

**EXPLANATORY MEMORANDUM TO
THE SUPREME COURT FEES ORDER 2009**

2009 No. 2131 (L. 25)

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.

2. Purpose of the instrument

2.1. Under Section 52 of the Constitutional Reform Act 2005 the Lord Chancellor may, with the agreement of the Treasury, by order prescribe fees payable in respect of anything dealt with by the Supreme Court. The overriding objective of the Fees Order is to ensure that a robust framework of charging points, fee levels and system of fee concessions exists to ensure the appropriate recovery of costs while ensuring that the Court is accessible, fair and efficient.

3. Matters of Special Interest to the Joint Committee on Statutory Instruments

3.1. Some of the Supreme Court fees are based on the existing fees for cases taken to the Appellate Committee of the House of Lords. These have been increased to reflect the fact that those fees have been unaltered since 2000. As a basic rule, where there is a directly comparable fee under the Appellate Committee rules a rate of 3.5% has been applied each year to bring this into line with 2010/11 prices.

4. Legislative Context

4.1. The Constitutional Reform Act (CRA) received royal assent in March 2005. The Act provided for the creation of a United Kingdom Supreme Court to replace the Appellate Committee of the House of Lords. The Supreme Court will become operational on 1 October 2009, and upon its opening will need to have a mechanism for setting charging points, fee levels and fee concessions for appeals to the Court and for appeals and references under the Court's devolution jurisdiction.

5. Territorial Extent and Application

5.1. This instrument applies to all of the United Kingdom.

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

What is being done and Why?

7.1. At present, the exercise of the highest level of jurisdiction in the UK is shared between the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council. The Appellate Committee receives appeals from the courts in England and Wales and Northern Ireland, and in civil cases from Scotland. The Judicial Committee of the Privy Council, in addition to its overseas and ecclesiastical jurisdiction, considers questions as to whether the devolved administrations (the Scottish Parliament, the National Assembly for Wales and the Northern Ireland assembly) are acting within their legal powers.

7.2. This means that the highest appeal court in the land sits within the legislature. The Supreme Court is being brought into existence so that the highest court is demonstrably independent of the legislature.

7.3. Part 3 of the CRA moves the 12 Lords of Appeal in Ordinary to a new Supreme Court separate from Parliament. The appellate jurisdiction of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council will transfer to the new Court.

7.4. The judicial decisions of the 'House of Lords' are in practice decisions of the Appellate Committee and the current arrangements potentially confuse the judicial and legislative roles of the House. Creating a Supreme Court will help to avoid this.

7.5. The considerable growth of judicial review has brought the role of judges more into the public eye, and as such, it is vital to avoid the perception that any decisions could be perceived to be politically motivated. The European Convention on Human Rights, established in law by the Human Rights Act, stresses that judges must be independent, impartial and free of any prejudice or bias, both real and perceived. For this to be ensured, judicial independence needs not just to be preserved in practice, but also to be buttressed by appropriate and effective constitutional guarantees. The establishment of a Supreme Court will provide those guarantees. It will provide clarity in the UK's constitutional arrangements, give people confidence that the institutional arrangements for our highest court are robust and will endure. The operation of the Court will be visible and accessible – improving the transparency of our justice system.

7.6. The new Court will also take on the devolution jurisdiction of Judicial Committee of the Privy Council. This will create the proper apex for constitutional issues for the court. Currently there is a danger of a case coming to the Judicial Committee as a devolution issue and to the House of Lords as an ordinary appeal. The creation of the Supreme Court will avoid this possibility.

7.7. The Order specifies the fees payable in the Supreme Court. The fees in column (2) of the table in Schedule 1 are payable in relation to the items described in column (1). Where the appeal relates to criminal proceedings the only fee payable is the fee for submitting a claim for costs. Where the proceedings relate to the Supreme Court's devolution jurisdiction the fees in column (3) of the table are payable rather than the fees in column (2).

Schedule 2 sets out when a party is entitled to remission or part remission of a fee.

8. Consultation Outcome

8.1. S52 (4) of the CRA place upon the Lord Chancellor a duty to consult certain persons and bodies specified in S52(5) and (6) before making the Fees Order. The consultation was widened and undertaken as a full public consultation given the importance of the issue, in order to gather a range of views on fees in the Supreme Court. The paper looked at charging points and fee levels for civil cases in the Supreme Court. It also consulted upon the system of fee concessions that the Supreme Court would adopt. Consultees were asked about fee levels for devolution cases and about the fee that should be payable for assessment of costs in the Supreme Court.

8.2. The consultation period closed on 5 May and a report summarising the responses including how the consultation process will influence the final shape of fees in the Supreme Court can be found at <http://www.justice.gov.uk/consultations/fees-uk-supreme-court-consultation.htm>

8.3. A total of 22 responses to the consultation paper were received. Of these, 11 responses, one half, were from members of the legal profession. A further 8 responses were from members of the Judiciary and 3 responses were received from Liberty and Justice (a joint response), the Legal Services Commission and Revenue and Customs Prosecution Office.

8.4. Just over half of the respondents agreed that the civil fee increases were equitable and there was a general feeling amongst respondents that some form of increment in fee levels was inevitable. There was consensus that it was right litigants should not shoulder the full cost of taking a case. It would, however, be disingenuous in any summary not to mention the fact that 8 of the respondents took the opportunity to state their strong opposition to the principle of full cost recovery for civil fees.

8.5. The point on which there was unanimous agreement was that the Supreme Court should adopt a system of fee concessions analogous to that used in other courts to ensure access to justice; there was a feeling that fee concessions should, as far as possible, be consistent throughout the civil courts. Many did not comment on the issue of devolution fees. While there was consensus among those that responded that the fees for devolution cases should be consistent with those charged for civil cases, there was concern at the potential level of increase if this change was made in one step. The Government has therefore decided to stage the increase in devolution fees, although the long term aim of parity with civil fees remains. The majority agreed with the proposals on the assessment of costs where the fee is split between an application for assessment of costs and once an assessment has been made.

9. Guidance

9.1. The Lord Chancellor has a duty under s.53(2) of the Constitutional Reform Act to take such steps as are reasonably practical to bring the fees to the attention of those that are likely have to pay them. In discharging this duty the Lord Chancellor acknowledges that the Chief Executive of the Supreme Court is in regular contact with the relevant bodies that represent the interests of the main users of the court and work will be done to raise awareness among potential court users of the Fees framework.

10. Impact

10.1. The impact on business, charities and voluntary bodies is the same as for all potential users of the Supreme Court. The Fees Order is not predicted to have a negative effect. Paragraph 9 of the schedule to the Fees Order provides the Chief Executive with the discretion to grant remission to a charity or not-for-profit body seeking to intervene in an appeal.

10.2 The impact on the public sector is not predicted to be negative.

11. Regulating Small Business

11.1. The legislation applies to small businesses as to all potential users of the court.

11.2. During the passage of the Constitutional Reform Act contact was made with the Small Business Service about the setting up of the Supreme Court and the Regulatory Impact done at that stage states that the Small Business Service agrees that the impact on small businesses will be minimal.

12. Monitoring and Review

12.1. It is expected that the fees will normally be reviewed every 3 years. As the Supreme Court is a new institution there will be monitoring of the processes and procedures when it first become operational. In addition the Chief Executive will be under a duty to lay an annual report before Parliament which will deal with the running of the Court.

13. Contact

13.1 Charles McCall at the Ministry of Justice Tel: 0203 334 3855 or e-mail charles.mccall@justice.gsi.gov.uk can answer any queries regarding the instrument.