

**EXPLANATORY MEMORANDUM TO**  
**THE COMMUNITY LEGAL SERVICE (FUNDING) (AMENDMENT) ORDER 2010**

**2010 No. 95**

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

**2. Purpose of the instrument**

2.1 This instrument amends the Community Legal Service (Funding) Order 2007 (“the 2007 Order”), which limits the power of the Legal Services Commission to pay remuneration under contract for the provision of funded services, and sets out remuneration rates which are payable for funded services. The purpose of this amendment is to ensure that legal aid continues to be available for immigration and asylum matters when the Asylum and Immigration Tribunal is replaced with the Immigration and Asylum Chamber of the First-tier and Upper Tribunals.

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

3.1 None

**4. Legislative Context**

4.1 This instrument makes consequential amendments arising from the Tribunals, Courts and Enforcement Act 2007, which replaces individual tribunals with a new First-tier and Upper Tribunal grouped into chambers. The functions of the Asylum and Immigration Tribunal will be transferred into the new system by the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010, and the Asylum and Immigration Tribunal will cease to exist under the Act. This instrument therefore replaces references to that Tribunal with references to proceedings in the Immigration and Asylum Chamber of the First-tier and Upper Tribunals.

These regulations are made by the Parliamentary Under Secretary of State, by authority of the Lord Chancellor in exercise of powers conferred upon him by section 6(4) of the Access to Justice Act.

**5. Territorial Extent and Application**

5.1 This instrument applies to England and Wales.

**6. European Convention on Human Rights**

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

## **7. Policy background**

- 7.1 The changes are to ensure that legal aid funding continues to be available when the Asylum and Immigration Tribunal (AIT) transfers to the unified structure established under the Tribunals, Courts and Enforcement Act 2007. The aim of the changes is to ensure that legal aid continues to be available and that the current levels of payment to practitioners are transferred across to the new system as far as possible unchanged.
- 7.2 One of the consequences of the 2007 Act is that the system of funding set out in the Nationality, Immigration and Asylum Act 2002, in which a judge would decide at the end of an application for review or reconsideration whether public funding should be granted, falls away. This Order does not seek to replicate that system. Broadly, cases in the First-tier tribunal will receive the same level of funding as cases would have received for a substantive appeal to the Asylum and Immigration Tribunal; appeals to the Upper Tribunal will broadly receive the same level of funding as review/reconsideration applications would have received.

## **8. Consultation outcome**

- 8.1 The consultation ran from 7 July until 21 August 2009. There were four replies. The Law Society welcomed the abolition of the cost order scheme. There were no issues raised in relation to the funding of appeals before the First tier Tribunal. Immigration Law Practitioners' Association (ILPA) and the Law Society both raised concern about the removal of the judge's discretion to grant a costs order in the event of an unsuccessful permission application for leave to appeal to the Upper Tribunal.
- 8.2 Currently, subject to some limited exceptions, the ability to grant public funding for review/ reconsideration applications rests with the judge. This will no longer be the case. Upon transfer of the AIT into the new Tribunal structure these applications will move to the Upper Tribunal and the Cost Order Scheme will be abolished. The Legal Services Commission's Unified Contract and Funding Code will set out the circumstances under which a publicly funded provider will be able to claim their costs from the legal aid fund. The effect of this will be that in the Upper Tribunal, funding (again subject to some limited exceptions) will be determined by the outcome of the permission application for leave to appeal to the Upper Tribunal. Where the judge refused the application no funding will be claimable; where it is granted the costs of that application and subsequent appeal costs will be claimable subject to the usual LSC funding requirements.

## **9. Guidance**

- 9.1 The LSC will issue guidance to practitioners as to the implementation of the changes

## **10. Impact**

10.1 An impact assessment has not been prepared for this instrument as the change is to ensure that legal aid continues to be available in the unified structure as now and funding arrangements are transferred across to the new system as far as possible unchanged. Therefore there is no new impact on businesses, charities or the voluntary sector.

## **11. Regulating small business**

11.1 As above, the change is to ensure that legal aid continues to be available in the unified structure as now and funding arrangements are transferred across to the new system as far as possible unchanged. Therefore there is no new impact on small businesses

## **12. Monitoring & review**

12.1 Monitoring will continue as part of the normal process of maintaining business as usual.

## **13. Contact**

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