

EXPLANATORY MEMORANDUM TO
THE LEGAL SERVICES ACT 2007 (PRESCRIBED CHARITY) ORDER 2008

2008 No. 2680

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. The instrument prescribes a charity – the Access to Justice Foundation - to receive amounts from orders made by the courts under section 194 of the Legal Services Act 2007 ('the 2007 Act')

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

3.1 None.

4. Legislative Background

4.1. This instrument prescribes a charity pursuant to section 194(8) of the 2007 Act, which received Royal Assent on 30 October 2007. The 2007 Act introduces a new regime for the regulation of legal services and makes a large number of amendments to the legislation which governs legal services regulators. This includes amendments to the Solicitors Act 1974, the Administration of Justice Act 1985, the Courts and Legal Services Act 1990 and the Compensation Act 2006.

4.2 The Legal Services Act 2007 (Commencement No 2 and Transitory Provisions) Order 2008 (S.I. 2008/1436) commenced (in stages) section 194 of the 2007 Act. Section 194(8) came into force on 30th June 2008.

4.3 Section 194 of the 2007 Act applies to proceedings in a civil court in which a party to those proceedings is or was represented by a legal representative and that legal representation was provided free of charge. Under section 194(3) of the 2007 Act, the court may order any person to make a payment to the prescribed charity in respect of that legal representation. This instrument prescribes the charity, the Access to Justice Foundation, pursuant to section 194(8) of the 2007 Act.

4.4 To accommodate section 194(3) of the 2007 Act amendments have been made to the Civil Procedure Rules 1988 (S.I.1998/3132) –SI2008 2178(L10) to ensure that appropriate court rules are in place.

4.5. Section 194(9)(a) requires that an order under section 194(8) of the 2007 Act may only prescribe a charity which is registered under section 3A of the Charities Act

1993 (“section 3A”). As section 3A is yet to be commenced, the Legal Services Act 2007 (Transitory Provision) Order 2008 (S.I 2007/1799) enables the reference to section 3A in section 194(9)(a) to have effect as if it were a reference to section 3 of the Charities Act 1993.

5. Territorial Extent and Application

5.1 This instrument relates to provisions which apply 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 Section 194 of the 2007 Act enables the court to make, in civil proceedings where a party has received pro-bono (or free of charge) legal representation, an order against another party to make a payment to the charity in respect of the pro bono representation. This provision removes the anomaly that currently exists whereby an unsuccessful party in a case where the successful party was represented on a pro bono basis can benefit from the courts’ inability to order that unsuccessful party to pay a sum, (equivalent to costs) due to the operation of the indemnity principle. It will create a more level playing field in these cases by making both parties liable for costs or a payment equivalent to costs.

7.2 The sums awarded in these cases will go, not to the lawyers providing the pro bono representation, but to a single charity, prescribed by order of the Lord Chancellor under section 194(8) of the 2007 Act. This charity will administer and distribute the monies received to voluntary organisations that provide free of charge legal support for individuals and communities. The awards will support additional pro bono help; they are not intended to replace funding already received from central or local government or other funders.

7.3 This instrument prescribes the Access to Justice Foundation, (Charity Registration No 1126147), as the charity eligible to receive sums paid pursuant to orders made by the courts under section 194(3) of the 2007 Act. The charity fulfils the necessary criteria laid down in subsection 194(9) of the 2007 Act.

Consultation and Guidance

7.4 Section 194 was designed with the support of the then Attorney General, Lord Goldsmith, and the National Pro Bono Co-ordinating Committee, whose members include representatives of the main legal professional bodies (the Law Society, Bar

Council and Institute of Legal Executives), of the not for profit and voluntary sectors (Citizens Advice, the Law Centres Federation and the Advice Services Alliance) and the main pro bono networks. The Access to Justice Foundation's trustees are drawn mainly from these bodies.

7.5 A consultation on the proposals for the implementation of section 194 (then clause 185 of the Legal Services Act) and the prescribed charitable body - '*Cost Recovery in Pro Bono Assisted Cases*' was published on 16 April 2007. The Ministry of Justice published its response on 30 November 2007 which concluded that all type of civil cases would be included; changes to Civil Procedure Rules kept to a minimum and a prescribed charity would become the sole destination for the pro cost orders. The single charity route was the preferred option as it was acknowledged that the courts are not equipped to decide on the merits of charities or other organisations nor should they be asked to do so.

7.6 The response to the consultation widely supported the single charity option and it was recognised that a central body would be in the best position to take a strategic overview of areas of need. Some concerns were raised that not allowing the lawyers themselves to decide where the proceeds of orders made under section 194(3) of the 2007 Act might be directed could be a disincentive and the Ministry of Justice response indicated that the charity might want to consider this via their guiding principles.

7.7 Only those involved in providing pro bono legal assistance will be eligible to apply to the Access to Justice Foundation for financial support and all applications will be scrutinised via regional committees before being passed to the central board for approval.

7.8. A copy of the relevant extracts of the Ministry of Justice's consultation response is attached at Annex A .The full version can be found on the MoJ website at: <http://www.justice.gov.uk/publications/cp0707.htm>

8. Impact

8.1 The final impact assessment for then clause 185 was published together with the response to the consultation mentioned at 7.8 above. The sections relating to the charity are reproduced at Annex B.

A full version can be found at www.justice.gov.uk/docs/probonoconsultation-draft-full-reg-assess.pdf

9. Contact

9.1. Any enquiries about the contents of this Memorandum should be addressed to:

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Annex A

Extracts from the Pro Bono Consultation Response published on 30 November 2007

Background

The consultation paper 'Cost Recovery In Pro Bono Assisted Cases' was published on 16 April 2007. It invited comments on what was then clause 185 of the Legal Services Bill - 'Payments in respect of representation provided pro bono'. The information obtained would be used to help develop secondary legislation and determine any changes that might be needed to Civil Procedure Rules. The Bill received Royal Assent on 30 October 2007 when the clause became section 194 of the Legal Services Act 2007.

Section 194 was designed to enable costs to be awarded in civil cases where legal representation has been provided free of charge. This change will remove the anomaly that currently exists in cost law, whereby an unsuccessful party in a pro bono supported case may benefit from the court's inability to award costs owing to the operation of the indemnity principle. It will create a more level playing field in these cases, making both parties to the litigation potentially liable for costs.

The intention is that the sums recovered go, not to those providing the representation, but to a prescribed charitable body that will administer and distribute monies received to voluntary organisations that provide legal support for individuals and the community.

The Consultation period closed on 9 July 2007 and this report summarises the responses, including how the consultation process influenced the final shape and further development of the proposals consulted upon.

Comments on the prescribed charity (Page 6)

Concerns were raised that making the prescribed charity the only destination for section 194 awards would prove a disincentive to those undertaking the work. They might prefer that the proceeds of any successful cases go to a charity of their choice. This point was addressed by Lord Goldsmith, the former Attorney General, during the debate on the clause in the House of Lords on 6 March 2007. He said:

'Pro bono work is presently undertaken by practitioners simply because the person receiving the help needs it; that is the incentive, and I do not anticipate that that will change one jot. To date, lawyers have not needed any incentive for being able to direct funds to a particular charity in order to undertake pro bono work'.

It is anticipated that one of the factors that the prescribed charity could have regard to when making a decision on the distribution of funds would be any preference expressed by the legal representatives acting in a particular case. However this should be actioned through the charity's own guiding principles rather than by constitutional fetter.

Responses to specific questions (Page 9)

3. Do you have any comments on the proposals regarding the prescribed charitable body?

The majority of those responding agreed that there should be a single prescribed charity to receive and administer the cost awards as this body will have no interest in litigation, have a strategic view of need and the ability to distribute the money where it was most needed. It was also seen as relieving pro bono providers from the need to use time that might be better employed elsewhere in funding raising.

Where opposition to the prescribed charity approach was expressed it was mainly in relation to the possible bureaucracy that might be involved and the lack of financial recognition for those either on whose behalf the work was undertaken or for the wishes of those providing representation.

Some responses used this question to flag up issues that will be for the prescribed charity itself to consider. These included such how they will ensure orders are enforced, the effect of possible bureaucracy on both funds and the organisations bidding for them, the negative effect of not allowing monies to be directly channelled to those charities involved in individual cases.

The Advice Service Alliance welcomed the proposal of the prescribed charity, but suggested an extension to enable a registered charity undertaking representation of a party to retain any costs awarded to its client.

The combined Clifford Chance LLP, DLA Piper LLP and Lovells response made a strong case for others to be the recipient of cost awards. They raised the issues of the possible politicising of the charities decisions and of deterring law firms in supporting legal advice clinics or providing representation if they are aware that their efforts are going to fund other organisations. They queried why unpaid work for (for example) a children's charity should not result in an award for that charity if successful in court and suggested the courts be given the power to award costs to the charity involved at the judges' discretion and possibly after consultation with lawyers providing the services. Alternatively the prescribed charity could have a wider remit that would grant it the discretion to award money to successful charities outside the legal and advice fields.

The ELA opposed the New Foundation proposal on principle and felt there was no reason why legal charities providing the legal support in a particular case should not receive these awards. Naomi Cunningham (an employment lawyer) agreed the ELA's view and added that it would be motivating for those undertaking the work to know that it would benefit those they are helping directly.

The Child Poverty Action Group suggested that in public interest cases the charity bringing the case might receive the award rather than the prescribed charity. They queried if a charity such as their own could apply the foundation for funding.

Conclusions and next steps (Page 13)

The prescribed charity will be the sole destination for the receipt of pro bono cost orders. Having one prescribed charity handling the receipt and distribution of the funds

raised by pro bono cost recovery orders will add value by offering a strategic route to assessing needs. This route, as detailed in legislation, was expressly designed with the help of the Attorney General's Pro Bono Co-ordinating Committee. The prescribed charity will stand apart from litigation and any payments of proceeds to it will be because legislation mandates that course in the public interest. The courts are not equipped to decide the merits of other charities or organisations, nor should they be asked to do so.

It has already been acknowledged that one of the factors that the prescribed charity would be expected to have regard to when making decisions about distribution of funds would be any preference expressed by the legal representatives acting in a particular case, or their client. This would probably be through its guiding principles rather than as a constitutional fetter. This could allow the wider remit requested in some responses, however legislation and Parliament's intention was clearly that these should be only legal charities.

Annex B

Extract from Full Regulatory Impact Assessment

Items Concerning Charity prescription

(iii) Option 3 – Cost orders in pro bono cases.

Benefits

- 5.11. Enabling the courts to make cost orders in pro bono assisted cases will allow them to be treated in the same way as any normal litigation. It will put in place a fairer costs regime where all will know from the outset that should they lose they will be liable for costs
- 5.12. This power will not be mandatory. The pro bono lawyer will have to advise the court at the start of the case that they will be seeking an order to award costs if successful. Parties to the action will know from the start what their liabilities might be and that these liabilities could apply to all in their situation. It will not change the courts' ability to decide if an award was appropriate and proportionate but it will allow them to make an award if they so wished
- 5.13. The orders will be made in favour of a prescribed body registered with the Charity Commission and managed by Trustees. To ensure its impartiality and effectiveness it will be prescribed by Order of the Secretary of State. It will not be involved in the litigation process; its role would be purely to administer and distribute funds to enable the provision of legal help and advice to those otherwise unable to access it. Such a body would be able to move more speedily in response to emerging needs than more traditional funding streams. It could also be the receiving body for other streams of funding that are being investigated, including Interest and Lawyers Trust Accounts and Unclaimed Client Monies
- 5.14. It is estimated that in 95% of the cases where pro bono assistance has been given, the help is mainly of an initial advice nature. It is envisaged that a similar proportion of the funds raised by the recovery of pro bono costs would go to increase the groundwork done in local legal clinics and advice centres.
- 5.15. Currently only some 5% of cases handled by pro bono lawyers come to court—about 1,000 each year. In theory, costs could apply to most of these cases. Indications are that an average cost award in civil cases is approximately £800 so we envisage that the total amount of awards in any one-year would be in the region £800,000

Costs

- 5.16. It was anticipated that in pro bono organisations and the not-for-profit sector who currently receive central or local government funding this might be perceived as a way for these funders to withdraw from their commitments. Responses to the public consultation responses show no significant evidence of this.