

## EXPLANATORY MEMORANDUM TO

### THE CIVIL AND FAMILY PROCEEDINGS FEES (AMENDMENT) ORDER 2022

2022 No. 540 (L. 7)

#### 1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

#### 2. Purpose of the instrument

- 2.1 This Order amends the Civil Proceedings Fees Order 2008 (S.I. 2008/1053) and the Family Proceedings Fees Order 2008 (S.I. 2008/1054). It provides that no fee is payable for making an application for a direction in relation to the prohibition of cross-examination in person in family proceedings under Part 4B of the Matrimonial and Family Proceedings Act 1984, or in civil proceedings under Part 7A of the Courts Act 2003.

#### 3. Matters of special interest to Parliament

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

- 3.1 None.

#### 4. Extent and Territorial Application

- 4.1 The territorial extent and application of this instrument is England and Wales.

#### 5. European Convention on Human Rights

- 5.1 As this Order is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

#### 6. Legislative Context

- 6.1 The Lord Chancellor makes this Order in exercise of the powers conferred by section 92 of the Courts Act 2003.
- 6.2 Section 92 allows the Lord Chancellor (with the consent of the Treasury) to prescribe fees in the senior courts, the family court, the county courts and the magistrates courts, including scales or rates of fee, exemptions from or deductions in fees, and remission of fees.

#### 7. Policy background

##### *What is being done and why?*

- 7.1 Sections 65 and 66 of the Domestic Abuse Act 2021 (c. 17) (“the DA Act”), contain the provision to prohibit domestic abuse perpetrators from cross-examining their victims in person, and vice versa, in family and civil proceedings in specified circumstances. 65 inserts a new part 4B into the Matrimonial and Family Proceedings

Act 1984, composed of sections 31Q-31Z, and Section 66 inserts a new Part 7A into the Courts Act 2003, composed of sections 85E-85N. This Order provides that where an application is made for a direction by reference to sections 85F-K of the Courts Act 2003 or sections 31R-W of the Matrimonial and Family Proceedings Act 1984, no fee will be payable.

- 7.2 In some cases, the prohibition on cross-examination in person in family and civil proceedings will apply automatically. These are where:
- (i) one party has been convicted of, given a caution for, or charged with specified offences against the witness;
  - (ii) an on-notice protective injunction is in place between the party and witness; and
  - (iii) there is other specified evidence of domestic abuse between the party and witness.
- 7.3 Where none of the automatic prohibitions apply, the court has the discretion to make a direction prohibiting a party from cross-examining another party or witness if not doing so would be likely to diminish the quality of the witness evidence or cause significant distress to the witness or party. In these instances, any party to the proceedings may make an application to the court to direct, or revoke, the prohibition of cross-examination. Where the prohibition on cross-examination in person arises, the court can consider alternatives to cross examination in person, or to obtaining the evidence which would have been given. If the court decides that the prohibition should apply, a qualified legal representative may be appointed to conduct the cross examination in person. The new provisions will allow a party in such proceedings to apply to court for directions in respect of cross-examination in person.
- 7.4 Without changes to fees legislation, any application which needs to be made under these new legislative provisions will result in a fee being payable. The policy intention behind this fee exemption is to ensure there is no financial barrier to making such applications to prohibit cross-examination in person, and restricting the ability for perpetrators of domestic abuse to use the court as a platform to distress their victim and continue the abuse. Any financial barrier to use these measures runs the risk of frustrating the policy intention of the new legislation and would run counter to the approach used for protection orders such as non-molestation orders, occupation orders and forced marriage protection orders, where in all such cases, fees are not payable.

## **8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

## **9. Consolidation**

- 9.1 It is not intended that this instrument will consolidate any legislation.

## **10. Consultation outcome**

- 10.1 The Lord Chancellor has performed his statutory obligation to consult the judiciary when ordering a fee exemption, as described in sections 92(5) and (6) of the Courts Act 2003, which also contain the lists of persons to be consulted. A general public consultation on this instrument is not necessary.

## **11. Guidance**

- 11.1 Accompanying guidance setting out the changes introduced by this instrument will be made available by HMCTS from June 2022.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no significant impact on the public sector other than the financial effects described below.
- 12.3 An impact assessment has not been prepared for this instrument due to the size of the change. However, we estimate there to be approximately 11,000-16,000 parties in family proceedings and 500 parties in civil proceedings annually who will benefit from the appointment of a qualified legal representative through an in-person cross-examination prohibition. This estimate is inclusive of not only those that would make an application (and benefit from the exemption), but also where a cross-examination in person prohibition is directed by the court automatically.

## **13. Regulating small business**

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

## **14. Monitoring & review**

- 14.1 The Ministry of Justice monitors the impact of changes to court fees in accordance with the Lord Chancellor's duty to ensure an efficient and effective courts system, as described in section 1 of the Courts Act 2003.
- 14.2 A statutory review clause is not included in this instrument and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Parliamentary Under Secretary of State at the Ministry of Justice, James Cartlidge MP has made the following statement: "In my view the provisions of the Family Proceedings Fees (Amendment) Order 2022 have no net cost to business".

## **15. Contact**

- 15.1 Oliver Georgiou (email: [Oliver.Georgiou@justice.gov.uk](mailto:Oliver.Georgiou@justice.gov.uk)) can be contacted with any queries regarding the instrument.
- 15.2 Joanna Otterburn and Stephanie Hack, Deputy Directors for Legal Support and Fees Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister James Cartlidge at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.