

EXPLANATORY MEMORANDUM TO
THE COMMUNITY LEGAL SERVICE (FUNDING) (COUNSEL IN FAMILY
PROCEEDINGS) (AMENDMENT) ORDER 2007

2007 No. 2443

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

2. Description

- 2.1. This Order exempts certain levels of service from the Family Graduated Fee regime, which applies to counsel, because these levels of service will be covered by the new standard fee schemes for family legal aid work which are being introduced on 1 October. The Government has announced that it will introduce a single fee scheme for solicitors and counsel conducting other family advocacy work in April 2008.
- 2.2. This Order also makes terminological changes to the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 concerning the appeals processes of the Legal Services Commission (LSC), and changes the references to those within the LSC who are responsible for considering certain claims, applications and appeals under the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001. These changes reflect amendments made in 2006 to the LSC Funding Code.

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

- 3.1 None.

4. Legislative Background

- 4.1. The Lord Chancellor makes this Order in exercise of the power conferred by section 6(4) of the Access to Justice Act 1999. The Lord Chancellor has consulted the General Council of the Bar and the Law Society in accordance with section 25(2) of that Act and has had regard to the matters specified in section 25(3) of that Act.

5. Extent

- 5.1. The Order applies to England and Wales.

6. European Convention on Human Rights

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

7. Policy Background

Legal Aid Fee Schemes

- 7.1. Lord Carter of Coles published his Review of Legal Aid Procurement on 13 July 2006, when the Department for Constitutional Affairs (DCA) and the LSC issued their joint consultation paper on his proposals, *Legal Aid: A Sustainable Future*. The consultation period lasted until 12 October 2006.
- 7.2. On 28 November 2006, the DCA and LSC jointly published *Legal Aid Reform: The Way Ahead*. This document set out plans to defer implementation of the fee schemes from April to October 2007, and to re-consult on aspects of the Family Private and Care Proceedings schemes. The re-consultation took place over 6 weeks from 1 March to 16 April. The Tailored Fixed Fee Replacement scheme (for civil law) and Immigration and Asylum schemes were agreed by Ministers and published on 28 November 2006 and 1 March 2007 respectively. The Mental Health, Family Private and Care Proceedings fee schemes were agreed by Ministers and published on 22 June.

Terminology Changes

- 7.3. In October 2006, the process by which providers can appeal against assessment of their legal aid bills by the LSC was revised following consultation: 'costs committees', were replaced by 'Independent Costs Assessors' to improve efficiency and the consistency of decision-making. References to 'Regional Director' were also changed to 'Director' at the same time. This was because most 'operational' issues (including decisions on whether or not to grant, refuse or terminate funding) are now taken by staff ultimately reporting to the LSC's Director of Business Delivery, rather than to Regional Directors. In addition, three person 'Funding Review Committees' were replaced with single 'Independent Funding Adjudicators'.
- 7.4. References in the Funding Code were altered to reflect the new working arrangements. The Funding Code is prepared under section 8 of the Access to Justice Act 1999 and provides a set list of criteria and procedures by which the LSC operates the provision of civil legal aid. However, certain references to the old arrangements survive in regulations, and the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 needs to be amended to change references to 'directors' and 'costs committees'. Separate regulations

have also been made in respect of replacing references to ‘Regional Directors’ in the Community Legal Service (Costs) Regulations 2000.

Consultation

- 7.5. The new fee schemes for civil and family legal aid work have been consulted upon extensively. During the summer of 2006, the then-legal aid minister, Vera Baird QC MP, toured the country and held some twenty-five meetings over the summer to meet practitioners and to listen to their views on the proposals. The LSC also met practitioners to explain the proposals and to answer questions. The DCA and the LSC received 2372 written consultation responses to *A Sustainable Future*; all of these were analysed and considered before decisions on the final fee schemes were taken.
- 7.6. In addition to being subject to extensive consultation, the new fee schemes have also been subject to Parliamentary scrutiny and debate. The Government initiated a full Commons debate on the legal aid reform programme on 11 January 2007. In addition, there have been three separate debates on legal aid reform in Westminster Hall this year, a detailed report by the Constitutional Affairs Select Committee (CASC), and two debates in July on the changes to the Funding Code.
- 7.7. This Order was also subject to statutory consultation with the Law Society and the Bar Council, but we also consulted with the Legal Aid Practitioners’ Group (LAPG), the Immigration Law Practitioners’ Association, the Mental Health Lawyers’ Association, Resolution (formerly the Solicitors’ Family Law Association) and the Association of Lawyers for Children. The consultation ran from 3 July until 24 July. This was a consultation on whether the Order met its policy objective, rather than a consultation on the policy itself. Both the Law Society and the LAPG raised some policy objections to the legal aid reform programme, but made no substantive points on the Order itself.
- 7.8. The Government has announced that it will introduce a single fee scheme for solicitors and counsel conducting family advocacy work in April 2008. This scheme will be the subject of a consultation later this year. In the interim period, solicitor advocacy will continue to be paid at hourly rates, whilst advocacy by counsel will remain under the Family Graduated Family Fee Scheme.

8. Impact

- 8.1. An impact assessment has been prepared and was included in the full Impact Assessment which accompanied the document ‘Legal Aid Reform: Family and Family Mediation Fee Schemes for October 2007’. It is attached to this Explanatory Memorandum.

9. Contact

9.1. Any enquiries about the contents of this memorandum should be addressed to:
Stephen Jones, Civil and Family Legal Aid Directorate, Ministry of Justice
Email: Stephen.Jones@justice.gsi.gov.uk
Tel. 0207 210 2626