EXPLANATORY MEMORANDUM TO THE

NON-CONTENTIOUS PROBATE FEES (INDIAN OCEAN TSUNAMI) ORDER 2005

2005 No. 266

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 relates to fees payable on an application for a grant of probate or administration of a deceased person's estate. It provides that the fees for such a grant in respect of the dead and missing in the earthquake and tsunami that took place in the Indian Ocean on 26 December 2004 shall be waived and that where such fees have already been paid they shall be refunded. It does not affect the existing exemption powers in the Non-Contentious Probate Fees Order 2004.

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 can apply to non-contentious probate proceedings and the fees payable on the application for a grant of representation.

4. Legislative Background

4.1 Section 92 of the Courts Act 2003 provides that the Lord Chancellor may with the consent of the Treasury by order prescribe fees payable in respect of anything dealt with by the Supreme Court. This includes probate matters. Orders may also provide for fee reductions, exemptions, and remissions.

4.2 The probate fees order currently in force is The Non-Contentious Probate Fees Order 2004 (S.I. 2004/3120). Article 4 of the order provides for the remission and reduction of fees where, owing to the exceptional circumstances of a particular case, the applicant may suffer undue financial hardship. However, it does not provide for the Lord Chancellor to remit fees for other applicants where application is made in respect of a death occurring as a result of a disaster. For the Lord Chancellor to remit fees in those circumstances he must make a new Order.

4.3 Before making any order pursuant to section 92 of the Courts Act 2003, the Lord Chancellor must obtain the consent of the Treasury and consult with the following;

The Lord Chief Justice
The Master of the Rolls

The President of the Family Division
The Vice Chancellor
The Head of Civil Justice
The Deputy Head of Civil Justice (if there is one)
The Civil Justice Council.

5. Extent

5.1 This order only applies to applications for a grant of representation made in England and Wales.

6. European Convention on Human Rights

Not applicable

7. Policy background

7.1 Following the Indian Ocean tsunami disaster the Government decided that it would assist where appropriate the survivors and the relatives of the victims of the disaster. Consequently, the Foreign and Commonwealth Office waived its fees for issuing death certificates, the Home Office waived its fees for replacement passports, and the Department for Transport waived airspace charges for all relief flights to the tsunami areas.

7.2 The Department for Constitutional Affairs is waiving probate fees in respect of applications related to victims of the tsunami. The waiving of fees will allow those persons who have obtained a death certificate, or a leave to swear death order, for tsunami victims to obtain probate without unnecessary hindrance. Waiving the probate fees will bring benefits to those survivors who have limited or no access to funds because of the tsunami. And to those who would not rely on funds frozen by the tsunami, but who instead, would normally obtain an exemption from fees under Article 4 of Non-Contentious Probate Fees Order 2004. The Article 4 applicants will benefit because they will not have to prove to the court their own financial hardship. For other applicants it will remove some of the red tape required to obtain probate at an emotional and sensitive time. The DCA believes that waiving the fees will provide some emotional support to the survivors.

7.3 Applicants wishing to benefit from the waiving of fees for the 26 December tsunami will have to submit suitable qualifying evidence in support of their application for probate. The evidence should show that the deceased had died as a result of the tsunami disaster or had gone missing in the disaster and was now presumed dead.

7.4 Applicants who could not produce such evidence would not benefit from the fee waiver.

7.5 The waiver will not effect the application of Article 4 NCPF Order 2004 in respect of any other applications.

7.6 On 26 January 2005 the Foreign and Commonwealth Office reported

the following statistics in relation to the tsunami;

Confirmed dead	53
Category 1 – highly likely to be involved in the tsunami	198
Category 2 – possibly involved in the tsunami	282
Total	533

7.7 There is therefore the potential for around 533 applications. Probate fees are currently £90 for a personal application and £40 for a solicitor application. Taking the higher figure there is a potential loss of £48,000 in fees to the Probate Service.

7.8 The Lord Chancellor has obtained the consent of the Treasury and he has consulted with those listed above and they agree to this order being made.

7.9 Those responding to the consultation wished to know whether the Treasury would reimburse the DCA for the fees it would lose as a result of the waiver. The Treasury was of the view that the potential loss was of such a limited amount that the DCA should cover the loss within its own budget.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 The impact on the public sector is that those applying for a grant of representation as a consequence of the tsunami disaster will not have to pay the probate fee.

9. Contact

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can answer any queries regarding the instrument.