**EXPLANATORY MEMORANDUM TO**

**THE CIVIL PROCEEDINGS FEES (AMENDMENT) (No. 2) ORDER 2007**

**2007 No. 2176 (L. 16)**

**AND**

**THE FAMILY PROCEEDINGS FEES (AMENDMENT) (No. 2) ORDER 2007**

**2007 No. 2175 (L. 15)**

**1.** This explanatory memorandum has been prepared by the Ministry of Justice 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 amends both the Civil Proceedings Fees Order 2004 [SI 2004/3121] and the Family Proceedings Fees Order 2004 [SI 2004/3114] and provides for some increases to Supreme Court and County Court fees.

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

3.1 Under HM Treasury Guidelines (paragraph 2.1 of HM Treasury's *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. Fee concessions are an example of this and are designed to ensure that access to justice is protected to those of limited financial means. The cost of the cases attributed to concessions is excluded from any fee recovery targets.

3.2 The total cost of running the civil and family courts is £626 million. The majority of this cost is met through court fees. In 2006-07, court fees were set at 77% on average of the total cost. The remaining 23% was met by contributions from the taxpayer, made up of two elements;

(i) potential fee income foregone under the system of concessions; and

(ii) fees set below full cost levels; currently the case for family fees generally and civil proceedings in magistrates' courts.

3.3 Where fees fail to recover cost in full the shortfall must be met from within the Department's overall settlement. However, in 2006-07 this subsidy was partly offset by the fact that the civil fees in the county courts and above recovered significantly more than the cost of those proceedings. With the agreement of HM Treasury this internal cross-subsidy will be removed by the end of CSR07. Concern has been expressed about the levels of funding and investment in the civil and family courts. When the courts recover their costs

in full they will no longer have to compete against other Government priorities for scarce resources. These proposals go a long way to achieving the aim of full-cost recovery. Further efficiencies will be needed in the future to reflect investment and service improvement.

**4. Legislative background**

4.1 Section 92 of the Courts Act 2003 provides the Lord Chancellor with a single fee setting power, with Treasury consent, to prescribe the fees payable in respect of anything dealt with in the Supreme Court, County Courts and Magistrates' Courts.

4.2 Court fees have to comply with legal and policy principles that apply to all services where the Government charges fees under statutory powers. The most important is that; unless Parliament has explicitly provided otherwise, fees should not exceed the full cost of providing the service concerned. The General policy on fee-charging is set out in HM Treasury's Fees and Charges Guide. Lower targets can be agreed where sound policy justification is offered; the existence of the concession system represents such justification.

4.3 The Government' policy on court fees is, therefore based on the principle of full-cost pricing. Court fees should be set at levels that reflect on average, the full cost of the processes involved, with a well-targeted system of fee concessions to protect access to justice. This is a better way of targeting the taxpayer's contribution to the cost of the civil and family courts than setting fees generally below full-cost levels. That would mean that corporations and wealthy litigants who could afford to pay would benefit from that contribution – increasing its cost and in turn putting pressure on legal aid and other programmes.

4.4 Fee increases are in accordance with Government policy referred to when the Courts Act 2003 was passed.

**5. Extent**

5.1 These Fees Orders only extend to courts within England and Wales.

**6. European Convention on Human Rights**

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

**7. Policy Background**

7.1 An initial Regulatory Impact Assessment did not indicate that any groups were likely to be particularly affected by the proposed increases. The proposals are unlikely to lead to additional costs for businesses, charities or the voluntary sector, or on the public sector. The fee increases are designed to ensure that Her Majesty's Court Service charge fees, which reflects the cost to the courts of providing that service.

**Civil Proceedings**

7.2 The changes to the fee remission and exemption system will see a better-targeted, more transparent and consistent than the current system. The

introduction of a singular set of fee concessions, applicable to all courts in all jurisdictions will promote fairness and consistency. The new system is based on two distinct tests:

- The first test will determine whether the applicant is automatically entitled to a full remission of the court fee. This will apply if the applicant is currently receiving a prescribed means-tested benefit or, failing that, can demonstrate that their gross household income is below a threshold that probably entitles them to such a benefit.
- The second, more detailed test will consider both gross income and fixed out-goings to assess the applicant's net or disposable income. The applicant may then be required to pay a contribution towards the fee based on a fraction of their disposable income (or pay the full fee if it is lower than the contribution would be). This system is based on a simplified version of the means test for legal aid.

7.3 All the changes are part of the Government's strategy to develop and reform the court fee system to ensure that it is fair and sustainable.

- The introduction of hearing fees for civil cases and adjustments to other downstream fees, aimed at a better match of costs and income within the system;
- Reductions in issue fees for civil business have been calculated to offset the additional income arising from hearing fees and begin the process of removing the over-recovery in this area;
- The reductions have been weighted towards the fees for issue using our electronic systems, reflecting their lower marginal cost and in order to promote their use as part of HMCS's overall business strategy;
- Changes to fees for various ancillary process better reflect their true cost and where appropriate are harmonised across jurisdictions.
- Vexatious litigants or a litigant bound by a civil restraint order who would normally be exempt from paying court fees due to financial hardship will be required to pay the full fee for an application for permission to bring a case. If the court grants the permission requested the fee will be refunded.

7.4 The Mental Capacity Act 2005 established a new specialist court, the Court of Protection, which has the jurisdiction to deal with decision making for adults who lack capacity. Draft rules of court have been prepared, replacing the 2001 version, and will incorporate various modified parts of CPR 44,47 and 48 and PD 43-48. The combined effect of the new rules and PD which accompanies it is that where a request for detailed assessment of costs is made, the assessment will be undertaken by the Supreme Court Costs Office (SCCO). However, the new court of protection will not be part of the Supreme Court. As such, the fee for a detailed assessment of costs and appeal arising from the same will be provided for as a civil fee under section 92 of Courts Act, rather than a separate Court of Protection fee.

**Family Proceedings**

7.5 There has been little change to the court fees in family proceedings except to align those with the same process in other jurisdictions, for example, assessment of costs. In the current and previous spending reviews, the treasury has agreed to targets that gradually increase the proportion of family costs covered by fees. A comprehensive review of family fees is currently being undertaken upon which a full separate consultation will be take place later in the year.

## 8. Impact

8.1 An Impact Assessment was prepared and attached to the Consultation Paper on Civil Court Fee Increases an extract of that is annexed to this document at A.

## 9. Contact

9.1 Cara Mitchell-Langford, Civil Law & Justice Division, Her Majesty's Courts Service, 020 7210 8979.

**Annex A**

**Impact Assessment**
**Title of Proposal**

Civil Court Fees, including revising the Exemption and Remission System.
**Purpose and Intended Effect**

The proposals are part of a longer-term strategy which aims to ensure that the system of court fees is fair and sustainable. In particular, it must:

- meet its cost recovery and net funding targets;
- protect access to justice for the less well-off; and
- be flexible enough to accommodate changes in demand.

**Objective**

The objectives of the current proposals are to:

- introduce a new system of fee concessions that is well-targeted, simple, transparent and consistent;
- re-balance the structure of civil fees so there is a close match between income and cost drivers within the system;
- increase civil magistrates' court fees, aimed at achieving overall fee levels that will recover about 55% of the full-cost in 2007-08.

**Background**

Court fees are worth about £550m and cover nearly 80% of the full cost of running the civil and family courts.

The Treasury's *Fees and Charges Guide* requires all fee-charging services to have an agreed financial objective. The norm is full-cost recovery, but ministers can agree lower targets. That is the case here, because our targets discount the cost of fee exemptions and remissions.

However, family fees and magistrates' court civil fees do not currently meet the full-cost net of fee concessions. And within the civil court system, there is a substantial mismatch between the points where most fees are charged and income raised and the procedures which incur most of the cost.

The proposals currently subject to consultation would:

- Introduce a new system of fee concessions with the following key features: entitlement to a full remission based on receipt of certain benefits or gross income below a prescribed benefits; partial remissions based on a means test similar to that for contributory civil legal aid; abolition of the automatic exemption in family proceedings for recipients of Legal Help.

- Introduce changes to civil fees that would achieve a closer match of income and cost drivers and, other things remaining equal, a small reduction in the total level of fees. This is necessary both to make the system fairer as between different

types of litigant, and make it easier to ensure that cost and funding remain in balance as workload changes.

- Increase various civil fees in the magistrates' courts.

**Rationale for Government Intervention**

The changes are driven by the need to meet financial targets while protecting access to justice for the less well-off.

**Options**

The current proposals are part of the broader strategy summarised in Annex B of the Consultation Paper. They are driven by the department's financial targets as set in the latest sending review settlement; the need to comply with the principles of HM treasury's *Fees and Charges Guide*; and the need to ensure that the fees system protects access to justice and remains compliant with Article 6 of the European Convention on Human Rights. If the changes were not made, the benefits set out below would not be realised. In particular, if the increases to magistrates' fees are not made, HMCS would need to instead reduce spending commensurately (e.g. by closing courts or reducing staff numbers); this would inevitably affect court performance and service to customers. Therefore, this assessment analyses the costs and benefits of the proposals, but does not consider any alternative options to the proposed package.

**Analysis of costs and benefits**

**Fee Exemptions and Remissions**

The benefits of the reforms proposed are that the fee concession system will be:

- Better-targeted – assisting those who are genuinely unable to afford a fee, but not others. An over-generous system would be unaffordable and unfair to the taxpayer and other users. In particular, people who do not qualify for basic means-tested benefits and who have some disposable income will be required to pay a contribution.

- Simple and transparent – making it easier for applicants, their advisors and court staff to understand and apply. The system and its qualifying criteria will be well published setting out the process including what information is required and the criteria for applying.

- More consistent – a with the process clearly defined in three stages it prevents staff throughout the courts from using their own discretion and making different decisions from those made in other courts.

The new system provides automatic full remission for those on basic means-tested benefits or equivalent gross income. As such, it is slightly more generous than the current system. Above that level, it provides for a means-test based on that for Community Legal Service funding. This calculates a maximum one-off contribution from income towards any fee otherwise payable by the applicant.

The core changes to remissions and exemptions will be broadly cost neutral. The slightly more generous criteria at the bottom of the scale will cost an estimated £1.2m in a full year through additional automatic full remissions. This will be offset by a reduction in the cost of remissions of about £1m, because more people of modest means will receive part rather than full remissions.

Removal of the automatic exemption for recipients of Legal Help in family proceedings will save over £3m in a full year. This does not create a consequential cost for the CLS fund as court fees are not recoverable under Legal Help.

**Re-balancing the fee structure**

We are proposing to introduce hearing fees for civil cases and adjust the fees for allocation, listing, applications and various ancillary processes so they more closely reflect cost. These increases will be slightly more than offset by reductions in issue fees, particularly for issue using HMCS's electronic channels.

The revised fee structure should provide stronger incentives for users to issue electronically and consider mediation or other means to settle the case before trial. Within the system, it shift some of the burden of fees away from undefended claims and onto cases which proceed further and therefore incur more court costs.

Undefended cases are typically issued against individuals and small businesses by large-scale creditors, such as credit card and utility companies. The fees are initially paid by the claimant, but then added to the judgment debt and potentially recovered from the defendant. The parties in these types of case will tend to benefit most from the reductions in issue fees.

The cost of hearing fees, on the other hand, will be borne by litigants in contested cases (again, the claimant initially, but ultimately the losing party). These cases include small claims, which are typically consumer claims against small business, personal injury claims against insurers and large-scale commercial litigation between companies.

The revenue arising from court fees depends on the number of cases issuing and reaching subsequent fee-charging points. This varies over time and depends on a wide range of factors, including economic conditions. The changes themselves are designed to encourage changes in litigants' behaviour (more electronic issue, more settlements). To illustrate the scale of the impact of the fee changes, however, the figures below are based on workload figures for 2006-07.

On that basis, the introduction of hearing fees and the other changes to downstream fees would generate additional fee income of about £10m a year.

The reductions in issue fees will reduce revenue by about £14m a year.

The net reduction of £4m will reduce the level of over-recovery on civil fees identified in 2005/06 by about 1%.

**Fees for civil proceedings in the magistrates' courts**

Fees for this area of business currently cover about 29% of the cost.

Assuming constant workload, the package proposed would increase cost recovery to 64% in a full year (55% on 2007-08 if introduced in September 2007), and raise an additional £12m in a full year.

This cost would be borne by applicants in a wide range of different types of case. In many cases, the cost will then be passed on to the defendant by way of an order for costs.

The most significant increase relates to the £25 fees payable in various stages in a wide range of miscellaneous applications for which case-specific fees are not set. These include recovery of unpaid income tax; applications for orders under various statutes (e.g. anti-social behaviour, proceeds of crime, environmental protection, dangerous dogs); and appeals against various local authority decisions (e.g. liquor licensing, Public Health Act).

We recognise that Anti-Social Behaviour Orders and other similar orders may require special consideration due to their close connection to criminal process. Full-cost recovery remains the aim, but further consultation with stakeholders in local government and the police will be required in order to develop a fair and workable system.

For licensing and other appeals, which often involve lengthy hearings, we are proposing a single new fee of £400. In other cases, fees of £75 and £50 will be charged. Many of the proceedings affected are ones brought by various public bodies. Others, including the £400 appeal fee, will typically fall on business.

**Summary**

The changes proposed would:

- increase the numbers eligible for an automatic full fee remission, but require others to pay at least a part contribution towards their fee;
- reduce the overall cost of fee exemptions and remissions by about £3m, due to the removal of the automatic exemption for recipients of Legal Help;
- reduce total fee income for mainstream civil business by about £4m (1%), while increasing fees paid in defended cases by about £10m;
- increase fees for civil proceedings in magistrates' courts by £12m.

The overall effect of the package is to increase the total level of fees paid by court users, and so reduce net spending by HMCS, by about £11m in a full year.

However, the CLS fund meets the cost of court fees for those in receipt of full legal representation in the main civil and family courts, and we are proposing to apply this to the magistrates' court as well when we introduce the new fee concessions system. The additional cost to the legal aid fund as a result of the proposals will be about £3m in a full year (£1m for magistrates, £2m for higher courts). This has been factored into the legal aid forecasting as an additional pressure.

**Public Consultation**

This Consultation Paper is being sent to a variety of stakeholders including the judiciary, Civil and Family Justice Councils, and bodies representing consumer, small businesses and legal practitioners.

**Equality Impact Assessment**

Government policies should be assessed specifically to ensure that they do not discriminate against anyone on the grounds of: race; disability; gender; sexual orientation; age; religion or belief; and caring responsibilities.

There is a lack of evidence as to how changes to court fees, and remissions and exemptions, specifically affect diverse communities. We have set out the probable impacts below. We would welcome your views on these as part of your response to the consultation.

**Race Equality Assessment**

The following table uses figures from a fact sheet produced by the Department for Trade and Industry [1] and shows the average hourly earnings of people in the United Kingdom, by ethnic group in Spring 2002.

| Ethnic Group | Other Ethnic Group | Chinese | Indian | White | Caribbean | Black / Black American | African | Asian / Asian British | Mixed | Pakistani / Bangladeshi |
|---|---|---|---|---|---|---|---|---|---|---|
| Mean Hourly Earnings (£) | 11.36 | 10.75 | 9.92 | 9.50 | 9.29 | 9.04 | 8.92 | 8.91 | 8.52 | 7.10 |

Some black and minority ethnic groups tend to have lower incomes, as the table above demonstrates. Any change in fees, therefore, would be likely to have a greater potential impact on these groups.

However, people for whom payment of fees will cause financial hardship will be able to take advantage of the exemptions and remission policy. Therefore, there will be no differential impact on these groups. Information on the fees including the remissions and exemptions policy will be available in a variety of other languages.

Because of the remissions and exemptions policy and other measures (e.g. provision of information in languages other than English) we will put in place, we do not think that there will be an impact of these fee policies on people because of their racial group.

**Religion and beliefs**

Due to the variety of fees that impact on different areas of work we do not have any information that gives a breakdown on court users' religion or beliefs. We do not expect there to be any impact on people because of their religious or other beliefs.

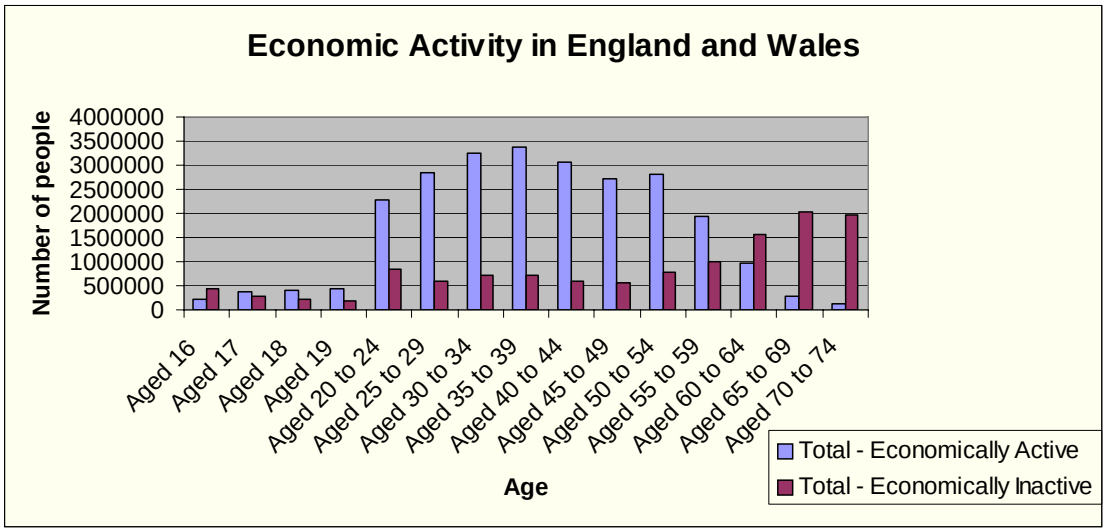
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[1] http://www.womenandequalityunit.gov.uk/publications/

**Disability impact assessment**

At some point in their lives, millions of people in the United Kingdom lose their ability to make decisions that effect their lives – either through illness, disability or injury. And some people are born with disabilities. Due to the variety of fees and different services offered and our remissions and exemption policy being designed for all those that would suffer financial hardship regardless of disability, we do not expect that these changes will have any impact on people with disabilities.

**Age**




The chart above shows the proportion of the population that is economically active in each of several age groups (from the 2001 census). We can see that until the age of 18, more people are economically inactive than are economically active. More significantly, people aged over 65 are much more likely to be economically inactive – due mostly, one would expect, to retirement.

We expect, therefore, that many of those potentially affected by fees will be covered by our remissions and exemptions policy, which is subject to no age limit. We think, therefore, that the actual impact of these policies on people because of age will be neutral.

**Caring responsibilities**

Again due to the variety of fees and different services offered the actual impact of these policies will be largely neutral. In any event our remissions and exemptions policy will permit those who may suffer financial hardship from paying a fee to avoid doing so should they qualify. Therefore, we do not expect there to be a direct impact of these fees on those with caring responsibilities.

**Gender**

The 2001 census shows that 48.67% of the population is male and 51.34% are female. Women tend to earn less than men (see below), and so they may be more impacted by new or increased fees.

Women who work full-time earn 13% less than men who work full-time, based on median hourly earnings, and 17% less based on mean hourly earnings. These lower earnings leave women at greater risk of falling below the poverty line and of being worse off than men in retirement.[2]

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[2] Data from the women and work commission report "shaping a fairer future" Feb 2006

It is expected that the exemptions and remission policy will mitigate this, allowing access to justice, and so, we do not expect there to be a an impact of these changes on the basis of gender.

**Sexual orientation**

A recent study has shown that gay men earn, on average, 6% less than their heterosexual equivalents, although lesbian women earn about 11% more than their heterosexual counterparts.[3] This means that an increase in fees may affect gay men more than heterosexual men. However, if people cannot afford to pay the fees, they will be covered by our exemptions and remissions policy. We do not therefore expect that the proposed changes will impact this segment of the population.

**Environmental**

There is nothing to suggest that these fee policies, nor the associated remissions and exemptions policy, will have an environmental impact.

**Small Firms' Impact Test**

Claimants are not required by the court rules to provide information that would make it possible to classify them as belonging to a particular group. It is therefore impossible to estimate the effect in isolation on the 'small business sector'. Business customers in general are mainly concerned about their ability to recover large numbers of small debts economically. However, the judicial statistics report for 2005-06 shows that 80% of liquidated claims (claims with a fixed monetary value) are issued by businesses to recover debts. The fees paid in those claims, which are ultimately recoverable from the debtor.

So the impact on the small business sector is likely to be neutral or positive. This is in accordance with the objective of setting fees to recover cost.

**Competition Assessment**

An initial competition assessment test was undertaken, in line with Cabinet Office guidance. The main sectors affected by the proposed fees are small business, solicitors, individuals and other government departments. These areas are not dominated by a small number of large firms and are not characterised by rapid technological change. The proposed fees would affect existing and newer potential business / individuals in the same way, regardless of their size. As such the proposed fees are not expected to have an impact on competition. We consider that the proposals are unlikely to have a negative impact upon competition in any market. It is unlikely that there would be any markets that would face a disproportionately large impact and a detailed competition assessment is not deemed necessary.

**Enforcement / Sanctions / Monitoring**

Nearly all fees are paid for in advance of the service so the sanction for non-payment is that the service will not be performed. Special arrangements apply to fees on allocation to track and setting down for trial. The proceedings may be struck out if the fee is not paid. Similar provisions in the Civil Procedure Rules will be needed to enforce payment of the fee in relation to the proposed new hearing fee.

**Legal Aid / Judicial Impact test**

The impact of the proposed increases on the legal aid budget has been estimated at a cost of £3m (see breakdown of costs and benefits section for more detail).

The judicial impact will be broadly neutral, although there may some reduction in the number of hearings required. Charging cost-based fees at key decision points in the

[3] http//cop.ISE.ac.uk/centrepiece

process would mean that litigants were subject to appropriate incentives to encourage settlement before trial, whether as a result of negotiation, mediation or some other form of alternative dispute resolution. Refunding the hearing fee on early notice of settlement could reduce the amount of judicial resource wasted when cases settle on the day.

**Administration burdens / simplification**

Administrative burdens will reduce as systems become more transparent and easier to understand. A single system of fee remissions will apply to all courts including magistrates' courts.