

**EXPLANATORY MEMORANDUM TO THE
COMMUNITY LEGAL SERVICE (FUNDING) (COUNSEL IN FAMILY
PROCEEDINGS) (AMENDMENT) ORDER 2005**

2005 No. 184

The Family Graduated Fees Scheme (FGFS)

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the House of Lords Select Committee on the Merits of Statutory Instruments and the Joint Committee on Statutory Instruments.
2. **Description**
 - 2.1. This instrument amends the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 which relates to the payment of graduated fees for counsel for work in family proceedings.
 - 2.2. This instrument provides for amendment to the Special Issue Payments rates and for the addition of new Special Issue Payments to the relevant categories of proceedings and for new fees payable in respect of the type of work carried out, referred to in this Order as functions F1 to F5.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1. Following representations from the Bar Council and the Family Law Bar Association (FLBA), the Secretary of State agreed an overall increase to the rates of the Scheme of 8%.
4. **Legislative Background**
 - 4.1 This Order is made by the Secretary of State, in exercise of the powers conferred upon him by section 6(4) of the Access to Justice Act 1999, having regard to the matters specified in section 25(3) in respect of remuneration orders made under the Act, and having consulted the General Council of the Bar and the Law Society in accordance with section 25(2).
 - 4.2 This Order relates to the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 and the Community Legal Service (Funding) (Counsel in Family Proceedings) (Amendment) Order 2003.
5. **Extent**
 - 5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

- 6.1 This instrument is subject to negative resolution and does not amend primary legislation. It is considered, however, that the provisions of this instrument are compatible with the European Convention on Human Rights.

7. Policy background

- 7.1 The aim of the FGFS, which was introduced in May 2001, is to enable the Department to obtain greater control over expenditure. Barristers are paid more quickly and receive fixed fees for elements of work (which can be enhanced if the criteria are met).
- 7.2 The FGFS was developed over a number of years in close consultation with the Bar and the FLBA. The scheme is based on fixed rates for specific pieces of work (functions) carried out in a case, dependent on the complexity and length of the case.
- 7.3 The then Lord Chancellor, Lord Irvine, agreed to a review of the scheme following a set period of operation in order to allow time for the new payment system to bed down and for the collection of sufficient management information on the operation of the scheme. This review was started in May 2002.
- 7.4 Members of the judiciary, barristers' clerks and solicitors were consulted during a five month period. Consultees were asked to comment on the operation of the scheme in terms of both structure and rates. The review also comprised a written consultation to a broad group of consultees amongst whom were High Court, Circuit and District Judges, the Court Service, groups such as the Solicitors' Family Law Association (SFLA), the Legal Aid Practitioners' Group (LAPG), the Justices' Clerks' Society and other organisations including the Law Society, the Bar Council and the FLBA, together with individual practitioners.
- 7.5 The review of the scheme concluded in July 2004 with agreement being reached between the Department for Constitutional Affairs (DCA), the Legal Services Commission (LSC), the Bar Council and the FLBA on changes to both the structure and the rates of the scheme. The Bar Council and FLBA expressed concerns during the review that the scheme had resulted in an overall reduction of rates of around 13% (as opposed to the 5% reduction intended) and that the structure of the scheme was generally too 'flat' and had substantially reduced rates in certain areas of work, for example, ancillary relief cases. The Department gave no commitment to return money to the scheme if more than a 5% reduction, as originally intended, was achieved.
- 7.6 To account for the work to be done under the new Judicial Case Management Protocol in Care Cases, revisions to the scheme were implemented from 1 November 2003. At the same time, other agreed minor revisions were made to improve the scheme.
- 7.7 Initially, the Secretary of State proposed an increase of 8% to be introduced in two 4% tranches, over the next two years, the second tranche being conditional

on efficiency increases by the Bar. The Bar were unhappy with this although they welcomed the Department's endorsement of the revised structure of the scheme.

- 7.7. Following representations by the Bar Council and FLBA, Ministers decided that an unconditional increase of 8% should be given, to be introduced in one tranche, taking effect from February 2005.
- 7.8. The proposals for the FGFS are exceptional in that the Secretary of State is making them at a time of considerable financial pressure on the Department's resources. He is doing this because the FGFS anomaly is exceptional in the way in which it arose.
- 7.9. The revised scheme structure with the new rates will apply only to work done under a new certificate granted, and amendments made to add to an existing certificate on or after that date.

8. Impact

- 8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

9. Contact

Helen Bateman at the Department for Constitutional Affairs: Tel: 020 7210 8763 or e-mail Helen.Bateman@dca.gsi.gov.uk; can answer any queries regarding the instrument.