EXPLANATORY MEMORANDUM TO

THE COMMUNITY LEGAL SERVICE (FUNDING) (AMENDMENT NO.2) ORDER 2011

2011 No. 2066

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, barristers and Not for Profit organisations who provide civil legal aid services to the public. The Order amends the 2007 Order to implement a number of changes to the remuneration of the civil legal aid scheme on which the Government recently consulted. The Order intends to reduce all fees and hourly rates paid in civil and family legal aid matters by 10%; codify the rates paid to barristers in civil non-family cases, and reduce them by 10%; and limit the level of enhancements that can be paid to solicitors in civil and family cases at 100% for cases heard in the Upper Tribunal, High Court, Court of Appeal and Supreme Court and 50% for all other proceedings. The Order also imposes, for the first time, a set of fixed fees and hourly rates to be paid for expert witness work in civil cases. The Schedules to the Order set out the fees and rates and detailed rules applicable to the revised schemes.

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.

4.2 The instrument is subject to the negative resolution procedure under section 25(10) of the Access to Justice Act 1999.

4.3 A related Order, The Criminal Defence (Funding) (Amendment) Order 2011, implements a number of changes to the remuneration of the criminal legal aid scheme.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 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 Government believes that reform of the legal aid scheme is needed in order to ease the significant pressures on the legal aid budget. The overall expenditure on legal aid in 2009/10 was around £2.2bn. The purpose of the legal aid system is not to sustain the current legal market, but to ensure that help is targeted on those who need it most, for the most serious cases in which legal advice and representation is justified

7.2 Under section 25(3) of the Access to Justice Act 1999, the Lord Chancellor is explicitly required to have regard to the cost to public funds and the need to secure value for money when setting remuneration rates. Given the urgent need to address the fiscal deficit, the Government's view is that it is crucial to review every area of expenditure to ensure that this duty is being met and that the amount that it pays for any service represents maximum value for money. In this context the Government considers that it needs to ensure that it only pays those fees that are absolutely necessary to secure the level of services that are required.

7.3 This Funding Order requires the LSC to implement changes to all civil and family fee schemes as set out in the schedules. The LSC will implement these changes through amendments to current civil and family legal aid contracts. All civil legal aid work is currently carried out under the '2010 Standard Civil Contract' but family (and family with housing) work is still carried out under the 'Unified Civil Contract 2007'. This is because the LSC were unable to award new Family contracts following a successful Judicial Review of the family legal aid contract tender by the Law Society. Instead of awarding new family contracts, the LSC simply extended the Unified contract for family work instead, to November 2011,

7.4 For this reason, the LSC will apply the changes in two phases, as follows: In October 2011, we will introduce the codification of counsel rates in civil non-family proceedings; the 10% fee reduction for all work covered by the 2010 Standard Civil Contract (civil non-family work); and the new limits on enhancements for work covered by the 2010 Standard Civil Contract. In February 2012, as part of the introduction of the new family contracts, we will introduce: the 10% fee reduction for all work covered by the 2007 Unified Contract (family legal aid work and housing work carried out under the Unified Contract); and the new limits on enhancements for work covered by the 2007 Unified Contract.

7.5 The Order also makes amendments to remove proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 and the Trusts of Land and Appointment of Trustees Act 1966 from the definition of family proceedings for the purposes of the Order. Whilst proceedings under these Acts may fall within the family category under the Unified Contract and work may be carried out by providers with a family contract they are treated as civil cases by the courts and have traditionally been paid as such. The proposed changes in articles 3 and 5 mean that these cases will continue to be treated as civil cases for the purposes of payment. However, as before they will also continue to fall within the definition of family proceedings used within LSC contracts so that family providers can continue to carry out this work.

7.6 Given the need to make substantial savings to legal aid, the Government's view is that fees paid to experts should be subject to the same constraints as those paid to lawyers. Legally aided expert witnesses are contracted directly by solicitors and paid for as a disbursement when the solicitor submits their final bill. The LSC therefore currently has no direct control over the commissioning of expert witness services and estimated costs are increasing. There are currently no official rates but the LSC operates benchmark hourly rates which they use as guidance when considering payment claims for expert witnesses at the end of a case. The Government therefore intends to codify the LSC's benchmark hourly rates (reduced by 10%) and continue to develop longer term plans to further tailor payments to expert witnesses in a more detailed and prescriptive scheme in future. The Funding Order will apply the changes to all legally aided expert witness work in October 2011

7.7 There are no current plans to produce a consolidated version of the 2007 Order and the amendment to it. This is because the Government has introduced the Legal Aid, Sentencing and Punishment of Offenders Bill in the Current Session and this will be producing secondary legislation governing legal aid, subject to that Bill receiving royal assent.

8. Consultation outcome

8.1 Proposals to reform the civil and family legal aid fees were the subject of a consultation exercise entitled 'Proposals for the Reform of Legal Aid in England and Wales' which ran from 15 November 2010 to 14 February 2011.

8.2. Copies of both the consultation paper and the Government response (published 21 June 2011) are on the MoJ website at http://www.justice.gov.uk/consultations/legal-aid-reform.htm. Respondents to the consultation included the Law Society, Bar Council, and other bodies representing solicitors and barristers. Responses were also received from members of the judiciary, other representative bodies and members of the public. Most respondents, particularly lawyers and their representative bodies, were opposed to proposed fee changes.

8.3 Many respondents raised concerns that the proposed fee reforms may lead to providers leaving the civil and family legal aid market. However, the

Government is satisfied that the proposed fee reforms are likely to be sustainable, and that, although individual providers may leave the scheme, there will be sufficient supply of providers of sufficient quality to provide an appropriate level of service. Following the implementation of the fee reforms, the LSC will monitor the situation to ensure that they are aware of any developing market shortfall and the Government will work closely with them so that they are able to respond promptly, effectively and appropriately should this materialise.

8.4 The Law Society and the Bar Council were consulted on the instrument, in accordance with section 25(2) of the Access to Justice Act 1999. The consultation was held between 13 July and 10 August 2011. The purpose of the consultation was to ensure that the text of the Funding Orders delivered the policy intentions as set out in 'Reform of Legal Aid in England and Wales: the Government response'.

9. Guidance

9.1 Existing guidance will be amended and re-issued to both providers and LSC staff.

10. Impact

10.1 An Impact Assessment, including an equality impact assessment is available at: http://www.justice.gov.uk/consultations/legal-aid-reform.htm.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 MoJ has not taken any specific steps to minimise the impact of the requirements on firms employing up to 20 people.

11.3. The Order does not impose any additional regulatory burdens on small firms. Instead the Order governs the fees paid to solicitors, barristers and Not for Profit organisations who provide their services under the terms of the Community Legal Service.

12. Monitoring & review

12.1 Expenditure on legal aid is regularly monitored and reviewed by the MoJ and the LSC.

13. Contact

13.1 Any enquiries about the contents of this memorandum should be addressed to: Chris Volume, Access to Justice Policy, Ministry of Justice, 102 Petty France, London SW1H 9AJ.
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