

EXPLANATORY MEMORANDUM TO
THE SOLICITORS' (NON-CONTENTIOUS BUSINESS) REMUNERATION
(AMENDMENT) ORDER 2010

2010 No. 2262

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 amends the Solicitors' (Non-Contentious Business) Remuneration Order 2009 ("the 2009 Order"). It does this by:

- inserting a provision, effective from 6th October 2010, that interest charged by a solicitor on unpaid costs may be calculated by reference to a direction regarding solicitors' fees made under section 137 (2) of the Legal Services Act 2007 (the 2007 Act)
- making minor changes to the terminology substituting "taxation" and "taxed" with "assessment" and "assessed" respectively.

2.2 These changes are the results of provisions being commenced in the Legal Services Act 2007 (Commencement No. 8, Transitory and Transitional Provisions) Order 2010 (the "eighth commencement order") which will come into force on 6th October 2010. This eighth commencement order will allow the Office for Legal Complaints (OLC) and its Ombudsman Scheme (LeO) to become operational and begin dealing with all new service complaints about legal services providers. The LeO will be able to make directions regarding solicitors' fees under section 137(2) of the 2007 Act. This instrument will permit interest on solicitors' unpaid costs to be calculated by reference to the LeO's fee direction under section 137(2).

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

3.1 None

4. Legislative Context

4.1 This instrument is made under section 56 of the Solicitors Act 1974 (the 1974 Act) which deals with the remuneration of solicitors for non-contentious business. Section 56(2) of the 1974 Act makes provision for a Committee to make general Orders prescribing and regulating the remuneration of solicitors in respect of non-contentious business.

- 4.2 The 2009 Order sets out the principles that may be considered when assessing fair and reasonable costs for non-contentious business and replaced the Solicitors' (Non-Contentious) Remuneration Order 1994 ("the 1994 Order"). The main change introduced by the 2009 Order was the removal of the system to enable consumers to obtain independent assessment of solicitors' costs through the issuing of Remuneration Certificates. The regulation of solicitors' costs by the Law Society is now dealt with using the inadequate professional services provisions set out at Schedule 1A to the 1974 Act. Paragraph 2(1) of Schedule 1A to the 1974 Act provides for the Law Society to determine that a solicitor's costs should be limited to an amount set out in the determination. The principles in article 3 of the 2009 Order which set out the matters to be considered when judging whether solicitors' costs are fair and reasonable remain unchanged.
- 4.3 Article 5(1) of the 2009 Order permits solicitors to charge interest on unpaid costs and article 5(4) provides for interest to be calculated by reference to the amount specified in a determination of costs by the Law Society under Schedule 1A to the 1974 Act or a court assessment of a solicitor's bill.
- 4.4 The eighth commencement order commences section 137(2)(b)(i) of the 2007 Act. This section permits the LeO to make a determination about a complaint containing a direction that the fees to which a respondent is entitled in respect of the services to which the complaint relates are limited to such amount as may be specified in the direction. This instrument permits interest to be calculated by reference to a fees determination made under section 137(2)(b)(i). It is being laid over recess as it is closely linked to the eighth commencement order (which comes into force on 6 October 2010) and should therefore come into force at the same time.
- 4.5 Further amendments have been also made to reflect the changes being made by the 2007 Act updating references to "taxation" and "taxed" (in article 5(4) (b)) with references to "assessment" and "assessed" respectively.

5. Territorial Extent and Application

- 5.1 This instrument applies to England and Wales only.

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

- *What is being done and why?*

- 7.1 The 2009 Order needs to be amended to reflect the changes being made to the complaints handling system for legal professionals. The new complaints handling procedures are set out in Part 6 of the 2007 Act and will come into force on 6 October 2010.

- 7.2 The 2007 Act reforms the way in which legal services are regulated in England and Wales. The aims of the Act are: to simplify the existing regulatory framework by establishing an oversight regulator, the Legal Services Board; to improve consumer confidence and the way in which complaints are dealt with by establishing an independent complaints handling body, the OLC; and to provide for alternative business structures in which lawyers can work together with non-lawyers in firms that provide a range of legal and non-legal activities.
- 7.3 At the moment, the Legal Complaints Service (LCS), an independent body set up by the Law Society, deals with all service complaints about solicitors. This includes complaints about solicitors' bills in relation to fees relating to non-contentious business (matters which do not involve Court proceedings). If a client challenges a solicitor's bill, then the LCS can, if it considers it appropriate, reduce or limit the amount of the solicitor's bill. This costs' determination is made under the inadequate professional services provisions of Schedule 1A to the 1974 Act. Solicitors must have regard to any determination of costs made under Schedule 1A when charging clients interest on unpaid fees.
- 7.4 The position will change when the OLC and its Ombudsman scheme (LeO) become operational on 6 October 2010, when the eighth commencement order comes into force. The OLC will become the new single complaints' handling body responsible for dealing with service complaints about legal professionals. From this point onwards, the ten approved regulators, including the Law Society¹ will no longer be responsible for dealing with new complaints about the service provided by their members, they will deal only with complaints relating to the conduct of their members.
- 7.5 From 6 October 2010, any client wishing to challenge a solicitor's bill, which relates to non-contentious business, will need to apply to the LeO for a fee determination. As explained at 4.4 above, part of the LeO's functions will be to make determinations about the fees which complainants should pay for the services about which they have complained. The effect of this instrument is to amend the 2009 Order to ensure that solicitors take into account any fee determinations made by LeO under section 137(2) when calculating the interest to be charged on unpaid fees.
- 7.6 This Instrument does not delete the reference to determinations made by the Law Society under Schedule 1A. It may continue to issue a determination in cases where the client has complained about a solicitor's bill before 6 October during the transitional period set out in the eighth commencement order.

Consolidation

- 7.7 There are no issues relating to consolidation.

¹ Approved regulators are listed in the table in paragraph 1 of Schedule 4 to the Legal Services Act 2007 as amended by the Legal Services Act 2007 (Approved Regulators) Order 2009 (SI 2009 No. 3233).

8. Consultation outcome

8.1 Early discussions were held with stakeholders to gauge whether any amendment was needed to the principles in article 3 of the 2009 Order, which set out the matters to be considered when judging whether solicitors' costs are fair and reasonable. Taking stakeholder views into consideration, and after some discussion, the Committee agreed that it seemed more appropriate that the principles should be revisited at a later date when the OLC had had a chance to consider how the principles aligned with their policy on complaints handling. These principles have therefore been carried forward into the 2010 Order and have not been amended.

8.2 This instrument makes no substantive changes beyond what is necessary to reflect the new position for determining costs created by the 2007 Act. This Order is made under section 56 of the 1974 Act, by a Committee of the following persons: the Lord Chancellor; the Lord Chief Justice; the Master of the Rolls; the President of the Law Society, the President of the Sussex Law Society; a member of the Legal Services Board and the Chief Land Registrar. The Lord Chancellor (in accordance with section 56(3) of the 1974 Act) sent a draft of this instrument to the Law Society and other committee members to seek their views. This has ensured that the final instrument has been prepared following the necessary statutory consultation. In addition, other interested persons, including relevant stakeholders such as the Solicitors Regulation Authority have had the opportunity to consider the draft instrument and agree it.

9. Guidance

9.1 The Law Society will issue an update to the profession, about the changes made by the instrument.

10. Impact

10.1 This instrument reflects the changes brought in by the 2007 Act and the transitional arrangements for assessments made under section 37A of and Schedule 1A to the 1974 Act. It makes no substantive changes beyond what is necessary to reflect the new position created by the 2007 Act. Therefore it was not necessary to undertake a formal Impact Assessment for this instrument.

11. Regulating small business

11.1 This instrument 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 of the 1974 Act has the power to make a new Order at any stage. Following informal discussion with various

stakeholders it was decided that the 2009 Order (which this instrument amends) may require reconsideration once the OLC has become operational and had an opportunity to consider whether the article 3 principles reflect the reality of the new complaints regime.

13. Contact

For any queries relating to this instrument, please contact Surinder Sawali, by Tel: 020 3334 2638 or Email: Surinder.Sawali@justice.gsi.gov.uk