

These notes refer to the Public Trustee (Liability and Fees) Act 2002 (c.35) which received Royal Assent on 7th November 2002

PUBLIC TRUSTEE (LIABILITY AND FEES) ACT 2002

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Public Trustee (Liability and Fees) Act which received Royal Assent on 7th November 2002. They have been prepared by the Lord Chancellor's Department and the Treasury in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

SUMMARY

3. This Act amends provisions of the Public Trustee Act 1906 about liability and fees of the Public Trustee in order to:
 - bring the power to fix fees in relation to the Public Trustee's trust work into line with other fee-setting provisions, by providing that the Lord Chancellor (as the Minister responsible) sets the fees rather than the Treasury;
 - remove the requirement that fees charged by the Public Trustee must be set to produce an annual amount sufficient to discharge the salaries and other expenses incidental to the workings of the Act;
 - clarify the extent of the Public Trustee's liability for breach of trust, and make the Lord Chancellor's Department, rather than the Consolidated Fund, liable to make good sums required to discharge it.
4. The Act does not raise any issues in relation to the European Convention on Human Rights.
5. The Public Trustee Act 1906 established the office of the Public Trustee. The Public Trustee's trust work arises when individuals appoint him to act as the executor or trustee of estates or settlements, or where he agrees to act as successor trustee where existing trustees are no longer willing or able to act. In other cases, the Public Trustee is asked to act by the High Court, although the current practice is for the Court's power to be exercised only for the benefit of children pending their majority.

Fees charged by the Public Trustee

6. Section 9(1) of the Public Trustee Act 1906 provides that fees are to be charged in respect of the duties of the Public Trustee under the Act, and that the Treasury sets the level of those fees with the sanction of the Lord Chancellor. It provides that the Treasury has power to direct the manner in which those fees are to be collected and accounted for.

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7. **Section 9(4)** provides that the fees charged by the Public Trustee must be fixed to produce an annual amount sufficient to discharge the salaries and other expenses incidental to the working of the Act and no more.
8. There has been a significant shortfall between the fees generated by and the actual costs attributable to trust work under the Act. Following recommendations in a Quinquennial Review of the former Public Trust Office, a re-focused role for Public Trustee work was agreed. This involved removing trust work from the Public Trust Office, re-launching that office as the Public Guardianship Office with effect from April 2001, and combining the trust work with the Official Solicitor's existing estates work. As a result, the accommodation and other overhead costs attributed to trust work increased from 1 April 2001. This means that the level of fees has not been sufficient to meet the requirement in section 9(4) for full cost recovery. The level of fee increase required to meet full cost recovery would be very high, (in the region of 100% in the financial year 2001/2) and would not be accompanied by any increase in the level of service to beneficiaries. The Act removes the requirement for full cost recovery in section 9(4), permitting the Lord Chancellor flexibility in setting the level of the fees, subject to normal Government fees and charges policy, guidance on which is to be found in the Treasury's Fees and Charges Guide.

Public Trustee's liability

9. The Public Trustee's liability to the beneficiaries of the funds he manages is imposed by section 2 of the Public Trustee Act 1906.
10. Section 2 of the Public Trustee Act 1906 provides that (subject to the other provisions of the Act) the Public Trustee has the same powers, duties and liabilities as a private trustee acting in the same capacity. In general, the position is that a private trustee is personally liable to reimburse a fund where his breach of trust causes a loss to it.
11. **Section 7** imposes a liability on the Consolidated Fund to make good any sums required to discharge the Public Trustee's liability. It also provides, however, that the Public Trustee (and accordingly the Consolidated Fund) is not liable where the Public Trustee (or any of his officers) has not contributed in any way to that liability, and could not have prevented it by reasonable diligence.
12. The intention behind the limitation of liability in section 7 seems to have been to exclude liability for a breach of trust caused solely by the actions of a co-trustee. This exception to the general liability imposed by section 7 of the Act is not needed because private trustees are not liable for breach of trust by co-trustees in the absence of their own fault. Accordingly, the exception in section 7 is of no effect.

COMMENTARY ON SECTIONS

13. **Section 1** (liability) repeals section 7 (liability of Consolidated Fund) of the Public Trustee Act 1906. The repeal means that, by virtue of section 2, the Public Trustee is liable for breach of trust in the same circumstances as a private trustee acting in the same capacity. It also removes the Consolidated Fund's liability to make good any sums required to discharge the Public Trustee's liability. In accordance with modern financial practice, it will be the Lord Chancellor from his Estimate, and not the Consolidated Fund generally, that will meet any liability incurred. It is not necessary to make special provision for this in the Act.
14. **Section 1** also makes consequential amendments on the repeal of section 7 to remove the reference to the "Consolidated Fund of the United Kingdom" in section 40(2) of the Crown Proceedings Act 1947, and the reference to section 7 contained in section 3(6) of the Public Trustee and Administration of Funds Act 1986.
15. **Section 2**(fees) amends section 9 of the Public Trustee Act 1906 in order to make the Lord Chancellor responsible for fixing fees in respect of the Public Trustee's work

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under the Act. Subsection (1) also repeals the requirement in section 9 that fees charged by the Public Trustee must be fixed to produce an annual amount sufficient to discharge the salaries and other expenses incidental to the workings of the Act. It makes further amendments to remove from the section specific reference to the Treasury's power to require that such accounting requirements as it directs be followed and to authorise the application of fees as an appropriation in aid. Such references are unnecessary on the face of the Act given that departments are required to follow Treasury guidance in this regard in any event.

16. Subsections (2) to (4) make consequential amendments removing references to the power of the Treasury to fix fees from section 138 of the Law of Property Act 1925, and section 1 of the Public Trustee (Fees) Act 1957 respectively, and removing a reference to section 9(4) in section 19(5) of the Law of Property (Miscellaneous Provisions) Act 1994.

COMMENCEMENT DATE

17. This Act came into force on the day it received Royal Assent, 7th November 2002.

HANSARD REFERENCES

The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

<i>Stage</i>	<i>Date</i>	<i>Hansard Ref.</i>
House of Lords		
Introduction	Vol. 633 March 2002	Col. 358
Second Reading	Vol. 635 May 2002	Col. 1049-1051
Order for Commitment discharged	Vol. 636 June 2002	Col. 134
Third Reading	Vol. 636 June 2002	Col. 625
House of Commons		
Second Reading	Vol. 388 July 2002	Col. 41-53
Committee (SCA)	Standing Committee A July 2002	
Third Reading	Vol. 390 October 2002	Col. 261
Royal Assent – 7 November 2002	House of Lords	Hansard Vol. 640 col. 963
	House of Commons	Hansard Vol. 392 col. 480