

EXPLANATORY MEMORANDUM TO
THE COMMUNITY LEGAL SERVICE (FUNDING) (AMENDMENT) ORDER 2011

2011 No. 1027

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

2. Purpose of the instrument

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 two new fees schemes as set out in the *Family Legal Aid Funding from 2010* consultation. It also revokes the instrument in which the previous fees relevant to the second new fee scheme had been contained. The Schedules to the Order set out the fees and rates and detailed rules applicable to the new schemes. The Order also makes provision relating to the payment of certain types of disbursements.

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

3.1 None.

4. Legislative Context

4.1 The Lord Chancellor makes this Order in exercise of the powers conferred by section 6(4) and 25(8A) 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) of that Act.

4.2. The instrument is subject to the negative resolution procedure under section 25(10) of the Access to Justice Act. It revokes the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 (S.I. 2001/1077).

5. Territorial Extent and Application

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. In November 2006, in *Legal Aid Reform: the Way Ahead* (Nov 2006), the Government's response to Lord Carter's report into legal aid procurement, the Government set out its intention to abolish the Family Graduated Fee Scheme (FGFS) barrister fee scheme, and to move towards a new harmonised payment system for family advocacy work by both solicitors and barristers. The FGFS, introduced in May 2001, was developed over a number of years in close consultation with the Bar and the Family Law Bar Association (FLBA). Barristers receive fixed fees for certain activities, and these fixed fees can be increased by a variety of uplifts, depending on factors in the case. These extra payments are controlled by the judiciary – who approve the uplifts at the end of the hearing or case.
- 7.2. The joint MoJ and Legal Services Commission (LSC) consultation, *Family Legal Aid Funding from 2010*, focused on two payment schemes: The Private Family Law Representation Scheme (PFLRS), designed to bring private family work (excluding advocacy) within a standard fee regime, and The Family Advocacy Scheme (FAS), designed to create a single graduated fee scheme covering payments to both solicitor advocates and barristers for public and private family law cases. These fees schemes, collectively known as 'Phase 2 Fees' are contained in this Order.

Family Advocacy Scheme

- 7.3. The FAS includes: Public Law Family: Care and supervision cases and Other public law cases. It also includes Private Law Family: Private law children cases, Finance cases and Domestic abuse cases.
- 7.4. There is significant overlap between the advocacy work that solicitors and barristers do, therefore the FAS proposes to pay the same for advocacy, regardless of whether a solicitor or barrister does the work (although certain payments would only be made to barristers and other self-employed advocates). Further details on the FAS can be found on the LSC website at:
<https://consult.legalservices.gov.uk/gf2.ti/f/137410/3072293.1/pdf/-/Information%20Sheet%20FAS%2021.10.09.pdf>
- 7.5. For interim cases there will be two hearing units. Hearing Unit 1 (where the case is 1 hour or less) and Hearing Unit 2 (where the case lasts longer than 1 hour but less than or equal to 2.5 hours). A daily fee will be payable for each day of the final hearing. Because of this there will be no exceptional cases or uplifts payable in the FAS. However there will be additional payments (bolt ons) for cases which are particularly complex.

Private Family Law Representation Scheme

- 7.6. The PFLRS includes all work (excluding advocacy which is covered by the FAS) from the issue of proceedings up to the conclusion of the final hearing, including any review hearing following the final order.
- 7.7. Further details on the PFLRS scheme can be found on the LSC website at:

<https://consult.legalservices.gov.uk/gf2.ti/f/137410/3071077.1/pdf/-/QA%20Private%20law%202021.10.09.pdf>

- 7.8. The PFLRS has an exceptional case threshold of 3 times the profit costs i.e. if a case is particularly complex it may escape from the fee scheme and be paid on hourly rates.
- 7.9. The new fees schemes were originally to be introduced through the Legal Services Commission's 2010 family contract. The Community Legal Service (Funding) (Amendment No.2) Order 2010 (SI 2010/1109)) therefore introduced the schemes in line with the rules of the new 2010 family contract. The Order, laid on 31 March 2010, was due to come into force on 14 October 2010 with the original date for the commencement of the new contracts.
- 7.10. On 27 August 2010, the Law Society commenced judicial review proceedings challenging the lawfulness of the Legal Services Commission family tender exercise. As a result, the Legal Services Commission agreed to a one month extension of the Unified Civil Contract (otherwise due to expire on 14 October 2010) until midnight on 14 November 2010. On 30 September 2010, the court gave its oral judgment. The judicial review claim succeeded.
- 7.11. Following the judgment, the Community Legal Service (Funding) (Amendment No. 2) Order 2010 (SI 2010/1109) was revoked by the Community Legal Service (Funding) (Amendment No.2) (Revocation) Order 2010. As the Explanatory Memorandum to that Order explained, this step was taken as interim measure in the light of the judicial review proceedings. Subsequently, the current Unified contract has been extended in respect of family (and family with housing) contracts to 30 November 2011 and the Government has confirmed that a further Order would be brought to introduce the new fee schemes as soon as possible.
- 7.12. This Order therefore requires the Legal Services Commission to implement the Private Law Representation and Family Advocacy schemes for family legal aid work. The Legal Services Commission intends to do this through amendment of the Unified Contract. The Schedules to the Order set out both payment rates and the relevant detailed rules of the new fee schemes. The substance of the rules of the schemes had previously been contained in the old 2010 family contract specification. The fifth Schedule to the Order implements controls over payment of certain disbursements that were due to come into force at the same time as the new fee schemes. These relate to contact activities, independent social work and experts (the latter having already been introduced for non-family work under the 2010 contract for civil work).

8. Consultation outcome

- 8.1 The *Family Legal Aid Funding from 2010* consultation began on 17 December 2008 and closed on 3 April 2009 following an extension of the original closing date of 18 March, which was granted following requests from representative bodies to allow providers further time to set out their concerns.

8.2 In total there were 1,491 responses to the consultation. In general, respondents were not in favour of the proposals but opinion was split as to what they would favour instead. The general theme was that the scheme needed more graduation to recognise complexity but there was no clear agreement as to how that could be achieved. Both barristers and solicitors felt the fee levels had been set too low and that they would not be prepared to undertake family legal aid work at these rates. A summary of the responses to the consultation can be found on the LSC website at:
<https://consult.legalservices.gov.uk/gf2.ti/f/137410/3070949.1/pdf/-/summary%20of%20responses%2021.10.09.pdf>

8.3 Changes were made to the schemes following consideration of the responses to consultation and the input of the working group that was set up. There is now much greater graduation to ensure that those advocates who take on the more difficult and complicated cases are fairly rewarded.

8.4 Key changes to the schemes were:

- excluding certain proceedings from the schemes including Forced Marriages and Rule 9.5 cases
- Moving from a per hearing fee for advocacy to a fee based on time
- Uplifts for work undertaken in the County Court and High Court
- The introduction of bolt-on fees to recognise the complexity of some cases
- Payment of finding of fact hearings as final hearings
- Payment of an Issues Resolution hearing as a final hearing where a case settled at the stage in Care proceedings

8.5 The Government's announcement on the final fee schemes was broadly welcomed by the Association of Lawyers of Children (ALC), one of the practitioner groups involved in improving the scheme.

8.6 ALC co-chair, Piers Pressdee, commented:

“The priority for family legal aid must be child protection. These are complex, demanding cases, involving the highest of stakes, and requiring a high level of expertise to conduct properly. We welcome the Government's recognition of that priority and reality, together with the significant improvements to the scheme that have now been made. While we still have concerns about some elements of it, the scheme now proposed is immeasurably better, fairer and more practice-reflective than that originally devised. That shows the benefits of collaborative working within the family justice system.” (ALC Press Release 21 October 2009).

8.7 The Bar Council and the Law Society were consulted on the draft Order pursuant to section 25(2) of the Access to Justice Act 1999. The Association of Lawyers for Children, the Family Law Bar Association, President of the Family Division, Advice Services Alliance, Resolution and the Legal Aid Practitioners' Group were also consulted

on the draft Order since they had been consulted on the draft of the Community Legal Service (Funding) (Amendment No.2) Order 2010. A number of drafting amendments and clarifications were made in the light of the comments received. No changes were made to the policy reflected in the fee schemes as this was the subject of the previous *Family Legal Aid Funding from 2010* consultation.

9. Guidance

- 9.1 Information on the *Family Legal Aid Funding from 2010* consultation process can be found on the LSC website at:
<https://consult.legalservices.gov.uk/inovem/consult.ti/FamilyFees2008/consultationHome>

10. Impact

- 10.1 An Impact Assessment, including an equality impact assessment was published as part of "Family Legal Aid Funding from 2010: a consultation response" and was referred to in the Explanatory Memorandum to the Community Legal Service (Funding) (Amendment No. 2) Order 2010 (SI 2010/1109). The impacts remain as set out in that Impact Assessment, which is available at:
<https://consult.legalservices.gov.uk/consult.ti/FamilyFees2008/consultationHome>.

11. Regulating small business

- 11.1. The legislation does not specifically apply to small businesses.

12. Monitoring & review

- 12.1. The LSC gathers statistical data on its legal aid fee schemes on a regular basis. The Impact Assessment sets out that a Post Implementation Review will be undertaken 18 months after the implementation of the fee schemes.

13. Contact

- 13.1. Any enquiries about the contents of this memorandum should be addressed to: Jackie Hartley, Access to Justice Policy Strategy Directorate, Ministry of Justice, 102 Petty France, London SW1H 9AJ.
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