

EXPLANATORY MEMORANDUM TO
THE COMMUNITY LEGAL SERVICE (FUNDING) (COUNSEL IN FAMILY
PROCEEDINGS) (AMENDMENT) ORDER 2008

2008 No. 666

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty. It contains information for the Joint Committee on Statutory Instruments. The memorandum should be read with the attached original explanatory memorandum for the Community Legal Service (Funding) (Counsel in Family Proceedings) (Amendment) Order 2008, S.I. 2008/666, which this instrument replaces.
2. **Description**
 - 2.1. This Order amends the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 (“the 2001 Order”), which sets out the Family Graduated Fee Scheme which governs legal aid remuneration for barristers in family proceedings. The original memorandum for this instrument gives further details.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 The Order was made on Monday 10 March. A minor change to the Order had been made earlier that day but unfortunately, because of an error by officials, the document which was laid before Parliament, on 11 March, was the version of the instrument from 7 March, without the amendment made on 10 March. The error came to light in June. The instrument as correctly made by the Minister is therefore being laid before Parliament. As this instrument as made has effectively been laid after it has taken effect, in accordance with section 4 (1) of the Statutory Instruments Act 1946 letters have been sent to the Speakers of the House of Commons and the House of Lords, apologising for the error and stating that steps are being taken to prevent a recurrence.
 - 3.2 The change made to the Order was the addition of a second paragraph in Article 5. In addition to its principal purpose of amending the 2001 Order to refer to the Public Law Outline, the Order amended article 8 of the 2001 Order to make clear what fee was payable where there was more than one Issues Resolution Hearing in care proceedings. The change of 10 March added a reference to such cases in article 2E of the 2001 Order.
 - 3.3 The original memorandum contained further information for the Joint Committee.

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.

5. Extent

- 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 See the original memorandum for S.I. 2008/666.

8. Impact

- 8.1 A Regulatory Impact Assessment was prepared in relation to the Child Care Proceedings Review recommendations, which include the Public Law Outline itself. That RIA is available at:
www.dca.gov.uk/publications/reports_reviews.childcare_psria.pdf.

9. Contact

- 9.1. Any enquiries about the contents of this memorandum should be addressed to: Nicholas Hodgson, Judiciary and Legal Services Division, Ministry of Justice. Email: nicholas.hodgson@justice.gsi.gov.uk *Tel. 020 7210 8091*.

**ORIGINAL EXPLANATORY MEMORANDUM TO
THE COMMUNITY LEGAL SERVICE (FUNDING) (COUNSEL IN FAMILY
PROCEEDINGS) (AMENDMENT) ORDER 2008**

2008 No. 666

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

2. Description

2.1. This Order amends the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 (“2001 Order”), which sets out the Family Graduated Fee Scheme which governs legal aid remuneration for barristers in family proceedings. The Order amends the 2001 Order to recognise, for the purposes of payment, the hearings and stages contained in the Public Law Outline (PLO), a case management protocol for care proceedings which is being implemented nationally on 1 April 2008.

2.2. This instrument also amends the 2001 Order to correct drafting errors which were contained in the Community Legal Service (Funding) (Counsel in Family Proceedings) (Amendment No. 2) Order 2007.

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

3.1 The Community Legal Service (Funding) (Counsel in Family Proceedings) (Amendment No. 2) Order 2007 (S.I. 2007/3169) was laid before Parliament on 7 November 2007 and came into effect on 30 November 2007. It erroneously referred to paragraph (1)(b) of Article 8 of the 2001 Order, whereas the reference should have been to paragraph (1). The new paragraph (1)(c) in the 2001 Order should have been inserted as paragraph (1A). These errors do not alter the substance or intention behind the amending Order. These errors were drawn to the attention of the Department by the Joint Committee on Statutory Instruments in its Fifth Report of Session 2007-8, and the Department undertook to make an amendment Order to remedy the defects. However, because the next substantive amendments to the 2001 Order were to be made in early March, it seemed appropriate to avoid having two instruments in quick succession and to combine both sets of amendments in one Order.

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).

5. Extent

- 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 The PLO replaces the current Protocol for Judicial Management in Public Law Children Act Cases (“the 2003 Protocol”) for most cases, but references to the 2003 Protocol are retained for those cases where the PLO is not deemed appropriate. The 2003 Protocol was introduced in November 2003. It was intended to reduce delay in care proceedings cases, and set a 40-week guideline for the completion of such cases. In 2005 the Department for Constitutional Affairs published *A Fairer Deal for Legal Aid*, which recommended that a child care proceedings review be carried out.
- 7.2 The *Review of the Child Care Proceedings System in England and Wales* made a number of recommendations, including introducing pre-proceedings advice for parents where local authorities are considering bringing care proceedings (to try to avoid such proceedings), and issuing revised guidance to local authorities. The Review also recommended revising the 2003 Protocol by streamlining proceedings (reducing the 6 stages to 4) and focusing more on the early stages of care proceedings in order to avoid delay.
- 7.3 To this end, the President of the Family Division developed a revised judicial case management protocol, the PLO. A draft version was published for consultation between 21 June and 13 September 2007, and tested in 10 initiative areas around the country between June 2007 and April 2008. In these areas local Designated Family Judges have been given discretion to engage locally with other agencies and implement the PLO when ready. The outcomes of these initiatives informed the President’s final draft of the PLO, which was published in February 2008 following the agreement of the Lord Chancellor. The PLO will be implemented nationally on 1 April 2008.

Current Amendments

- 7.4 The amendments set out in The Community Legal Service (Funding) (Counsel in Family Proceedings) (Amendment) Order 2008 allow barristers to be paid for work conducted under the PLO in childcare proceedings from 1 April 2008.

- 7.5 Under the PLO, advocates are required to meet or have discussions to agree a draft case management order and narrow the issues. Under the 2001 Order for cases operating under the 2003 Protocol, non-face-to-face meetings are not recognised as “Advocates’ Meetings” and are instead remunerated with a single half fee without uplifts. The amending Order continues to provide for the same remuneration when advocates are able to agree matters without the need for a face to face meeting i.e. a single half fee without uplifts.
- 7.6 The PLO can also be applied to non-child care proceedings. Currently the 2001 Order only recognises, for the purposes of payment, child care proceedings hearings, such as Advocates’ Meetings, Case Management Conferences and Issues Resolution Hearings, in child care cases. The existing definition of a “conference” is being extended and clarified to include Advocates’ Meetings in non-childcare cases under the PLO, so that barristers can be paid for this work. In child care cases, to encourage continuity of counsel, if the same barrister attends the Issues Resolution Hearing and the main hearing, the Issues Resolution Hearing is paid for as a main hearing. The Order clarifies that this uplift is reserved for high-priority childcare proceedings, and does not extend to non-childcare cases operating under the PLO.
- 7.7 The Order also clarifies that uplifts payable for Advocates’ Meetings (Special Issues Payments) are approved by the judge at the end of the relevant hearing.

Consultation

- 7.8 The proposed changes to the Order have been subject to statutory consultation with The Bar Council and the Law Society. We also consulted the Family Law Bar Association (FLBA), the Legal Aid Practitioners’ Group (LAPG), Resolution, the Association of Lawyers for Children (ALC) and the President of the Family Division, the Rt Hon Sir Mark Potter.
- 7.9 There have been two consultations since 30 November 2007 on the Community Legal Service (Funding) (Amendment No. 2) Order 2007. The first one, which ran from 9 January 2008 to 23 January 2008, centred on corrections to the Community Legal Service (Funding) (Counsel in Family Proceedings) (Amendment No. 2) Order 2007. This Order was not made or laid before Parliament; instead the corrections were incorporated into the current Order.
- 7.10 The current Order was subject to consultation between 11 February and 25 February 2008 and allows the 2001 Order to recognise, for the purposes of payment, the hearings and stages contained in the Public Law Outline (PLO), a case management protocol for care proceedings which is being implemented nationally on 1 April 2008.

- 7.11 The representative bodies who responded substantively to the consultation (the Family Law Bar Association, the Bar Council, and the Association of Lawyers for Children) and the Rt Hon Sir Mark Potter were in favour of changing the existing remuneration arrangements which applied to the 2003 Protocol, and, for cases under the PLO, increasing the payment offered when matters were resolved without the need for a face-to-face Advocates' Meeting. Respondents generally favoured offering identical remuneration for face-to-face Advocates' Meetings and advocates' discussions.
- 7.12 Respondents argued that both types of activity involve the same preparation work, and should receive the same fees and uplifts, or use of unnecessary face-to-face meetings would be incentivised.
- 7.13 These representations were considered, but ultimately rejected, for a number of reasons, as set out below.
- 7.14 Taking a single case in isolation, the lower payment offered when advocates do not meet face-to-face may seem to incentivise advocates to meet unnecessarily. However, advocates will be dealing with a range of cases and they will need to decide how best to use their time. Advocates will know that the time spent holding a face-to-face meeting is time that they could be spending doing something else – for example, agreeing case management orders by phone or email in other cases (and receiving additional remuneration for each of those additional cases). Therefore, there are significant financial benefits for advocates to resolve matters without meeting.
- 7.15 Under the PLO the existing incentive to have a meeting, rather than a discussion, is removed; under the 2003 Protocol advocates often meet face-to-face on the day of the hearing, as they need to meet for the hearing in any event. By contrast, under the PLO, advocates must agree the draft case management order before the hearing, so they will not otherwise be meeting. This will mean that advocates will seek to agree case management orders by phone or email for reasons of efficiency.
- 7.16 The 2001 Order was amended last year so that barristers conducting family cases in the pilot areas operating under the draft PLO could be paid. The arrangements for the pilots continued the previous arrangement of paying a half-fee where a meeting does not take place. There are no indications that this remuneration arrangement has caused any difficulties in the pilot areas.

8. Impact

- 8.1 A Regulatory Impact Assessment was prepared in relation to the Child Care Proceedings Review recommendations, which include the Public Law Outline itself. That RIA is available at:
www.dca.gov.uk/publications/reports_reviews.childcare_psria.pdf.

9. Contact

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