EXECUTIVE NOTE

THE ADULTS WITH INCAPACITY (PUBLIC GUARDIAN'S FEES) (SCOTLAND) AMENDMENT REGULATIONS 2008 SSI/2008/238

The above instrument is being made in exercise of the powers conferred by section 7(2) of the Adults with Incapacity (Scotland) Act 2000 (asp 4). The instrument is subject to negative resolution procedure.

Policy

Fees should generally be set at levels that reflect, on average, the full cost of the processes involved, with a well-targeted system of fee exemptions to protect access to justice.

It currently costs £2.9m to run the Office of the Public Guardian and Accountant of Court and fees of £1.5m represent 52% of this cost.

It is intended that this instrument increases fees to improve the level of cost recovery and by 2010-11 it is anticipated that fees raised will recover 80% of the cost of running the Office of Public Guardian and Accountant of Court. The average fee increase in 2008 is 8%. The Order also allows for 3% annual increases in both 2009 and 2010.

Consultation

Within Government

Other directorates of the Scottish Government have been informed of these proposals in advance of and in connection with the formal public consultation.

There have also been separate discussions with the Scottish Legal Aid Board.

Public Consultation

There has been a public consultation on these proposals. More detailed information is given in the attached regulatory impact assessment.

Financial effects

It is anticipated that the effects of this Order, together with those of the Fees Orders relating to Sheriff Courts, High Court of Justiciary and the Court of Session will increase total fee income received by the Scottish Court Service by £5m by 2010-11. This will reduce the current level of public subsidy in these services. The 2007 Spending Review (covering the following 3 years) settlement afforded to the Scottish Court Service assumed that there would be such an increase in fee income and allowed resources to be targeted to other Government priorities.

Regulatory Impact Assessment

A composite regulatory impact assessment for three fees orders relating to the Scottish courts (one each for the Sheriff Courts, Court of Session, and High Court of Justiciary) and one fees order relating to the Public Guardian has been produced (a copy of which accompanies this Executive Note).

Equality Impact Assessment

An initial equalities impact assessment was included in the formal public consultation document. Views were invited on whether a person or the group a person represented would be specifically affected by the proposals. Since the Scottish Court Service did not receive any comment, the initial impact assessment still stands; showing that there is no differential impact on such groups.

Scottish Court Service
5 June 2008

REGULATORY IMPACT ASSESSMENT
Civil and Public Guardian fees

Title of proposals

This is the Full Regulatory Impact Assessment (RIA) resulting from the proposed revision of fees charged for civil and Public Guardian business in Scotland.

The proposed fee changes will apply to the following Fees Orders:

- The Court of Session etc. Fees Amendment Order 2008
- The High Court of Justiciary Fees Amendment Order 2008
- The Sheriff Court Fees Amendment Order 2008
- The Adults with Incapacity (Public Guardian's Fees) (Scotland) Amendment Regulations 2008

Purpose and intended effect and rationale for government intervention

Government policy is for fees to be set at a level that recovers the full cost of providing these services; at present levels this is not being achieved. If fees are not increased, these services will continue to be subsidised by general taxation and this is not an equitable situation.

The proposal is to increase fees to make a significant step towards the achievement of full cost recovery for civil court and OPG business. This involves recovering directly the costs of transacting civil business through the courts.

Additional income will be raised through implementation of these fees orders; this income will be used to invest in Scottish Court Service (SCS) and was taken into account in Spending Review allocations.

Options considered

Option 1: Do Nothing

The 'Do Nothing' Option would mean that fees for civil court and public guardian business in Scotland were not increased.

Benefits

Maintaining the status quo would see no change to the cost of proceeding with civil and public guardian actions and would therefore not give rise to any additional concerns over impact on access to justice.

The do nothing option would not give rise to any additional perceived impacts, of increased court fees on; the number of cases proceeding through the courts or number of applications to the Public Guardian and associated adverse impacts on the Scottish legal profession and the State.

Costs

Leaving the fee structure 'as is' would mean that fees for civil business would continue to fall short of the associated costs. As such the Scottish Court Service would continue to incur significant budget deficits for civil and OPG business. This situation is not acceptable under current government policy and would continue to place strain on the Court Service's budget, given that any shortfall in civil fees must be met from within the Court Service's overall public expenditure settlement.

The 'do nothing' option fails to comply with the Government policy of achieving full cost recovery for civil court business.

This Option is not recommended.

Option 2: Full Cost Recovery – Desired End Position

An alternative option is to revise the current structure for civil court fees whereby fees would be set at a level designed, by 2010-11, to recover the full cost of providing these services.

Benefits

This would increase the fees that could be generated by SCS, allowing the current level of subsidy from general taxation to be reduced.

This would mean that in a relatively short period the policy objective would have been achieved and thereafter the main changes to fees would be to cover for inflationary cost increases.

Costs

There would be a much greater impact on the cost of proceeding with civil and public guardian actions and so more anxiety about access to justice issues.

There may be conflict with the conclusions of the Civil review (due to report in 2009). Civil court processes may, in future, be substantially changed and fee structures would be adjusted accordingly.

SCS is introducing new technology to simplify procedures, improve customer service and accelerate improved service delivery and this will led to revised fee structures for, in particular, small claims.

This Option was not pursued in the public consultation.

Option 3 – Less than Full Cost Recovery

This option would involve setting fees for civil business at a rate which would cumulatively achieve ***less*** than full cost recovery by 2010-11.

Benefits

Option 3 involves increases in fees for civil business which are lower than those applied under the full cost option outlined in Option 2. Comparatively therefore this option would reduce concerns over access to justice resulting from a potential inability of applicants to pay.

Costs

An option to introduce fees that would achieve less than full cost recovery (excluding any subsidies, remittals or exemptions) does not meet the requirement set by HM Treasury in 'The Fees and Charges Guide' to achieve full cost recovery for civil court business.

This option was the subject of the public consultation.

Public Consultation

The fee proposals (detailed under Option 3) have been subject to a twelve week public consultation which commenced on 11 February 2008 and concluded on 6 May 2008. Responses were specifically invited from a wide range of interested parties including small business representatives, legal bodies and voluntary agencies.

The purpose of this consultation was to:

> Inform decision making on how best to secure the full recovery of costs for civil and public guardian business while ensuring that the level at which fees are set does not inhibit access to justice; and
>
> Seek views on whether or not any individual fee proposal could have a disproportionate or adverse consequence on a particular group of court users.

The consultation paper noted that the policy of recovering the full cost of civil court business was a matter of settled Government policy and it was in itself not a matter for consultation.

Eighteen responses were received to the consultation. A report was compiled by independent researchers to analyse the responses and SCS has also issued its response to the consultation. These have all been made available on the SCS and Scottish Government websites[1].

[1] www.scotcourts.gov.uk/FEESORDER; www.scotland.gov.uk/consultations

REGULATORY IMPACT ASSESSMENT
Civil and Public Guardian fees

Small/micro firms impact test

The impacts of changing the fee structure for civil court business will in some cases apply to small business as litigants, although not disproportionately so. The revised fee structure is based on the principle that fees are set relative to the cost of undertaking the specific business activity and will therefore be applied uniformly across all businesses.

Business customers to the courts are in the main concerned with recouping a large number of small debts. The fee for small claims will be increased to £15 from £8 but it will now apply to a claim value up to £3,000 (formerly the limit was £50) and this is likely to benefit small businesses

The greatest impact of the proposed fees is likely to be on smaller legal practices and advocates.

Based on responses received to the written consultation on the proposed fee changes, the Scottish legal profession is concerned that the increase in civil fees will place an increased burden on the cash flow position of solicitors' practices given the tradition of paying outlays on behalf of litigants. They also are concerned that litigants will be discouraged from proceeding with personal injury actions. Combined with the above factors it is feared that these factors will cause an accelerated reduction in the number of civil cases being proceeded with through the courts.

It is clear that there has been a small (3% annually) reduction in civil business over recent years. It is not possible to predict with any degree of certainty, future volumes of civil business, given the influence of many factors outside of the control of SCS. SCS does however estimate that the current trend in volumes of civil business will continue. Since the trend in civil fee volumes is already established it is not possible to attribute it or any component of it to the proposed increases in court fees.

Clearly the risk of reduction in the volume and attractiveness of civil business is a cause of considerable concern to the small business practices working in this area within the Scottish legal system.

Legal Aid Impact Test

Since SCS does not charge fees to cases where the person is in receipt of assistance from legal aid, there is no impact.

Test run of business forms

No changes are required to business forms so this does not apply.

Competition assessment

It is not anticipated that there would be any significant negative impact upon competition in any given market. Nor is it anticipated that any markets would face a disproportionately large impact.

The proposals are not considered to create any increases in barriers to entry as costs will be no higher for entrant firms than for existing firms.

Enforcement, sanctions and monitoring

Since most fees in respect of civil and OPG business activities are paid in advance of the activity being undertaken or the document being issued, the sanction for non-payment of fees is non-provision of the service. In a minority of cases (mostly those pursued by party litigants in Court of Session) a court hearing fee may not be settled as it will not have been charged for in advance. The administrative procedures at the Court of Session have been strengthened to minimise such cases and to ensure that the judge is aware of non-payment should the party litigant reappear at a subsequent hearing.

It is important that concerns regarding potential unintended impacts on access to justice and the legal profession are closely monitored. These have been highlighted within this RIA and SCS is committed to ongoing monitoring of the impact of the new fees.

Implementation and delivery plan

It is the intention of SCS to bring into force the new Fees Orders with effect from August 2008. The Fees Orders will be entitled as follows:

- The Court of Session etc. Fees Amendment Order 2008
- The High Court of Justiciary Fees Amendment Order 2008
- The Sheriff Court Fees Amendment Order 2008
- The Adults with Incapacity (Public Guardian's Fees) (Scotland) Amendment Regulations 2008

The implementation of the proposed Fees Orders will be combined with appropriate communication to interested and relevant parties.

Post implementation review

SCS acknowledge that business trends do shift and resources required to administer business needs must change to reflect this. On an annual basis, the levels of fee and associated costs are reviewed. Since fees are not being increased to the level necessary to recover full cost, SCS does not anticipate a situation whereby there is an over-recovery of

costs, but if this occurs fees will be reviewed. Otherwise these fees will be effective until 2010-11.

The proposed fees are intended to recover the cost of civil business as a whole and individual fees are not intended to precisely reflect the cost of the specific processes within the business area to which they relate. A Civil Courts review is currently underway and

SCS will monitor any access to justice issues that may arise over the next year.

Summary

After full consideration of all the costs and benefits it is recommended that Option 3 is adopted. This will reduce the level of public subsidy in these services and increase income to Scottish Court Service, in line with the anticipated Spending Review settlement.

Close monitoring of potential unintended impacts in terms of access to justice and the impact on the legal profession will be undertaken.

Declaration and publication

I have read the Regulatory Impact assessment and I am satisfied that the benefits justify the costs.

Signed

Fergus Ewing
Minister for Community Safety

5 June 2008