and, to deviate from this position would require a significant increase in the fee structure following the implementation of the proposals for this area.
- Despite the increase to court fees in 2017/18, business volumes have actually increased (particularly following what was observed as a general downward trend in business for this area). Therefore, there is no evidence to suggest that access to justice has been adversely affected.

### **Small Claims Court – offer a small discount for applications submitted on-line and the introduction of a number of new fees, to include a Hearing Fee, an Application Fee and an Administrative Fee**

- Within the Small Claims Court a number of new fees have been proposed, as well as a discount offered for on-line applications where NICTS is proposing to introduce a 5% discount of the fee, effectively enhancing access to justice. New fees will also be introduced commensurate to the fee structure already in place within the Small Claims Court, and this will help insure that any financial impact on the court user is in keeping with the aims of this court tier. Collectively proportionality for these types of claims is upheld.
- Research has shown that in this area of business, the court user can be defined as follows: Businesses (Bank/Finance House and Company/Firm) – c60%, Government bodies – c24% and individuals – c16%. As part of the consultation exercise a Regulatory Impact Assessment has been drafted to determine the financial impact on businesses.
- Despite the increase to court fees in 2017/18, business volumes have actually increased. Therefore, there is no evidence to suggest that access to justice has been adversely affected.
- NICTS has looked into the expected payoff structure associated with the current fee structure; the outcome of this concluded that the current fee structure should not prevent access to justice for claims with merit for any reasonable person, and to deviate from this position would require a significant increase in the fee structure following the implementation of the proposals for this area.
- This is further supported given the high success rate for applications in the Small Claims Courts (66% of all applications resulted in a default judgment in 2017, which is essentially a non-contested claim).

### **Creation of a specific fee for the Lis Pendens procedure**

- The nature of Lis Pendens/Vacate Lis Pendens is linked to disputes over land and property. Given that the standardised property price in Northern Ireland is £135,060 (as of November 2018, in 2015 prices); a £90 fee (in addition to the existing Land and Property Services (LPS) land registry fee outlined below) is significantly less than 1%. The proposed new fee is for the certification by a court officer required in order to be able to proceed to register a pending action in relation to land in the Land Registry (or the Registry of Deeds) or to vacate such a registration.
- It should also be noted that this process is similar to the land registry process in LPS for which a £90 fee is currently applicable. The number of applications is small, with less than 50 per annum and if the applicant can demonstrate they meet the eligibility criteria for either an exemption or a remission, then the fee will be either waived or subsidised.

### **Summary**

NICTS has conducted some broad affordability research on the NI population based on the most up to date evidence available. This research found that although median household disposable incomes were on a downward trend in real terms since 2008/09, they have recovered over the past few years to reach a new high in 2016/17. NICTS is mindful that an increase in fees and the introduction of new fees will have an impact on court users in the civil and family courts. It also accepts that access to justice must not be prohibited on the grounds of ability to pay. NICTS will continue to support the courts by way of a subsidy of 50% of qualifying fees in the family and children's arenas and, in applications arising from domestic violence related matters which are taken out of the charging regime altogether. In addition, the continued availability of the exemption and remission scheme allows access to justice to be maintained for those who cannot afford to pay.

**9. Article 14 equality issues**

Even if it does not interfere with or limit a right or freedom, could the policy/proposal result in people being treated differently in relation to any of the Convention rights? Article 14 does not allow discrimination in the exercise of any of the other Convention rights.

*For further information on Article 14, please refer to the relevant pages in the Guide*

<b>Convention Article affected</b>	<b>How are people treated differently?</b>	<b>Is this justifiable?</b>
None	Analysis of section 75 data has indicated that no categories are expected to be disproportionately affected by the court fee proposals. Appreciating that Article 14 extends further than section 75, there is still no evidence to suggest that any category of individual will be disproportionately affected given the availability of civil legal aid and the exemption and remission scheme for those who either meet the eligibility criteria or can demonstrate financial hardship in affording payment of any court fee.	N/A

You should now have a clearer view about the policy/proposal and the possibility of it engaging or interfering with Convention rights and freedoms.

Please ensure the proforma is also signed by your Senior Responsible Officer and if there is any possible interference or limitation refer to your legal advisor for further action and advice.

Please tick the statement that applies, and sign below.

- a) The policy/proposal does not engage any Convention rights.
- b) The policy/proposal does engage one or more of the Convention rights, but does not interfere with or limit it/them.
- c) The policy/proposal interferes with or limits one or more Convention rights and legal advice is being sought.

Countersign, hold copy with policy papers and refer to your legal advisor

Signed by : Ryan O'Donnell

(Official)

Date: 10<sup>th</sup> December 2018

Grade: Deputy Economist

Signed by:

(Senior Responsible Officer)

Date:

**This document is in draft and will be finalised on completion of the consultation exercise, Improving Cost Recovery in the Civil Courts.**