EXPLANATORY MEMORANDUM TO

THE NON-CONTENTIOUS PROBATE FEES ORDER 2017

2017 No. [XXXX]

1. Introduction

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

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument introduces a new regime of fees for applications for a grant of probate, replacing the previous flat fee structure with a banded structure based on the value of the estate. It increases the threshold below which no fee is payable from £5,000 to £50,000. The fees are set above cost recovery levels. Cost recovery meaning the cost required to cover the administrative cost of running the service. Therefore any fee above these levels is over recovering and is termed an 'enhanced fee.'

2.2 The instrument removes applications for a grant of probate from the generally applicable remissions scheme for courts and tribunal fees ('Help with Fees'), previously contained in Schedule 1A to the 2004 Order (which is to be revoked by Schedule 2 to this Order), but retains the Lord Chancellor's power to remit or reduce a fee in exceptional circumstances (Article 10 to this Order).

2.3 Articles 7 to 9 of this Order make provision in respect of refunds and remissions in specified circumstances. Article 7 refers to the resealing of a grant; a grant may be resealed in accordance with the Colonial Probates Act 1892, which allows grants issued in specified British possession countries to be resealed in this country.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument is made under the Lord Chancellor's power in section 180 of the Anti-Social Behaviour, Crime and Policing Act 2014[1], which allows the amount of a fee to exceed the cost of anything in respect of which the fee is charged. This power is being used to make sure that Her Majesty's Court and Tribunal Service is sufficiently funded now and into the future.

Other matters of interest to the House of Commons

3.2 This entire instrument applies to England and Wales only.

3.3 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly

[1] http://www.legislation.gov.uk/ukpga/2014/12/pdfs/ukpga_20140012_en.pdf

as a transferred matter, and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

4. Legislative Context

4.1 This instrument revokes and replaces the Non-Contentious Probate Fees Order 2004 (S.I. 2004/3120) and imposes a new fee structure for applications for a grant of probate.

4.2 Other 'enhanced fees' include claims for money, possession claims, civil general applications, applications for divorce and an uplift of ten percent on civil fees which have not been subject to any previous increases.

5. Extent and Territorial Application

5.1 This entire instrument applies to England and Wales only.

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 The Minister of State for Justice, Sir Oliver Heald, has made the following statement regarding Human Rights:

"In my view, the provisions of the Non-Contentious Probate Fees Order 2016 are compatible with the Convention Rights."

7. Policy background

What is being done and why

7.1 The case for revisiting the way in which fees are charged is based firmly on the need to make sure that Her Majesty's Court and Tribunal Service is properly funded to protect the vital principle of access to justice for the long term.

7.2 Since 2010, the Ministry of Justice has made substantial reductions to its spending but there is only so much that can be delivered through efficiencies. In 2015/16, the courts and tribunals cost £1.9 billion to run but only £700 million was recovered. This left a net cost of over £1 billion for the taxpayer to fund. This is an unsustainable position. Therefore it is right to look again at the balance between what users pay towards the overall cost of the courts and tribunals service as compared with the financial burden that falls on the general taxpayer. Court users who can afford to contribute more, should do so.

7.3 In 2014 grant of probate fees were raised to cost recovery levels, to £155 for an application by a solicitor and £215 for an application by an individual. The flat fee structure applies irrespective of value therefore having a greater impact on smaller estates. In the interests of fairness, the Government thinks it is right to have a system which takes account of the value of the estate. This was the system between 1981 and 1999 before it was replaced by the flat fee structure. Therefore the proposals reflect the spirit of that system but make it easier to calculate the fee based on a simple band structure. The same fee would apply irrespective of whether the application is made by a solicitor or an individual.

7.4 The proposed fee structure is set out below:

Value of estate (before inheritance tax)	**Proposed Fee**
Up to £50,000 or exempt from requiring a grant of probate	£0
Exceeds £50,000 but does not exceed £300,000	£300
Exceeds £300,000 but does not exceed £500,000	£1,000
Exceeds £500,000 but does not exceed £1m	£4,000
Exceeds £1m but does not exceed £1.6m	£8,000
Exceeds £1.6m but does not exceed £2m	£12,000
Above £2m	£20,000

7.5 On 18 February 2016, the Government consulted on proposals to increase fees for applications for a grant of probate. A copy of the original consultation can be found at the following link:

https://consult.justice.gov.uk/digital-communications/fee-proposals-for-grants-of-probate/

Consolidation

7.6 It is not intended that this instrument will consolidate any other legislation.

8. Consultation outcome

8.1 The provisions contained in this instrument were consulted on and the Government response was published on 24 February 2017. A copy of which can be found at: https://www.gov.uk/government/consultations/fee-proposals-for-grants-of-probate.

8.2 The consultation lasted 6 weeks from 18 February until 1 April and total of 853 responses were received ranging from members of the public to law firms and charitable organisations. The majority of respondents did not agree with the proposals and opposed the significant increase of the fees which are over and above the running costs of the Probate Service. The key argument cited by respondents was that many people would not be able to afford the fee because they would be 'asset rich, cash poor,' meaning they would have a valuable asset but not have the liquid funds to pay the fee.

8.3 After careful consideration of all the responses, the Government concluded that given the financial imperative to make sure that Her Majesty's Courts and Tribunal Service is properly funded, the proposals would proceed as consulted on. The Government considers that the move to a tiered structure is fairer and more proportionate. Under the new structure, 92% of estates will pay £1,000 or less and 58% of estates will pay no fee at all. Only those estates worth £2 million (0.5% of all estates) will pay the

highest fee for a grant of probate. In addition, the Government is raising the threshold for which no fee is required from £5,000 to £50,000 which will lift an additional 25,000 estates from having to pay a fee.

8.4 Whilst the Government accepts that many executors or administrators ("personal representatives") will be paying a higher fee and have to fund this upfront, the issue is not of affordability because the fee is based on the value of the estate and the personal representative will be able to recover the fee from the estate once the grant of probate has been issued.

8.5 If, however, a personal representative is not able to pay the fee because there is not enough cash within the estate or they are unable to obtain financial assistance, then the Probate Service will provide limited access to the assets of the estate for the sole purpose of paying the necessary fee. If for some reason this is not possible, then the Lord Chancellor still retains the power to remit fees in exceptional circumstances. This will make sure that no one is denied access to a grant of probate because they cannot pay a fee.

9. Guidance

9.1 Her Majesty's Courts and Tribunal Service will update its guidance on fees payable in line with these amendments and specifically, on the Lord Chancellor's power to remit fees in exceptional circumstances. Forms and leaflets will also be amended to reflect the changes and any such changes will be in place for the implementation of the fees.

10. Impact

10.1 For applications for a grant of probate, it is the personal representative that applies for the grant. The personal representative can be an individual, professional (such as solicitor, bank or accountant) or a charity. Beneficiaries of the estate can also be an individual, professional organisation or charity. Therefore there may be some impact on businesses, charities, voluntary bodies or public sector organisations. Information is not routinely collected on these people or organisations for applications for a grant of probate and therefore the potential impact cannot be calculated.

10.2 It is estimated that these proposals will generate around £300 million per annum in additional fee income.

10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation applies to applications for a grant of probate which are made by a personal representative, who can be a professional. An application may also be made by a professional acting on behalf of an individual personal representative. Current data suggests that around 60% of applications for grant of probate are made by a solicitor acting on behalf of a personal representative. It is possible that in light of the fees increasing, some personal representatives may choose to make a personal application in order to save money elsewhere in the estate but we have no way of forecasting the impact or likelihood of this.

12. Monitoring & review

12.1 Fees and the impact of any changes are constantly monitored by way of feedback from courts and their customers, and the monitoring of application volumes and fee income.

13. Contact

13.1 The Court and Tribunal Fees Policy Team at the Ministry of Justice, 3.38, 102 Petty France, London SW1H 9AJ or email: probatefeespolicy@justice.gsi.gov.uk can answer any queries regarding the instrument.