

## EXPLANATORY MEMORANDUM TO

### THE COMMUNITY LEGAL SERVICE (FUNDING) (AMENDMENT) ORDER 2008

#### 2008 No. 1328

1. This explanatory memorandum has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament by Command of Her Majesty. It contains information for the Joint Committee on Statutory Instruments.
2. **Description**
  - 2.1. This Order amends the Community Legal Service (Funding) Order 2007 (SI 2007/2441), which sets out the fees and rates payable to solicitors and Not for Profit organisations who provide civil legal aid services to the public. The Order amends the 2007 Order to implement increases in the rates for civil legal aid work.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None
4. **Legislative Background**
  - 4.1. The Lord Chancellor makes this Order in exercise of the power conferred by section 6(4) of the Access to Justice Act 1999. The Lord Chancellor has consulted the General Council of the Bar and the Law Society in accordance with section 25(2) of that Act and has had regard to the matters specified in section 25(3).
5. **Extent**
  - 5.1. The Order extends 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 Legal Services Commission (LSC) introduced a new Unified Contract for civil legal aid providers (solicitors and Not for Profit organisations) in April 2007 replacing the General Civil Contract and Family Mediation Contract. It contained a provision (13.1) which allowed the LSC to amend the contract if the LSC “think it necessary or desirable to do so in order to facilitate a Reform of the Legal Aid Scheme”. An objection was raised in respect of the power to amend but not on the basis of EU procurement and not until after the contracts had been finalised. Shortly before the contracts were due to come into force the Law Society (TLS) objected to that provision under EU procurement regulations. TLS subsequently issued Judicial Review Proceedings.
  - 7.2. On 29 November 2007 the Court of Appeal handed down its judgment in the appeal brought by the Law Society concerning the incompatibility of the 13.1 amendment clause in the Unified Contract for civil legal aid providers with the Public Procurement Regulations 2006 and EU law principle of transparency.

- 7.3 TLS felt that the fixed fee payment schemes introduced in October 2007 (for initial legal advice, family, and immigration and asylum work) and January 2008 (mental health cases) should be withdrawn. The fee schemes had been introduced under a different amendment provision (clause 13.2) of the contract, and this provision had not been the subject of the dispute. However, to provide certainty for the future LSC intended to terminate and re-let contracts.
- 7.4 However, following negotiations between the Ministry of Justice, the LSC and TLS an agreement was reached meaning that the contracts could continue, subject to the changes set out in the agreement. These changes included administrative improvements in the way LSC deals with providers, and targeted increases to some of the fees and rates in the existing civil payment schemes.
- 7.5 The fee increases set out in the Order are:
- to increase Level 1 Standard Fee Scheme (Legal Help) rates by 2%. Also to increase, by 2%, the Level 1 fee for Legal Help in Family Public Law, the Level 1 fee for Legal Help in Family Private Law, the Level 1 fee for Legal Help in Mental Health, and the Level 1 fee for Legal Help in Immigration and Asylum.
  - to increase the ‘exceptional case thresholds’ for Legal Help by 2% also (this will ensure that the overall balance of cases falling within fixed fees and escaping as exceptional cases to be paid on hourly rates remained as at present).
  - to increase the Level 2 Care Proceedings Graduated Fee Scheme fee from £347 to £405 (the equivalent of an additional hour’s work). Increase the underlying hourly rate for Level 2 in the Care Proceedings Graduated Fee Scheme by 2%.
  - to increase the Level 2 and 3 fees for controlled legal representation in mental health cases by 5%. The underlying hourly rates for Levels 2 and 3 will also be increased by 5%.
  - to increase the Level 2 fee and hourly rates for controlled legal representation in asylum and immigration cases (with the exception of those applying to excluded cases) by 5%.

### *Consultation*

- 7.6 The policy of increasing the fees and rates (and other parts of the agreement) were the subject of detailed discussions between the MoJ, LSC and TLS. Both TLS and LSC kept in close contact with various other representative bodies during these discussions. Therefore no further formal policy consultation was considered necessary.
- 7.7 This Order was the subject of a consultation with the statutory consultees: TLS and the Bar Council. We also chose to consult the Legal Aid Practitioners’ Group (LAPG), the Immigration Law Practitioners’ Association (ILPA), the Mental Health Lawyers’ Association, the Family Law Bar Association, the Advice Services Alliance, Resolution, the Association of Lawyers for Children, the Housing Law Practitioners’ Association, and the Rt Hon Sir Mark Potter (President of the Family Division). This was a consultation on whether the Order met its policy objective, rather than a consultation on the policy itself (which was the subject of negotiations instead).
- 7.8 Some consultees opposed a proposal that the Order should also incorporate, by reference, the Civil and Family Mediation Specifications of the Unified Contract for civil providers. In the light of their comments, the incorporation of the contract specification was not taken forward.

## **8. Impact**

- 8.1 An Impact Assessment has been prepared and was provided to the representative bodies during consultation on the draft Order. Both the Impact assessment and the Equality Impact Assessment are attached to this Explanatory Memorandum.
- 8.2 The option to introduce targeted fee increases was agreed during the negotiations between MoJ, LSC and TLS. The impact of doing so was assessed during the course of those negotiations. The fee increases were agreed, along with the estimated costs. The total increased cost over the three years from 2008/09 – 2010/11 is estimated to be £14.8m.
- 8.3 No unlawful discriminatory impacts were identified: the fee increases apply to all providers providing the appropriate services throughout England and Wales

## **9. Contact**

- 9.1. Any enquiries about the contents of this memorandum should be addressed to: Stephen Jones, Legal Aid Strategy Directorate, Ministry of Justice. Email: [stephen.jones@justice.gsi.gov.uk](mailto:stephen.jones@justice.gsi.gov.uk) *Tel. 0207 210 2626*

## Summary: Intervention & Options

<b>Department /Agency:</b> <b>Ministry of Justice</b>	<b>Title:</b> <b>Impact Assessment of Increases to Civil Legal Aid Fixed Fees</b>	
<b>Stage:</b> Implementation	<b>Version:</b> 1.0	<b>Date:</b> 1 April 2008
<b>Related Publications:</b> legal deed of agreement between the MoJ, Legal Services Commission (LSC) and The Law Society (TLS)		

**Available to view or download at:**

[http://www.legalservices.gov.uk/docs/civil\\_contracting/FinalDeedofSettlement.pdf](http://www.legalservices.gov.uk/docs/civil_contracting/FinalDeedofSettlement.pdf)

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**What is the problem under consideration? Why is government intervention necessary?**

In April 2007 a new civil legal aid contract (the "Unified Contract") was introduced between the LSC and providers of civil legal aid services (solicitors' firms and Not-for-Profit organisations). TLS brought a legal challenge against the contract. This challenge, that one of the powers of amendment in the contract was too wide and therefore did not comply with EU procurement regulations, was upheld at appeal. Following the judgment the MoJ, LSC and TLS reached agreement on the best way forward for legal aid providers. The fee increases are part of that agreement.

**What are the policy objectives and the intended effects?**

The policy objective is to implement part of the agreement reached between the MoJ, LSC and TLS. The intended effect is to introduce increases to some of the fees paid to providers under the new civil legal aid fixed fee schemes.

**What policy options have been considered? Please justify any preferred option.**

The decision to implement fee increases as part of the agreement was reached during detailed discussions between the MoJ, LSC and TLS, during which various options were considered.

**When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?** LSC conduct ongoing data gathering to assess expenditure on legal aid services in all categories of law they fund. This is summarised at the start of each new financial year in their Annual Report.

**Ministerial Sign-off** For SELECT STAGE Impact Assessments:

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible Minister:

Lord Hunt of Kings Heath

.....Date: 20<sup>th</sup> May 2008

## Summary: Analysis & Evidence

<b>Policy Option:</b> Increase Fees	<b>Description:</b> Targeted increases to civil legal aid fixed fees
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<b>COSTS</b>	<b>ANNUAL COSTS</b>	Description and scale of <b>key monetised costs</b> by 'main affected groups'  Key monetised costs are increased payments to solicitors and Not-for-Profit organisations providing civil legal aid services to the public due to a increase in the rates of payment offered. These fees are guaranteed until the existing contract expires in 2010.			
	<b>One-off</b> (Transition)		<b>Yrs</b>		
	<b>£ 0</b>		3		
	<b>Average Annual Cost</b> (excluding one-off)				
<b>£ circa £5m</b>		<b>Total Cost (PV)</b>	<b>£ 14.18m</b>		
Other <b>key non-monetised costs</b> by 'main affected groups'					

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>	Description and scale of <b>key monetised benefits</b> by 'main affected groups'  All of the costs of increased expenditure will benefit civil legal aid providers (solicitors and Not-for-Profit organisations) through payment for work.			
	<b>One-off</b>		<b>Yrs</b>		
	<b>£ 0</b>				
	<b>Average Annual Benefit</b> (excluding one-off)				
<b>£ circa £5m</b>		<b>Total Benefit (PV)</b>	<b>£ £14.18m</b>		
Other <b>key non-monetised benefits</b> by 'main affected groups'					

**Key Assumptions/Sensitivities/Risks**  
 Assumes that volumes of cases will remain constant (in Legal Help this can be controlled through the award or removal of New Matter Starts).

Price Base Year 2007	Time Period Years 3	<b>Net Benefit Range (NPV)</b> £	<b>NET BENEFIT (NPV Best estimate)</b> £
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What is the geographic coverage of the policy/option?	England & Wales			
On what date will the policy be implemented?	1 July 2008			
Which organisation(s) will enforce the policy?	LSC			
What is the total annual cost of enforcement for these organisations?	£ 0			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	N/A			
What is the value of the proposed offsetting measure per year?	£ 0			
What is the value of changes in greenhouse gas emissions?	£ 0			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro 0	Small 0	Medium 0	Large 0
Are any of these organisations exempt?	No	No	N/A	N/A

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)				(Increase - Decrease)
Increase	£ 0	Decrease	£ 0	<b>Net</b> £ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.

The option to introduce targeted fee increases was agreed during the negotiations between MoJ, LSC and TLS. The impact of doing so was assessed during the course of those negotiations. The following increases were agreed, along with the estimated costs:

### Increase in Level 1 Legal Help Rates

Increase Level 1 Standard Fee Scheme (Legal Help) rates by 2%. Also increase, by 2%, the Level 1 fee for Legal Help in Family Public Law, the Level 1 fee for Legal Help in Family Private Law, the Level 1 fee for Legal Help in Mental Health, and the Level 1 fee for Legal Help in Immigration and Asylum.

Increase the 'exceptional case thresholds' for Legal Help by 2% also. This will ensure that the overall balance of cases falling within fixed fees and escaping as exceptional cases to be paid on hourly rates remained as at present.

LSC spends approximately **£260m** per annum providing civil Legal Help services (initial legal advice) to those clients who are financially eligible. Approximately **£196m** of the Legal Help budget is covered by these increases (excludes non-family categories, other than mental health). The increases are budgeted to increase expenditure over three years by **approximately £7.5m**. This breaks down as follows:

2008/09	£1.63m
2009/10	£2.51m
2010/11	£3.27m
<b>Total:</b>	<b>£7.41m</b>

### Increase Fee for Pre-Proceedings Advice in Childcare Proceedings

Increase the Level 2 Care Proceedings Graduated Fee Scheme fee from £347 to £405 (the equivalent of an additional hour's work). Increase the underlying hourly rate for Level 2 in the Care Proceedings Graduated Fee Scheme by 2%.

LSC anticipate (when the Public Law Outline is fully implemented following its introduction on 1 April 2008) that expenditure on pre-proceedings advice will be approximately **£4m** (RAB) per annum. This was based on a fixed fee of £347 per case (equivalent to 6 hours' advice). Increasing the payment to £405 (the equivalent of an extra hour's advice), will increase costs, assuming the same volume of cases, by **approximately £1.7m** (RAB) over three years. This breaks down as follows:

2008/09	£0.36m
2009/10	£0.62m
2010/11	£0.68m
<b>Total:</b>	<b>£1.66m</b>

### Increase in Mental Health Fees

Increase the Level 2 and 3 fees for controlled legal representation (CLR) in mental health cases by 5%. The underlying hourly rates for Levels 2 and 3 will also be increased by 5%.

LSC spends approximately **£23m** per annum funding legal representation in mental health cases. A 5% increase would increase expenditure, assuming the same volume of cases, by **approximately £2.5m** (RAB). This breaks down as follows:

2008/09	£0.55m
2009/10	£0.94m

2010/11        £1.02m  
**Total:        £2.51m**

### **Increase in Immigration and Asylum Fees**

Increase the Level 2 fee and hourly rates for controlled legal representation (CLR) in asylum and immigration cases (with the exception of those applying to excluded cases) by 5%.

LSC currently spends approximately **£25m** per annum on Level 2 immigration and asylum legal representation (not including excluded cases). A 5% increase to the Level 2 fee will increase expenditure, assuming the same volume of cases, by **approximately 2.6m**. This breaks down as follows:

2008/09        £0.64m  
 2009/10        £1m  
 2010/11        £0.96m  
**Total:        £2.6m**

	08/09 (RAB)	09/10 (RAB)	10/11 (RAB)	Total (3 years)
Increase in Level 1 Legal Help Rates	£1.63m	£2.51m	£3.27m	£7.41m
Increase Fee for Pre-Proceedings Advice in Childcare Proceedings (Level2)	£0.36m	£0.62m	£0.68m	£1.66m
Increase in Mental Health Fees (Level2)	£0.55m	£0.94m	£1.02m	£2.51m
Increase in Immigration and Asylum Fees (Level2)	£0.64m	£1.00m	£0.96m	£2.6m
	<b>£3.2m</b>	<b>£5.1m</b>	<b>£5.9m</b>	<b>£14.18</b>

### **Equality Impact Assessment**

Impact assessments were conducted by the LSC on each of the civil fee schemes prior to introduction, including disability, gender, race, rural and small firms impact assessments. None of the fee schemes was found to discriminate unlawfully against any sector of society. These assessments are available on the LSC website.

A cumulative Impact Assessment was published in December 2007 showing the overall impact of all of the civil fee schemes and the civil and crime changes together. This assessment also did not identify any unlawful discrimination against any sector of society through the new fee schemes. This cumulative assessment is available here:

[http://www.legalservices.gov.uk/civil/transforming\\_civil\\_legal\\_aid.asp](http://www.legalservices.gov.uk/civil/transforming_civil_legal_aid.asp)

An Equality and Diversity Screening Assessment was conducted for these fee increases. This assessment did not identify any unlawful discrimination against any sector of society due to the fee scheme increases. The Summary of the EIA follows:

**“The MoJ intends to amend the Community Legal Service Funding Order 2007, which implemented the civil legal aid fixed fee schemes, in order to increase the rates for certain categories of legal aid work. The Equality Impact Assessment identified no unlawful discriminatory impact: the fee increases apply to all providers providing the appropriate services throughout England and Wales. The fee increases are to commence on 1 July 2008, as agreed as part of the Unified Contract dispute agreement.”**

## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	Yes	No



## Annexes