

**EXPLANATORY MEMORANDUM TO THE
THE FAMILY PROCEEDINGS ORDER 2004**

2004 No. 3114 (L. 21)

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments

2. **Description**

2.1 This Order replaces the Family Proceedings Fees Order 1999 and specifies the fees payable for family proceedings in the High Court and in county courts.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 Under HM Treasury Guidelines (para. 2.1 of HMT Fees and Charges Guide) departments and agencies are normally expected to meet full cost recovery of services through fees. However, there may be cases in which Ministers agree that a service should recover less than its full cost. This applies to the provision of civil court proceedings, where allowance is made for automatic exemption for those on certain means-tested benefits and remission of fees where payment would cause undue financial hardship. The balance of cost should then be recovered through fees charged.

3.2 All fees are set on the basis of the staff and judicial time (with their share of overheads) spent performing tasks related to the proceeding for which the fee is charged. The Department for Constitutional Affairs (DCA) continues to examine how to address the problem of reduced demand for civil litigation as part of a longer-term programme. Any fee increases following the wider programme will be the subject of future consultation.

3.3 For 2003-04 it was recognised that the DCA would have difficulty in achieving full cost recovery for civil and family courts, after exemption and remission and areas of business where it has been agreed DCA will not seek to recover full cost. DCA met the cash target of £328,791,000. The aim of the latest increases is not to achieve a cash target or full cost recovery but to make further progress towards the latter. This takes into account £25m of investment, principally in the new IT infrastructure that will take place during 2004-05. Gross income (with credit for remission and exemption) is expected to increase by 9% improving the level of cost recovery from 79% to 86%.

3.4 When section 92 of the Courts Act 2003 is brought into force, section 41 of the Matrimonial and Family Proceedings Act 1984 (fee making power for fees in family proceedings) will be repealed. The repeal of this section will also repeal all orders made under it unless saved. However, some family fees orders are also made under section 128 of the Finance Act 1990 and sections 414 and 415 of the Insolvency Act 1986. It is necessary therefore, as these sections will not be repealed, to use the power in section 108(6) of the Courts Act 2003 to revoke any Orders to the extent that they are made under those different Acts.

4. Legislative background

4.1 Section 92 of the Courts Act 2003 provides the Lord Chancellor with a single power, with HM Treasury consent, to prescribe the fees payable in respect of anything dealt with in the Supreme Court, county courts and magistrates' courts.

4.2 Fee increases are necessary to improve the overall cost recovery and the fee increases that are being introduced are in accordance with the Lord Chancellor's key principles announced in Parliament on 19 November 1998 (source: Hansard 1998 (House of Lords Debate) Vol 594 Col WA176).
Namely:

- Fees should not prevent access to justice
- Protection must be provided for litigants of modest means
- Fees should match the cost of the service for which they are charged
- The pay-as-you-go system should be extended without deterring access to justice
- Flat rate fees reflecting the cost of the stage or application should be paid at other charging points
- Issue and enforcement fees should reflect the value of the claim
- Flat rate fees should be set on the basis of average not actual costs
- Fees should be paid by the claimant, or where a specific application is made, by the party who made that application
- Fees should be paid in advance

4.3 Fee increases are in accordance with government policy referred to when the Courts bill was passed.

5. Extent

5.1 This fees order extends to courts within England and Wales only.

6. European Convention on Human Rights

6.1 Not applicable.

7. Policy Background

7.1 Paragraphs 6 to 15 of the Regulatory Impact Assessment set out the policy, risk and rationale for fee setting.

7.2 The proposed fee increases means that the fees paid by the vast majority of litigants will not increase or if they do the increase will be minimal.

7.3 The increase in fees in this consultation process partly reflects increases in cost, improvement in overall level of cost recovery, and financial investment. Paragraphs 20 to 30 of Regulatory Impact Assessment show the overall combined net income for the Supreme Court and county court.

7.4 The key fee increases made in the recent consultation (Consultation Paper CP 10/04) are:

Divorce Petition

7.5 The new fees to issue a petition will be £210 (was £180) and filing an answer £150 (was £100). The increase brings fees closer to cost.

Ancillary Relief

7.6 The new fee will be £210 (was £120). Surveys of hearing times carried out during 2003-04 showed that much higher fees were needed on ancillary relief. A fee of over £300 would be needed to bring fees closer to cost. Consultees welcomed the increase and some suggested alternative fees structures. The latter will be investigated when fees are revised and consulted upon in the future.

Children Act Applications

7.7 The new fee for all 'private law' cases will be £120 (was £90) and 'public law' cases will be £150 (was £90). A survey of Children Act applications, which compared fees taken with total time set aside in cause lists in the same month, showed that the average hearing time per fee taken was 78 minutes in 'private law' and 218 minutes in 'public law' applications. The low ratio of fees taken to hearing time in public law cases is partly the result of the fact that county courts received 'public and private law' applications transferred from family proceedings courts (magistrates' courts). Despite the increase it is expected that the fees will cover less than 25% of cost.

7.8 Consultees welcomed the introduction of one fee per application instead of multiple fees per multiple applications.

Adoption

7.9 The new fee will be £140 (was £120). The fee has been increased to bring fees closer to cost. However, a suggestion was made (by consultees) to have an alternative fees structures in place and this will be investigated when fees are revised and consulted upon in the future.

Detailed Assessment Hearings

7.10 The new fee will be £250 (was £160) to bring fees closer to cost. In the last fees consultation exercise a number of respondents said they thought the fees on detailed assessment of costs hearings were too low. An extensive survey of detailed assessment hearings was carried out during 2003 involving nearly all courts in England and Wales. This confirmed that much higher fees were needed in all jurisdictions if these fees were to recover cost in full. Consultees welcomed the increase and suggested an alternative fees structure that will be investigated when fees are revised and consulted upon in the future.

8. Impact

8.1 A Partial Regulatory Impact Assessment was prepared and attached to the Consultation Paper on Civil Court Fees. Attached is a copy of the Final Regulatory Impact Assessment (RIA).

9. Contact

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