

**EXPLANATORY MEMORANDUM TO THE
COMMUNITY LEGAL SERVICE (COST PROTECTION) (AMENDMENT)
REGULATIONS 2005**

2005 No. 2006

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 (Cost Protection) Regulations 2000 (S.I. 2000/824) which are made under section 11 of the Access to Justice Act 1999 and which define the scope of a funded client's protection against costs orders which may be made and enforced against him and provides for the circumstances in which costs may be awarded against the Community Legal Service.

2.2 The main effects of this instrument are as follows:

2.2.1 It removes cost protection from family proceedings as defined for this purpose in these Regulations.

2.2.2 It also provides for amendments to the 2000 Regulations consequent upon a change to the Funding Code criteria which abolishes the existing system of Support Funding (Investigative Support and Litigation Support) for high cost personal injury cases.

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

3.1 None.

4. Legislative Background

4.1 These Regulations are made by the Secretary of State for Constitutional Affairs, in exercise of the powers conferred upon the Lord Chancellor and now vested in him by section 11(1), (3) and 4(b) of the Access to Justice Act 1999.

4.2 Part I of the Access to Justice Act 1999 established the Legal Services Commission (LSC) and Community Legal Service as a coherent framework for the provision of legal services. In particular, sections 4 to 11 of the Act contain provisions about the funding of civil legal aid through the Community Legal Service. Section 11(1) of the Act provides that a funded client's personal liability for costs where a costs order is made against him shall not exceed whatever amount the court considers reasonable in all the circumstances, which include consideration of the financial resources of the parties and their conduct. The Community Legal Service (Cost Protection) Regulations 2000, made under section 11 of the Act, contain provision about when cost protection in relation to a funded party's liability for costs under section 11 of that

Act does not apply and where the LSC may be required to pay the costs of a non funded litigant. These Regulations also contain provision relating to the enforcement of an order for costs against a funded client. The Regulations therefore do not affect the jurisdiction of the court to make a costs order, but provide significant protection when the court has exercised its discretion to make a costs order against a funded client.

5. Extent

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 Not applicable.

7. Policy background

7.1 In July 2004, a [joint] consultation paper ‘A new focus for civil legal aid’ was published jointly by the LSC and the Department for Constitutional Affairs (DCA). This proposed a number of changes aimed at targeting legal aid in a better way, through reform of the merits test and scope of the civil legal aid scheme, in order to encourage early resolution of disputes and discourage unnecessary litigation. The legal aid budget is seriously under pressure and the proposals, while aimed at tightening up the existing funding arrangements, and considering whether any case types should be removed from scope, were carefully designed not to reduce access to funding for deserving cases in priority areas of law.

7.2 The consultation closed in October 2004. As part of the consultation, officials from the LSC and DCA held discussions with key stakeholders including the Legal Aid Practitioners Group ; Solicitors Family Law Association (now Resolution); The Law Society; The Official Solicitor. In addition, Ministers held meetings with the Child Poverty Action Group ; Public Law Project , Legal Aid Practitioners Group; Advice Services Alliance; the Bar and Law Society as part of this consultation process. Following careful consideration of the 136 written responses and issues raised during meetings, a number of proposals were not taken forward, and the final package represents a balanced set of measures.

7.3 The policy supporting this proposal is to place funded clients in the same position as privately funded clients in relation to conduct and behaviour during a case. In most family proceedings, (which will exclude public law cases), it is rare for costs to be ordered. In most cases costs will only be ordered where a court has concluded that a party has acted unreasonably. Ministers have agreed to a new policy approach to remove that protection from costs orders in most family cases, so that where a costs order is made, the intention of the court is not frustrated by the operation of cost protection. This will assist in deterring unreasonable conduct by publicly funded clients, (allowing a judge to order costs against a funded client who has behaved unreasonably,) eg, proceed to contested proceedings despite manifestly reasonable offers from the other side to settle. This also reflects the main aim of these reforms to encourage early settlement of cases. Recent case law also supports the need for the courts to retain an effective costs sanction in appropriate family cases.

- 7.4 Approximately 70% of those who responded to the consultation said that cost protection could be abolished in family cases. The remaining 30% felt that cost protection should be retained because its removal would discourage the poor from asserting their rights, and those receiving legal aid would be unable to pay costs in any event
- 7.5 The definition of family proceedings set out in the SI was carefully drawn up and subjected to a further 4 week consultation. Some of these were concerned that it may deter vulnerable people from proceedings with cases. The finalised regulations do not abolish cost protection from all family cases – the regulations instead list a limited range of proceedings. Most significantly, domestic violence proceedings are not listed – victims of domestic violence will therefore retain cost protection when seeking the protection of the court. Public law proceedings also fall outside the regulations. The regulations do remove cost protection in relation to property disputes between unmarried couples, which are generally brought under the Trusts of Land and Appointment of Trustees Act 1996.

8. Impact

- 8.1 The Final Combined Regulatory and Race Impact Assessment was signed by Ministers on 20 March 2005 and published shortly thereafter. The Small Business Service did not anticipate that these proposals would have a significant impact on business. A copy is attached to Community Legal Service (Financial) (Amendment No.3) Regulations 2005.

9. Contact

- 9.1 Yasmin Tengnah at the Department for Constitutional Affairs: tel: 0207 210 0601, (e-mail: yasmin.tengnah@dca.gsi.gov.uk), can answer any queries regarding this instrument.