

EXPLANATORY MEMORANDUM TO
THE SOLICITORS' (NON-CONTENTIOUS BUSINESS) REMUNERATION
ORDER 2009

2009 No. 1931

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

2. Purpose of the instrument

2.1 This instrument replaces The Solicitors' (Non-Contentious Business) Remuneration Order 1994.

2.2 The instrument is made under section 56 of the Solicitors Act 1974.

2.3 It sets out the general principles to be applied when determining the remuneration of solicitors in respect of non-contentious business.

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

3.1 None.

4. Legislative Context

4.1 This Order is made under section 56 of the Solicitors Act 1974 ('the 1974 Act').

4.2 Section 56 was amended by paragraph 54 of Schedule 16 of the Legal Services Act 2007 ('the 2007 Act'). The majority of the amendments were commenced on 30th June 2008 by the Legal Services Act 2007 (Commencement No.2 and Transitory Provisions) Order 2008. These amendments altered the purposes for which an Order can be made under section 56.

4.3 Prior to the commencement of the 2007 Act amendments, section 56(2) provided the power for a committee to make an Order "prescribing and regulating in such manner as they think fit" the remuneration of solicitors in respect of non-contentious business. This power was used in the Solicitors' (Non-Contentious Business) Remuneration Order 1994 ('the 1994 Order') to establish the Remuneration Certificate scheme to ensure that the amount solicitors charged their clients was fair and reasonable. As amended, section 56(2) allows for an order to be made "prescribing the general principles to be applied when determining" the remuneration of solicitors in respect of non-contentious business. The procedural provisions relating to the Remuneration Certificate scheme are no longer within the power granted by section 56(2).

4.4 This Order is made under the amended section 56. It sets out the principles that may be considered when assessing fair and reasonable costs for non-contentious business. These principles were present in the 1994 Order, which is repealed by this instrument. This Order does not include the procedural provisions that were in the 1994 Order for the regulation and assessment of solicitors' costs using the Remuneration Certificate scheme (because the amended section 56 of the Solicitors Act 1974, as explained above, does not allow for such provisions).

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 the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The existing 1994 Order was made under section 56 of the 1974 Act. It ensures that the general principles under which solicitors may be remunerated for non-contentious business are set out on a statutory basis. It also provides a system to enable consumers to obtain independent assessments of solicitors' costs (through the issuing of a Remuneration Certificate).

7.2 Section 56 (as amended by paragraph 54 of Schedule 16 to the 2007 Act) allows only the prescription of the general principles to be applied when determining remuneration of solicitors for non-contentious business. It does not allow for procedural provisions dealing with the regulation of remuneration (such as the Remuneration Certificate scheme). The regulation of solicitors' costs by the Law Society will now be dealt with using the inadequate professional service provisions of Schedule 1A to the Solicitors Act 1974.

7.3 A new Order is therefore needed in order to remove the invalid references to the Remuneration Certificate scheme from statute and clearly set out the principles by which costs can be assessed as fair and reasonable. This will ensure that clarity and protection for consumers is maintained.

7.4 This instrument replicates the principles from the 1994 Order that can be taken into account when assessing whether a solicitor's costs are fair and reasonable.

7.5 It also updates the definition of "entitled third party", to account for the new forms of legal practice allowed under sections 9 and 9A of the Administration of Justice Act 1985 (following amendment by the Legal Services Act 2007). Since 31st March 2009, the Law Society has recognised Legal Disciplinary Practices ('LDPs'), whereby solicitors can work alongside

other lawyers and non-lawyers in new business structures with owners and managers who are not solicitors. The new definition of “entitled third party” accounts for the wider pool of those within a legal practice who can be personal representatives (to include these non-lawyer managers and employees). It provides for the costs principles within Article 3 to apply in circumstances where the only personal representatives in the administration of an estate are either employees of a solicitor sole practitioner or managers or employees of a recognised body acting in that capacity. This is important because it recognises circumstances in which there is no lay executor and therefore no client who could agree costs or work to be done with a solicitor administering an estate. In these circumstances it allows a residuary beneficiary to be considered an “entitled third party”. The “entitled third party” will then fall within the remit of the principles within the Order and will be able to rely on agreements made with a solicitor as to costs or work to be done in administering an estate. The Order therefore offers more extensive protection to residuary beneficiaries.

7.6 Following this Order, consumers with concerns about their solicitor’s costs will no longer be able to request that their solicitor apply for a Remuneration Certificate. Complaints about costs will be dealt with in the same manner as all service complaints, under the procedures set out in Schedule 1A of the Solicitors Act 1974.

7.7 The Remuneration Certificate scheme had a number of shortcomings. For example, the scheme required consumers to apply for a certificate through their solicitor; the process was limited in its application (for example there were limitations on costs); there were problems with enforceability; and the process was complicated and lengthy. Consumers with complaints or concerns about costs will have more effective recourse to redress under Schedule 1A.

8. Consultation

8.1 This Order reflects the changes brought in by the Legal Services Act 2007 and specifically the amendments to section 56 of the Solicitors Act 1974. It makes no substantive changes beyond what is necessary to reflect the new position created by the Legal Services Act. Therefore consultation has not been conducted for this Order.

9. Guidance

9.1 This instrument sets out the principles by which solicitors’ fees for non-contentious business can be assessed as fair and reasonable. The principles remain unchanged from those that have been in force since the previous Order came into force in 1994. Therefore no further guidance is needed as to the operation of the principles within the instrument.

9.2 In line with the changes to section 56 of the Solicitors Act 1974, this instrument does not include the procedural provisions of the Remuneration Certificate scheme that were in the previous Order. As a result, consumers

with concerns about their bill will no longer be able to request that their solicitor apply to the Law Society for a Remuneration Certificate. Instead, consumers with concerns about their solicitor's costs will be able to seek redress through the normal complaints procedures set out in Schedule 1A of the Solicitors Act 1974. The Solicitors Regulation Authority will issue guidance to instruct solicitors and clients about the change in procedure. The Legal Complaints Service, which was responsible for issuing Remuneration Certificates, will also issue a policy statement explaining the change.

10. Impact

10.1 This Order reflects the changes brought in by the Legal Services Act 2007 and specifically the amendments to section 56 of the Solicitors Act 1974. It makes no substantive changes beyond what is necessary to reflect the new position created by the Legal Services Act. Therefore an Impact Assessment has not been completed for this Order.

11. Regulating small business

11.1 This Order maintains the existing principles in relation to solicitors' costs for non-contentious business that have been in force since 1994. Therefore there is no change to the effect on small business.

12. Monitoring & review

12.1 The committee established under section 56 has the power to make a new Order at any stage. It is anticipated that a new Order will be required when the Office for Legal Complaints becomes operational in 2010.

13. Contact

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