

EXPLANATORY MEMORANDUM TO
THE COMMUNITY LEGAL SERVICE (FUNDING) (AMENDMENT No.2)
ORDER 2010

2010 No. 1109

1. This explanatory memorandum has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament by Command of Her Majesty. It contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1. This Order amends the Community Legal Service (Funding) Order 2007 (SI 2007/2441), which sets out the fees and rates payable to solicitors and Not for Profit organisations who provide civil legal aid services to the public. The Order amends the 2007 Order to implement one of the two new fee schemes as set out in the *Family Legal Aid Funding from 2010* consultation. It also implements the second scheme and revokes the instrument in which the previous fees relevant to that scheme had been contained.

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

3.1 The Committee is asked to note that this Order also incorporates by reference the Civil and Family Mediation Specifications of the 2010 Standard Civil Contract for civil providers. The Specifications set out the detailed rules in accordance with which contracted services must be provided.

4. Legislative Context

4.1. The Lord Chancellor makes this Order in exercise of the powers conferred by section 6(4) and 25(8A) 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.

4.2. The instrument is subject to the negative resolution procedure under section 25(10) of the Access to Justice Act. It amends the Community Legal Service (Funding) Order 2007 and revokes the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 (S.I. 2001/1077), in each case with transitional or saving provisions.

5. Territorial Extent and Application

5.1. The Order extends 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

- 7.1 In November 2006, in *Legal Aid Reform: the Way Ahead* (Nov 2006), the Government's response to Lord Carter's report into legal aid procurement, the Government set out its intention to abolish the Family Graduated Fee Scheme (FGFS) barrister fee scheme, and to move towards a new harmonised payment system for family advocacy work by both solicitors and barristers. The FGFS, introduced in May 2001, was developed over a number of years in close consultation with the Bar and the Family Law Bar Association (FLBA). Barristers receive fixed fees for certain activities, and these fixed fees can be increased by a variety of uplifts, depending on factors in the case. These extra payments are controlled by the judiciary – who approve the uplifts at the end of the hearing or case.
- 7.2 The proposed fee schemes are designed to help control inflationary growth and maximise access to legal aid for the future.
- 7.3 The joint MoJ and Legal Services Commission (LSC) consultation, *Family Legal Aid Funding from 2010*, focused on two payment schemes: The Private Family Law Representation Scheme (PFLRS), which will bring private family work (excluding advocacy) within a standard fee regime, and The Family Advocacy Scheme (FAS), which creates a single graduated fee scheme covering payments to both solicitor advocates and barristers for public and private family law cases. The proposed fee schemes will replace hourly rates with standard fees and have been designed to be cost neutral against 2007/08 average case costs.
- 7.4 On 21 October 2009 the MoJ and the LSC published the new fee structures for family legal aid. The new schemes will be introduced with the new civil contracts in October 2010.

Family Advocacy Scheme

- 7.5 The FAS includes: Public Law Family: Care and supervision cases and Other public law cases. It also includes Private Law Family: Private law children cases, Finance cases and Domestic abuse cases.
- 7.6 There is significant overlap between the advocacy work that solicitors and barristers do, therefore the FAS proposes to pay the same for advocacy, regardless of whether a solicitor or barrister does the work (although certain payments would only be made to barristers and other self-employed advocates). Further details on the FAS can be found on the LSC website at:
<https://consult.legalservices.gov.uk/gf2.ti/f/137410/3072293.1/pdf/-/Information%20Sheet%20FAS%2021.10.09.pdf>

- 7.7 For interim cases there will be two hearing units. Hearing Unit 1 (where the case is 1 hour or less) and Hearing Unit 2 (where the case lasts longer than 1 hour but less than or equal to 2.5 hours). A daily fee will be payable for each day of the final hearing. Because of this there will be no exceptional cases or uplifts payable in the FAS. However there will be additional payments (bolt ons) for cases which are particularly complex.

Private Family Law Representation Scheme

- 7.8 The PFLRS includes all work (excluding advocacy which is covered by the FAS) from the issue of proceedings up to the conclusion of the final hearing, including any review hearing following the final order.
- 7.9 Further details on the PFLRS scheme can be found on the LSC website at:
<https://consult.legalservices.gov.uk/gf2.ti/f/137410/3071077.1/pdf/-/QA%20Private%20law%2021.10.09.pdf>
- 7.10 The PFLRS has an exceptional case threshold of 3 times the profit costs i.e. if a case is particularly complex it may escape from the fee scheme and be paid on hourly rates.

8. Consultation outcome

- 8.1 The *Family Legal Aid Funding from 2010* consultation began on 17 December 2008 and closed on 3 April 2009 following an extension of the original closing date of 18 March, which was granted following requests from representative bodies to allow providers further time to set out their concerns.
- 8.2 In total there were 1,491 responses to the consultation. In general, respondents were not in favour of the proposals but opinion was split as to what they would favour instead. The general theme was that the scheme needed more graduation to recognise complexity but there was no clear agreement as to how that could be achieved. Both barristers and solicitors felt the fee levels had been set too low and that they would not be prepared to undertake family legal aid work at these rates. A summary of the responses to the consultation can be found on the LSC website at:
<https://consult.legalservices.gov.uk/gf2.ti/f/137410/3070949.1/pdf/-/summary%20of%20responses%2021.10.09.pdf>
- 8.3 Changes were made to the schemes following consideration of the responses to consultation and the input of the working group that was set up. There is now much greater graduation to ensure that those advocates who take on the more difficult and complicated cases are fairly rewarded.

8.4 Key changes to the schemes were:

- excluding certain proceedings from the schemes including Forced Marriages and Rule 9.5 cases
- Moving from a per hearing fee for advocacy to a fee based on time
- Uplifts for work undertaken in the County Court and High Court
- The introduction of bolt-on fees to recognise the complexity of some cases
- Payment of finding of fact hearings as final hearings
- Payment of an Issues Resolution hearing as a final hearing where a case settled at the stage in Care proceedings

8.5 The Government's announcement on the final fee schemes was broadly welcomed by the Association of Lawyers of Children (ALC), one of the practitioner groups involved in improving the scheme.

8.6 ALC co-chair, Piers Pressdee, commented:

“The priority for family legal aid must be child protection. These are complex, demanding cases, involving the highest of stakes, and requiring a high level of expertise to conduct properly. We welcome the Government's recognition of that priority and reality, together with the significant improvements to the scheme that have now been made. While we still have concerns about some elements of it, the scheme now proposed is immeasurably better, fairer and more practice-reflective than that originally devised. That shows the benefits of collaborative working within the family justice system.” (ALC Press Release 21 October 2009).

8.7 This Order itself was the subject of a consultation with the statutory consultees: the Law Society and the Bar Council. We also consulted the Legal Aid Practitioners' Group, the Family Law Bar Association, the Advice Services Alliance, Resolution, the ALC, the Housing Law Practitioners' Association, and the Rt Hon Sir Mark Potter (President of the Family Division). This was a consultation on whether the Order met its policy objective, rather than a consultation on the policy itself (which was the subject of the *Family Legal Aid Funding From 2010* consultation). A number of drafting amendments and clarifications were made in the light of the comments received.

9. Guidance

9.1 Information on the *Family Legal Aid Funding from 2010* consultation process can be found on the LSC website at:
<https://consult.legalservices.gov.uk/inovem/consult.ti/FamilyFees2008/consultationHome>

10. Impact

10.1 An Impact Assessment, including an equality impact assessment, is available at:
https://consult.legalservices.gov.uk/gf2.ti/f/137410/3070853.1/pdf/-/Annex_A_IA_21.10.09.pdf

11. Regulating small business

11.1 The legislation does not specifically apply to small businesses.

12. Monitoring & review

12.1 The LSC gathers statistical data on its legal aid fee schemes on a regular basis. The Impact Assessment sets out that a Post Implementation Review will be undertaken 18 months after the implementation of the fee schemes and the LSC will work closely with the representative bodies on this.

13. Contact

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