

**EXPLANATORY MEMORANDUM TO  
THE COMMUNITY LEGAL SERVICE (FUNDING) (COUNSEL IN FAMILY  
PROCEEDINGS) (AMENDMENT) ORDER 2009**

**2009 No. 1854**

(The Family Graduated Fees Scheme (FGFS))

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

**2. Purpose of the instrument**

2.1 This instrument amends the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 (S.I. 2001/1077), which relates to the payment of graduated fees to counsel for work carried out in family proceedings.

2.2 This instrument increases by approximately 17% the basic rate paid to counsel for public law children cases and reduces or abolishes certain special issue payments currently paid in these and other family proceedings cases.

2.3 This instrument also introduces a requirement on counsel to provide information in support of a claim for a fee for any special preparation work done in a case.

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

3.1 None.

**4. Legislative Context**

4.1 This instrument makes changes to the legal aid family barrister fee scheme, called the Family Graduated Fee Scheme. It abolishes certain additional payments, principally on the side of private family law cases, and increases basic fees for public law children cases. It is intended to control expenditure on family barristers' fees which have risen unsustainably over the last five years, securing £6.5m per year net savings, and to take the first step towards harmonising advocacy payments for solicitor advocates and counsel in family cases.

**5. Territorial Extent and Application**

5.1 This instrument applies to England and Wales.

**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

- 7.1 The Family Graduated Fees Scheme (FGFS) was introduced in May 2001. The scheme sets out remuneration arrangements for barristers conducting family legal aid work in four categories: Family Injunctions (includes domestic violence); Public Law Children; Private Law Children and Ancillary Relief.
- 7.2 Standard fees and various uplifts are payable in each of the categories, but the exact amount of the fee or uplift varies from category to category. When the proceedings fall within more than one category, counsel must choose the category under which they wish to be paid for all the work performed when making a claim for payment. Usually, counsel would be expected to choose the category that pays the highest rate.
- 7.3 Standard fees are payable for different types of activity. These vary from a static one-off base fee (paid once per function claimed), or hearing unit fees (paid once per hearing unit for each function claimed). These activities are:
- Pre-proceedings work (function F1): work carried out prior to the issue of proceedings (does not include work carried out in connection with a conference). Base fee payable.
  - Injunctive Relief or Enforcement Hearings (function F2): work carried out relating to injunctive relief or enforcement procedures, except a committal hearing. Hearing unit fee payable.
  - Hearing (function F3): all work carried out in connection a hearing, including a committal hearing. Hearing unit fee payable.
  - Conferences (function F4): all work carried out in connection with a conference, including a telephone or video conference. Base fee payable.
  - Main Hearing (function F5): all work carried out in connection with the main hearing. Hearing unit fee payable.
- 7.4 There are various types of uplift and bolt-on payable in addition to the standard fees. The main ones of relevance to the changes set out in the order are Special Issue Payments (SIPs) and Special Preparation Fees (SPFs).

### *Special Issue Payments*

- 7.5 Special Issue Payments are the most complex of the uplifts. For each Special Issue that is relevant, the base or hearing unit fee is multiplied by a percentage. For each category of work, each SIP offers a specific percentage increase. These percentage increases are added together for each authorised SIP, and then the base or hearing unit fee is multiplied appropriately. For example, an advocate (non-QC; different rates apply for QCs) claiming a “Conduct” SIP in a private law case (category 3) would receive a 50% increase to any fees claimed to which that SIP applied. The same advocate claiming the same SIP in a public law case (category 2) would receive a 20% increase to any fees claimed to which that SIP applied.

- 7.6 These SIPs are certified on a form by the judge hearing the case at the end of the relevant hearing. While some SIPs are clearly objective, others (for example, relating to a party's conduct) are more subjective. Any claim requesting SIPs has to be supported by a copy of the certification.

#### *Special Preparation Fees*

- 7.7 A Special Preparation Fee is payable where the case involves exceptionally complex issues of law or fact, or was otherwise an exceptional case of its nature.
- 7.8 A SPF is also payable in public law children proceedings, in relation to work carried out within the secondary hearing unit of function F5, where the main hearing is split so that a period of at least four months elapses between its commencement and the time at which it resumes, such that it has been necessary for counsel to carry out work by way of preparation substantially in excess of the amount normally carried out for proceedings of the same type.
- 7.9 An SPF is also payable where the court bundle, or where there is no court bundle the counsel's brief, comprises more than 700 pages.
- 7.10 The amount of the special preparation fee is calculated by multiplying the number of hours of preparation in excess of the amount normally carried out for proceedings of the same type by an hourly rate.

#### *Our Changes*

- 7.11 The policy objective is to ensure that the Legal Services Commission (LSC) and Ministry of Justice (MoJ) can enable the provision of high quality services to as many people as possible, within a limited budget, which provides value for money, by reducing expenditure under the FGFS. This will help avoid restrictions to other client services, and will reduce the gap between what barristers and solicitors are paid for the same advocacy work, while continuing to fund a sufficient number of competent persons to deliver services to the public.
- 7.12 Figures show that family legal aid payments to family barristers have risen unsustainably over the five years from 2003-04 to 2007-08. The increases in costs are far in excess of any increases in volumes, so this represents a significant increase in average case costs, which places a continuing pressure on the legal aid fund.
- 7.13 If we do not control these payments to barristers, we might be forced, in order to live within our budget, to reduce the vital legal assistance available to vulnerable families and children. It is for that reason we are making changes to reduce expenditure on family law barristers' fees by £6.5m per year net.
- 7.14 This instrument makes amendments to the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 (S.I. 2001/1077). The changes will apply to work done under instructions received on or after 3 August 2009 under certificates granted on or after 28 February 2005. These

changes only apply to funding certificates granted on or after 28 February 2005 because the previous FGFS was significantly different to the current scheme.

## 8. Consultation outcome

- 8.1 On 18 June 2008, The MoJ and the LSC jointly published the *Reforming the Legal Aid Family Barrister Fee Scheme* consultation paper. The 12-week consultation period ended on 10 September 2008. The consultation paper and consultation response can be found on the MoJ website at [www.justice.gov.uk](http://www.justice.gov.uk)
- 8.2 The consultation proposed changes to the Family Graduated Fee Scheme and suggested three options: across the board reductions to FGFS rates and ‘bolt-ons’; abolition or reduction of Special Issue Payments (SIPs); and abolition or reduction of Special Preparation Fees (SPFs) and / or Court Bundle Payments (CBPs).
- 8.3 Nineteen responses to the consultation were received, including from solicitor and barrister representative bodies, individual barristers, the judiciary and judicial representative bodies. The responses were mixed, with some respondents, particularly the Family Law Bar Association (FBLA) expressing concern that the reductions would lead to barristers ceasing to do this work.
- 8.4 Following the close of the formal consultation period and consideration of the consultation responses, the MoJ and LSC continued to engage with interested parties in shaping the final changes.
- 8.5 Following discussions with interested parties, Lord Bach, the legal aid Minister, announced on 12 February 2009 that we would implement a variation of the proposal as set out under Option B – abolition/reduction of Special Issue Payments, which was generally supported by stakeholders, plus some changes to Special Preparation Fees (SPFs) suggested by respondents. Bearing in mind the significant priority given to child protection cases, the net £6.5m reductions will fall primarily on private family law, and in particular on cases concerning money or property.
- 8.6 The main changes are as follows:
  - Abolition of the ‘more than two parties’ SIP in child protection cases (with a re-direction of most of the funding spent on this SIP into increasing the fees paid to barristers for hearings and conferences in public law child care or supervision proceedings). Abolition of this SIP was supported by respondents as it did not adequately reward complexity.
  - In private law disputes concerning child contact or residence, a reduction of the special issue payments claimable by barristers for conduct issues and additional experts from 50 per cent to 30 per cent and 20 per cent respectively.
  - In private law disputes concerning financial settlement on divorce, abolition of the most expensive special issue payments claimable by

barristers for issues concerning conduct, analysis of accounts, assets which are outside the control of the parties, and more than one expert.

- In private law disputes concerning financial settlement on divorce, a reduction of the special issue payments claimable by barristers for litigants in person or a relevant foreign element from 25% to 20%.
- Introduction of regulation of barristers' claims for SPFs. In future, barristers will be required to submit to judges information justifying the payment of an SPF and a detailed written schedule of the hours spent in preparation so that these payments are only made where appropriate. This was an additional measure suggested by respondents.

8.7 There is no reduction of expenditure in the family injunction (e.g. domestic violence) category.

8.8 The changes are intended to complement ongoing Government reforms, including the consultation to harmonise family advocacy payments for solicitors and barristers, entitled *Family Legal Aid Funding from 2010*.

## **9. Guidance**

9.1 The Legal Services Commission will be revising its guidance for practitioners on the FGFS. Further information about fee schemes, including payment rates, can be found on the LSC website at: [http://www.legalservices.gov.uk/civil/payrates\\_schemes.asp](http://www.legalservices.gov.uk/civil/payrates_schemes.asp)

## **10. Impact**

10.1 An Impact Assessment, including an equality impact assessment, for the changes is available at Annex B in the *Reforming the Legal Aid Family Barrister Fee Scheme* consultation response document available at: [www.justice.gov.uk](http://www.justice.gov.uk).

## **11. Regulating small business**

11.1 The legislation does not apply specifically to small business.

## **12. Monitoring & review**

12.1 The LSC gathers statistical data on its legal aid fee schemes on a regular basis. The *Family Legal Aid Funding from 2010* proposals are likely to bring further changes to the FGFS.

## **13. Contact**

13.1 Maggie McDonald at the Ministry of Justice Tel: 020 3334 4569 or email: [margaret.mcdonald@justice.gsi.gov.uk](mailto:margaret.mcdonald@justice.gsi.gov.uk) can answer any queries regarding the instrument.