EXPLANATORY MEMORANDUM TO

THE COURT AND TRIBUNAL FEES (MISCELLANEOUS AMENDMENTS) ORDER 2024

2024 No. 476

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Minister Mike Freer, Parliamentary Under Secretary of State at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

2.2 Cathryn Hannah, Deputy Director for Tribunals, Legal Support, Dispute Resolution and Fees Policy at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Anna Ellis-Rees at the Ministry of Justice email: anna.ellis-rees@justice.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument increases 172 court and tribunal fees by 10% (rounded to the nearest pound) to partially reflect changes in the Consumer Price Index (CPI) from March 2021 to March 2023. It makes amendments to the values of selected fees in the following Fees Orders: the Enrolment of Deeds (Fees) Regulations 1994 (S.I. 1994/601); the Non-Contentious Probate Fees Order 2004 (S.I. 2004/3120); the Court of Protection Fees Order 2007 (S.I. 2007/1745); the Magistrates' Courts Fees Order 2008 (S.I. 2008/1052); the Family Proceedings Fees Order 2008 (S.I. 2008/1054); the Civil Proceedings Fees Order 2008 (S.I. 2008/1053); the Upper Tribunal (Lands Chamber) Fees Order 2009 (S.I. 2009/1114); the First-tier Tribunal (Gambling) Fees Order 2010 (S.I. 2010/42); the Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011 (S.I. 2011/2344); and the First-tier Tribunal (Property Chamber) Fees Order 2013 (S.I. 2013/1179).

4.2 This instrument will also make several miscellaneous amendments to remove redundant fees, revise selected fee exemptions, and amend certain historic or incorrect provisions in the above Fees Orders.

Where does the legislation extend to, and apply?

4.3 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.

4.4 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales and Scotland. Only amendments to fees under

the First-tier Tribunal (Gambling) Fees Order 2010 apply to Scotland. All other changes apply to England and Wales only.

5. Policy Context

What is being done and why?

Increases to selected court and tribunal fees

5.1 The Lord Chancellor has a duty to ensure that the courts and tribunals service is adequately resourced.[1] To support this duty, the Lord Chancellor is authorised to prescribe fees under the powers listed below in paragraph 6.1. In doing so, the Lord Chancellor has regard to the principles outlined in Chapter 6 of HM Treasury's 'Manging Public Money' (including the principle that fees should reflect the cost of providing a service) and to the need to ensure that access to justice is real and effective.

5.2 In 2022/23, income from fees accounted for £727 million of the £2.3 billion that it cost to run His Majesty's Courts and Tribunals Service (HMCTS), with the shortfall funded by the taxpayer. Since fees were last increased in 2021[2], the Consumer Price Index (CPI) has risen by 17.8% (specifically between March 2021 and March 2023), reflecting changes in the general level of prices and goods and services. Although there is no equivalent published metric specific to HMCTS costs, CPI is assessed by Government to be an appropriate indicator of the changes in inflation borne by HMCTS. Given the change in CPI since 2021, levels of fee cost recovery have decreased in real terms over time, and the system has become more reliant on subsidisation from the taxpayer.

5.3 To minimise the cost to the taxpayer and ensure that fees are better aligned with their underlying service costs, whilst also keeping fees affordable for users in light of increases to the cost of living, only a partial CPI-based increase of 10% is being made to selected court and tribunal fees. That increase is rounded to the nearest pound, resulting in slight variations in the percentage increase, meaning that some of the new fee values equate to a lower than 10% increase and some have increased by more than 10% (but no more than 12.5%).

5.4 The fees included as part of this instrument were chosen after a thorough analysis of their underlying cost. They include both 'enhanced' fees (fees set under the Lord Chancellor's power in section 180 Anti-social Behaviour, Crime and Policing Act 2014 to prescribe a fee which is intended to exceed its underlying cost) and 'non-enhanced' fees (fees which are not set under the s. 180 power, and which may therefore not recover more than their underlying cost to administer).

5.5 There are 306 different fees charged across HMCTS services. Each fee was assessed against exclusion criteria informed by: the relative size of the fee value (i.e. fees with a particularly small value were excluded); the structure of the fee value (i.e. fees divided into bands according to the size of a claim value, or calculated based on a % of the claim value, were excluded); proportionality considerations; access to justice implications (for example, where the majority user group could be perceived as vulnerable); and whether or not there were plans to redesign or remove the fee the near future, rendering it unnecessary or impractical to increase (for example, if the service is now defunct). Of the 306 fees, over 134 have been excluded from these

[1] Reflected in the Lord Chancellor's oath, see section 17 Constitutional Reform Act 2005 (c. 4).

[2] S.I. 2021/985 came into force in September 2021, increasing a selection of court and tribunal fees in line with historical inflation dating from August 2016 to March 2021 (equating to 7.7%), or from the date that the fee was last amended (if later than August 2016).

increases for the reasons stated above. Additionally, certain non-enhanced fees were excluded where the Lord Chancellor was not able to determine that an increase of 10% (rounded to the nearest pound) would not result in an unlawful over-recovery of costs, because further analysis was required which was not available at the time of making this instrument.

5.6 Increasing the selected court and tribunal fees is estimated to generate additional income of between £30 million and £37 million per annum for the department, depending on service demand. This funding will be used to support HMCTS to continue to deliver its services effectively, improve service delivery, and reduce the overall cost to the taxpayer.

Other miscellaneous amendments

5.7 This instrument also makes a series of miscellaneous amendments to several Fees Orders. These amendments will ensure that the relevant Fees Orders are current and consistent with other relevant legislation, and are intended to simplify the fee structure for HMCTS staff and users. This mitigates the risk of administrative errors and incorrect fees being charged. The amendments are as follows:

(a) Removing fees for three applications which are no longer processed by HMCTS

(i) *Fee 3 in the Enrolment of Deeds (Fees) Regulations 1994*: Searches by applicant (in person).

(ii) *Fee 6.2 in the Family Proceedings Fees Order 2008:* On commencing an appeal under section 20 in proceedings under the Child Support Act 1991.

(iii) *Fee 3.1(a) in the Civil Proceedings Fees Order 2008:* On entering a bankruptcy petition if presented by a debtor or personal representative of a deceased debtor.

(b) Changes to fee exemptions

(i) *Extend fee exemptions for applications relating to protection orders:* This relates to Article 3A(c) in the Family Proceedings Fees Order 2008. Fee exemptions are currently given for applications to obtain or vary/discharge protective orders (non-molestation orders, occupation orders, forced marriage protection orders, and female genital mutilation protection orders). This amendment extends the scope of the exemption to allow fee exemptions for all application types relating to protective orders, where they are made by the person who commenced the protective proceedings to which those orders relate. An example of a protective order application where fee exemptions did not previously apply is a stalking protection order.

(ii) *Extend exemption for reduced probate application fee:* This pertains to Fee 3.2 in the Non-Contentious Probate Fees Order 2004. This amendment extends the scope for the reduced probate application fee to ensure it is aligned with certain inheritance tax exemptions. Without this amendment, the reduced fee only applies to estates where a death occurred whilst in service for the armed forces, on or after 20th March 2003. Extending the exemption to include emergency service personnel, and constables and service personnel targeted because of their status aligns fees legislation with changes made to sections 153A, 154 and 155A of the Inheritance Act 1984 in 2015. In addition to this, this amendment will remove the requirement that, in respect of deaths of those in service in the armed forces, the death occurred on or before 20th March 2003, as well as the corresponding armed forces exemption outlined in Article 7 of the

Order, which relates to deaths in the armed forces prior to March 2003. These amendments will simplify the Order by applying the same exemption irrespective of the date of death.

(iii) *Remove the fee exemption for inspecting wills that are over 100 years old:* This will require the removal of paragraph 3 of Article 6 in The Non-Contentious Probate Fees Order 2004. This is a fee exemption for inspecting wills that are over 100 years old. The probate service is now digitised; however these documents pre-date digitisation, so the process of searching for them is now more expensive for HMCTS to administer. Therefore, an exemption is no longer considered to be justified.

(iv) *Apply fee exemption for Domestic Abuse Protection Order (DAPO) applications:* DAPOs are new protective orders for the purpose of protecting a person from domestic abuse, under the Domestic Abuse Act 2021. A 2-year pilot of these orders is due to begin in May 2024 in selected areas, ahead of an expected national roll-out. No fees will apply for the duration of the pilot for applications relating to these orders in all circumstances. The fees affected are fees 2.4, 8.1 and 9.2 under the Magistrates' Courts Fees Order 2008; fees 1.1, 5.3 and 6.1 under the Family Proceedings Fees Order 2008; and fees 2.3b, 2.4(a), 2.5(a) and 2.5(b) under the Civil Proceedings Fees Order 2008.

(c) Fee simplifications

(i) *Remove exemptions for the filing of name deeds:* This amendment removes Article 4 in The Enrolment of Deeds (Fees) Regulations 1994, which provides that fees do not apply to deeds filed in the King's Remembrancer's Department. Deeds are no longer filed in the King's Remembrancer's Department; this exemption is historic and no longer required.

(ii) *Amendment to applications within proceedings for enforcement orders:* This amendment to the direction to Fee 5.3 in the Family Proceedings Fees Order 2008 clarifies that all applications within existing proceedings for enforcement orders under the Children Act 1989 and the Social Services and Well-being (Wales) Act 2014 charge the same fee. Previously the direction referred to an alternative, and incorrect, fee being chargeable for two types of enforcement order.

(iii) *Exclude Money Claim Online and Possession Claim Online applications from Help with Fees:* This amendment to Article 5 in the Civil Proceedings Fees Order 2008 clarifies that remissions under the Help with Fees scheme are unavailable for any cases made via Money Claim Online and Possession Claim Online services, not just applications to recover money. This is due to the incompatibility of those online systems with the Help with Fees system. Court users can alternatively make and continue claims via civil proceedings in paper form, for which Help with Fees is available.

(d) Correcting other redundancies or errors in the fees legislation

(i) *Remove and update references to Legal Services Commission:* The Legal Aid Agency has replaced the Legal Services Commission.

(ii) *Amend outdated or incorrect references to procedure rules:* Cross-references in the Court of Protection Fees Order 2007 to the Court of Protection Rules 2007 (S.I. 2007/1744), are updated to reflect the equivalent references in the Court of Protection Rules 2017 (S.I.

2017/1035) which replaced the 2007 Rules. An incorrect cross-reference is amended in the Upper Tribunal (Lands Chamber) Fees Order 2009.

(iii) *Update fee remission in the Court of Protection:* Paragraph 14(3)(b) in Schedule 2 to the Court of Protection Fees Order 2007 deals with the calculation of a party's disposable capital and gross monthly income for the purposes of calculating entitlement to fee remissions. Mistakenly, paragraph 14(3)(b) fails to specify that the gross monthly income of 'P' (the protected party) is to be treated as the gross monthly income of the party, in proceedings brought concerning the property and affairs of a P. This amendment will correct this oversight.

(iv) *Remove outdated transitional provisions:* Outdated references to transitional provisions for hearings which took place in 2007 and 2008 in each of the Family Court, Magistrates' Court and the Court of Protection are omitted to simplify the legislation for users, as they no longer have any practical effect.

What was the previous policy, how is this different?

5.8 Fees were last updated according to changes in CPI in 2021, by the Court Fees (Miscellaneous Amendments) Order 2021 (S.I. 2021/985). The changes made at this time were to reflect historic inflation from August 2016 (the previous time fees were increased) to March 2021, which equated to 7.7%. This instrument makes changes to fees which only partially reflect historic inflation. The full rate of CPI from March 2021 to March 2023 was 17.8%, but in recognition of the Lord Chancellor's duty to protect access to justice, only a 10% increase has been implemented.

6. Legislative and Legal Context

How has the law changed?

6.1 The legislative powers to prescribe court and tribunal fees are contained within section 92 of the Courts Act 2003, section 42 of the Tribunals, Courts and Enforcement Act 2007, section 54 of the Mental Capacity Act 2005, section 133 of the Senior Courts Act 1981, and sections 414 and 415 of the Insolvency Act 1986. Fees set under these powers cannot be set above the underlying cost of the related service ("non-enhanced fees") and statutory instruments made under them are subject to the negative procedure as per section 108(5) of the Courts Act 2003, section 49(7) of the Tribunals, Courts and Enforcement Act 2007, section 65(2) of the Mental Capacity Act 2005, section 133(5) of the Senior Courts Act 1981, and sections 414(6) and 415(5) of the Insolvency Act 1986 respectively. In respect of fees under section 42 of the Tribunals, Courts and Enforcement Act 2007, the negative procedure applies unless an Order is made under powers in section 42(3) (power to specify an added tribunal) or under section 42(1)(a) to (d) if the Order provides for fees to be payable in respect of things for which fees have never been payable; neither of those circumstances applies in respect of this Order.

6.2 Certain fees can be set at a value above the cost of the related service ("enhanced fees") with explicit parliamentary approval using the powers provided in section 180 of the Anti-Social Behaviour, Crime and Policing Act 2014. Instruments that are made enacting enhanced fees are subject to the affirmative procedure, as per section 180(7) of that Act. However, section 180(8) of that Act allows the negative procedure to be used if the instrument "only adjusts a fee to reflect changes in the value of money". As the adjustments to fees in this instrument (both enhanced and non-enhanced fees)

solely reflect changes in the general level of prices, the negative procedure is being used.

Why was this approach taken to change the law?

6.3 This is the only possible approach to make the necessary changes to give effect to the policy of increasing court and tribunal fees, as described above.

7. Consultation

Summary of consultation outcome and methodology

7.1 The Lord Chancellor has a statutory duty to consult with certain senior members of the judiciary about changes to fees, as prescribed in section 92(5) and (6) of the Courts Act 2003, section 42(5) of the Tribunals, Courts and Enforcement Act 2007 and section 54(3) of the Mental Capacity Act 2005. Additionally pursuant to section 133(4) Senior Courts Act 1981, changes to enrolment fees require the concurrence of the Master of the Rolls. This was conducted in parallel with a public consultation, and we received direct responses from the Civil Justice Council, the Master of the Rolls and the Deputy Head of Civil Justice. Themes highlighted in these responses and discussed in follow-up engagement included: the financial and access to justice implications of 10% increases; the relationship between HMCTS fees and costs; the justification for referencing CPI in place of the Services Producer Price Index (SPPI); and the proposed approach to engaging with the Lord Chancellor's statutory consultees ahead of routine biennial fee updates.

7.2 Although the subject matter of this Order is reserved, prior to the publication of both the public consultation and consultation response, we also engaged with the devolved administrations to inform them of the changes and how they would be affected. While the Scottish and Northern Irish Governments follow-up with no further comments, further discussions and correspondence has taken place with the Welsh Government following a letter from the Counsel General for Wales to Minister Freer. This letter expressed the Counsel General's concern at the impact of proposed fee changes – including those made by this instrument – on users with lower financial means, and whether the revised Help with Fees remission scheme is sufficient in protecting access to justice.

7.3 The Ministry of Justice published a public consultation entitled "Implementing increases to selected court and tribunal fees", which ran from 10 November 2023 to 22 December 2023.[3] The response to this consultation was published on 01 April 2024. An updated Impact Assessment and Equalities Statement that accompanied the consultation were also published alongside this response.

7.4 52 responses to the public consultation were received. Of these, 62% came from those working in the legal or public sector. Other respondents included members of the judiciary, academics and members of the public.

7.5 Respondents were divided on the principle of increasing fees. Those that agreed believed that fee increases were justifiable given the increase in CPI since fees were last updated and thought that a partial increase represented a good balance between ensuring justice was accessible and effectively funding the courts and tribunals system.

[3] The consultation document is available to read at:
https://www.gov.uk/government/consultations/implementing-increases-to-selected-court-and-tribunal-fees

7.6 The main concerns raised by those in disagreement related to access to justice and the quality of service provided by HMCTS. Many respondents felt that fees are already too expensive for the average person, which has only exacerbated considering the cost of living, so an increase of 10% would act as a barrier to justice. They also argued that the current level of service performance does not offer good value for money for court users, therefore fee increases cannot be justified unless this improves.

7.7 The access to justice concerns raised during the consultation are mitigated by the reforms made to the Help with Fees remission scheme in November 2023 by the Courts and Tribunals (Fee Remissions and Miscellaneous Amendments) Order 2023 (S.I. 2023/1094), where the income and capital thresholds have been increased so that more people are able to access financial support when using court and tribunal services. Furthermore, in acknowledgement of the current cost of living situation, only partial increases in CPI are being passed on to court and tribunal users, rather than the full 17.8% increases measured between March 2021 and March 2023.

7.8 Regarding the current level of service performance, the government has invested in new initiatives to improve application processing times and increase efficiency. Additional judges have also been recruited to increase capacity in the courts so that higher numbers of cases can be heard. The additional funding raised through these fee increases will make a significant contribution to the funding of further improvements to the service.

8. Applicable Guidance

8.1 Accompanying guidance for staff setting out the changes introduced by this instrument will be made available by His Majesty's Courts and Tribunals Service in May 2024 on GOV.UK.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

Impact on businesses, charities and voluntary bodies

9.2 This instrument is out of scope from the definition of Regulatory Provisions as the prior legal definition from s21 to s27 of the Small Business, Enterprise, and Employment Act 2015.

9.3 There is no, or no significant, impact on business, charities, or voluntary bodies. for the reasons stated above.

9.4 There is no, or no significant impact on the public sector because all fee payers will be equally affected by this instrument.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is to establish regular full or partial inflation-based increases to fees which refer to changes in CPI, every two years. This was also consulted as part of the public consultation mentioned above. Many respondents agreed that regular updates to fees would ensure consistency and allow for budget planning, whereas other respondents felt that this would only be suitable if other types of associated costs were also updated in this way. Aside from this, the

underlying costs of fees will be reviewed regularly to identify any fluctuations that may require the fee to be updated.

10.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Minister Freer has made the following statement: "In my view the provisions of The Courts and Tribunals (Miscellaneous Amendments) Order 2024 have no net cost to business".

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").