EXPLANATORY MEMORANDUM TO

THE COMMUNITY LEGAL SERVICE (FUNDING) (COUNSEL IN FAMILY PROCEEDINGS) (AMENDMENT) ORDER 2014

2014 No. 2864

1. This explanatory memorandum has been prepared by the Ministry of Justice 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) (Counsel in Family Proceedings) Order 2001 (SI 2001/1077) as amended (the "Counsel in Family Proceedings Order"). Specifically, it:

- amends the legal aid framework for remuneration of Counsel under the Family Graduated Fee Scheme (FGFS) following the introduction of the new single Family Court; and

- amends the definitions of:

  - "Case Management Conference"; and
  - "Public Law Outline"

  to reflect the updated terminology under the Practice Direction, relating to case management, which is applicable to the proceedings.

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

3.1 None.

4. Legislative Context

4.1 The Counsel in Family Proceedings Order (as amended) makes provision for remuneration of funded services provided by counsel in family proceedings and applies to cases which continue to be covered by the Access to Justice Act 1999 (AJA) where the application for legal aid was signed before 9 May 2011 and was received by the Legal Services Commission (now the Legal Aid Agency) (LAA) before 16 May 2011. Section 6(4) of the AJA provides that the Lord Chancellor may by Order require the LAA to fund the provision of services in accordance with the Order. The Crime and Courts Act 2013 (Family Court: Consequential Provision) Order 2014 (S.I. 2014/605) amends the AJA to provide that advocacy in proceedings before the family court is specified as a service and is not excluded from the scope of civil legal aid under the AJA.

4.2 This Statutory Instrument implements changes consistent with those made to the Civil Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/422) ("the 2013 Regulations") by S.I. 2014/586 and the Community Legal Services (Funding) Order 2007 (S.I 2007/2441) (the "Funding Order") by S.I. 2014/1818 upon implementation of the family court. It also amends the definitions of "Case Management Conference" and "Public Law Outline" to reflect the current terminology under the updated Practice Direction for family proceedings.

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

7. Policy background

7.1 The Crime and Courts Act 2013 established the concept of the new Family Court, the aim of which was for it to become the national court for family proceedings in England and Wales. The new Family Court came into effect on 22 April 2014. The levels of judiciary capable of sitting in the new Family Court include lay Justices, District Judges, Circuit Judges and High Court Judges.

7.2 The allocation of a family case is now made on the basis of the most appropriate level of judge needed for the particular case, with remuneration to those providing family legal aid services made on the basis of the person or court before whom the proceedings are disposed or heard. Prior to this, remuneration for family legal aid services varied depending on the level of counsel and the type of work to be carried out in the hearing, not by reference to the person disposing of or hearing the case

7.3 Consequential changes have already been made to the framework of the family legal aid remuneration schemes to reflect the structure of the new Family Court for cases under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) through amendments to the 2013 Regulations, and for some pre-LASPO cases under the AJA through amendments to the Funding Order. The reforms, which were confirmed in the response to the consultation "*Supporting the introduction of the single Family court – Changes to the family legal aid remuneration schemes*", were made to ensure that appropriate mechanisms were in place to enable payment of family legal aid services from 22 April 2014.

7.4 This Order amends the Counsel in Family Proceedings Order (as amended) to ensure remuneration for family legal services for a sub-set of pre-LASPO cases to reflect the jurisdiction of the Family Court. The changes being made are consistent with those made to the 2013 Regulations and the Funding Order (as amended).

7.5 The amendments made in Articles 2(2)(b) and 2(4)-(6) provide for the necessary consequential changes to the FGFS as a result of the introduction of the new Family Court. These amendments align remuneration with the structure and jurisdiction of the family court but will have no affect on the levels of remuneration made under the FGFS.

7.6 The amendments made in Articles 2(2)(a), 2(2)(c) and 2(3) reflect the terminology used under the Public Law Outline which governs case management in family proceedings, the most recent of which is the updated Practice Direction 12A (Care, Supervision and Other Part 4 Proceedings: Guide to Case Management) to the Family Procedure Rules 2010.

7.7 Article 3 provides for transitional arrangements. The changes to the scope of the Counsel in Family Proceedings Order being made by article 2(4) of the order will only apply to the determination of claims for payment made in relation to hearings held on or after 22 April 2014.

8. Consultation outcome

8.1 The Government worked closely with the representative bodies of providers of family legal aid services to develop the proposals for consequential changes to the family legal aid schemes as a result of the introduction of the single Family Court. The subsequent consultation *"Supporting the introduction of the single Family Court – Proposed changes to the Family legal aid remuneration schemes*[1]*"* was published on 28 October 2013 and closed on 25 November 2013. The Government received 12 responses to its consultation, the majority of which were from representative bodies or providers of family legal aid services. The majority of respondents supported the Government's proposed changes to the family legal aid fee schemes. The Government took the decision to proceed on the basis of the changes it proposed in the consultation document, as set out in the consultation response *"Supporting the introduction of the single Family Court – Changes to the family legal aid remuneration schemes"*[2]. The amendments made to the Counsel in Family Proceedings Order are consistent with the proposals on which we consulted.

8.2 The Government has not consulted specifically on this instrument. The changes are intended, as far as possible, to be cost-neutral and expected to have little or no impact on legal aid recipients or those providing family legal aid services.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument as the amendments being made to the Counsel in Family Proceedings Order are consistent with amendments made to other Regulations (the 2013 Regulations and the Funding

[1] https://consult.justice.gov.uk/digital-communications/proposed-changes-family-legal-aid-remuneration

[2] https://www.gov.uk/government/consultations/supporting-the-introduction-of-the-single-family-court-proposed-changes-to-family-legal-aid-remuneration-schemes

Order) on which guidance was issued by the Legal Aid Agency in April. This guidance can be found at http://www.justice.gov.uk/legal-aid/newslatest-updates/civil-news/civil-lat-reforms-go-live.

10. Impact

10.1 The consequential changes necessary to the FGFS arise as a result of the implementation of the new Family Court. They do not, however, make any change to the fee income of those providing family legal aid services. As a result no impact assessment was prepared in respect of this policy.

10.2 The changes being made to the FGFS will have no impact on business, charities or voluntary bodies.

10.3 There is no impact on the public sector arising from the changes being made to the family legal aid remuneration schemes.

11. Regulating small business

11.1 There will be no impact on small businesses except in so far as this instrument affects counsel providing family legal aid services under the FGFS.

11.2 The Ministry of Justice has not taken any specific steps to minimise the impact on counsel providing services under FGFS.

12. Monitoring & review

12.1 The operation of and expenditure on the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency. The Ministry of Justice will, however, be monitoring the effectiveness of the changes in this instrument as part of separate work on assessing the overall impact of the implementation of the Family Justice Review reform programme.

13. Contact

13.1 Any enquiries about the contents if this memorandum should be addressed to:

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