**EXPLANATORY MEMORANDUM TO**

**THE FAMILY PROCEEDINGS FEES (AMENDMENT) ORDER 2022**

**2022 No. 54 (L. 3)**

## 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 Family Proceedings Fees Order 2008 (S.I. 2008/1054) ("FPFO"). It aligns terminology and references in the Order ahead of the proposed commencement of the Divorce, Dissolution, and Separation Act 2020 ("DDSA") on 6 April 2022. This Order also updates the description of fee 2.1(r) (and its related appeal fee) in the FPFO for applications to cancel, vary, remove or impose conditions on the registration of child minders or day carers, and increases the fee from £215 by £17 to £232.

## 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 sections 92 (for the fee 2.1(r) provision), 108 (for the transitional provision) and 109 (for the DDSA related provision) of the Courts Act 2003 (c.39) ("the Act").

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 (section 92(2)) scales or rates of fee, exemptions from or deductions in fees, and remission of fees. Section 108 governs parliamentary control of instruments made under the Act, and in particular section 108(6)(b) allows for transitory, transitional or saving provision where necessary or expedient. Section 109(4)(a) allows for supplementary, incidental or consequential provision where necessary or expedient. The DDSA related provision is being made under section 109(4)(a) because it is necessary and expedient for the purposes of fees already prescribed under section 92. Section 92 is being used for the rule 2.1(r) provision

because that involves increasing (hence "prescribing") a fee and ascribing a current appeal fee to a re-named category.

6.3 Fees made under s.92 cannot be set above the cost of the underlying service (non-enhanced fees). The increased rule 2.1(r) fee remains below that cost. Statutory instruments made under s.92 are subject to the negative procedure as per section 108(5) of the 2003 Act.

6.4 The fee for applications to cancel, vary, remove or impose conditions on the registration of child minders or day carers (or in Wales to cancel) is set out in the Family Proceedings Fees Order 2008 ("FPFO"). The Order will clarify that such applications are made pursuant to s72 of the Childcare Act 2006 and s34 of the Children and Families (Wales) Measure 2010, rather than s79k of the Children Act 1989, which is no longer in effect in England and Wales.

## 7. Policy background

***Amendment to increase a fee relating to the registration of a childminder***

7.1 This instrument will help to contribute to the funding of HMCTS by completing an outstanding inflationary fee increase to fee 2.1(r) of the FPFO that was intended as part of The Court Fees (Miscellaneous Amendments) Order 2021 (S.I. 2021/985) ("the 2021 Order").

7.2 Ofsted (in England) and Estyn (in Wales) maintain registers of childcare providers who are lawfully able to provide care services to children. The fee being increased relates to applications made by the Ofsted Chief Inspector (in England) and Welsh Ministers (in Wales) to ask the Family Court to change the registration of a provider on an emergency basis – to cancel their registration; to vary what services they are able to provide; or to impose additional conditions on their registration. It is used when the applicants have evidence to show that any child who is being, or may be, looked after by that registered provider is suffering or is likely to suffer significant harm.

7.3 This application to the Family Court may be made without giving notice to the registered provider (though the applicants will typically seek to make the application with both parties present, unless doing so jeopardises the safety and welfare of children). The power to make this application is contained in s72 Childcare Act 2006 in England, and s34 of the Children and Families (Wales) Measure 2010 in Wales.

7.4 The above power is only used to make applications on an emergency basis to protect a child suffering, or at risk of suffering, significant harm. Where Ofsted or Estyn wishes to take action against a provider and that condition is not met, there are alternative non-court processes set out in legislation. These processes typically take longer, and are designed to give the provider the opportunity to put right the issue raised.

7.5 Between March and May 2021, the Ministry of Justice consulted on increasing selected court fees by historic CPI inflation dated from August 2016, or the date the fee was last amended where later, through to the financial year 2021/22. This consultation included fee 2.1(r). The proposed fee increase for 2.1(r) was £17 and represented an increase of 7.8%.

7.6 The vast majority of the fee increases proposed in the consultation were taken forward in the 2021 Order. The increase to fee 2.1(r) was not included in the 2021 Order as officials in the Ministry of Justice were only made aware, shortly before the 2021

Order was made, that the legislative provision for the fee (section 79k of the Children Act 1989) was no longer in effect in England and Wales, and therefore wanted to clarify the legislative position before enacting the increase. There was insufficient time to check the position, after the issue had surfaced, fully and accurately before the 2021 Order was enacted. The Ministry of Justice has now confirmed the position via stakeholder engagement and is therefore in a position to proceed. Therefore, this Order now both increases the fee and corrects the legislative provision to section 72 of the Childcare Act 2006 in England and section 34 of the Children and Families (Wales) Measure 2010 in Wales.

7.7 The power to prescribe court fees for this purpose is contained within s.92 of the Courts Act 2003. Fees set under the power contained within s.92 of the Courts Act 2003 cannot be set above the cost of the underlying service (non-enhanced fees). We can confirm that increasing this fee to £232 will not lead to it being above the cost of the underlying service.

7.8 The Lord Chancellor has a statutory and constitutional duty to protect access to justice, and to ensure that the courts and tribunals can operate effectively and efficiently. The income received from court fees helps to fund the cost of running the courts and tribunals but currently meets less than half of that cost. In 2019/20, there was a net fee income of £724m against the £2bn running costs of Her Majesty's Courts and Tribunal Service (HMCTS), a significant gap that requires substantial public funding from the taxpayer. The Ministry of Justice estimates that the potential income generated by the inflation fee increases is £20-25 million per annum, from 2022/23 onwards. This additional funding will be crucial in supporting HMCTS to run an effective and efficient justice system, ensuring access to justice for all. However, despite the inflationary increases generating further income, taxpayer funding will still be required to cover the total costs of running HMCTS.

***Amendment to update terminology and referencing***

7.9 This instrument will help to facilitate the reforms to divorce by updating terminology and resetting references to make the language within the FPFO consistent with the DDSA reforms.

7.10 The DDSA will reform divorce so that the decision to divorce is a considered one, and that separating couples should not be put through legal requirements which can lead to ongoing conflict and poorer outcomes for children.

7.11 The DDSA will modernise language within the divorce process to help make the process easier to navigate. Various terms – such as "petitioner", "decree nisi" and "decree absolute" are now being aligned with the corresponding terms used in civil partnership dissolutions of "applicant", "conditional order" and "final order", which are easier to understand.

7.12 This updated language reflects that already contained within the Civil Partnerships Act 2004, aligning terminology across legislation.

7.13 This Order is part of a series of legislative changes that the Ministry of Justice are delivering to family procedure rules. This includes the Family Procedure (Amendment) Rules 2022, which will be laid in the same week as this SI, that updates references that are featured within the FPFO. These necessary changes are being made to deliver these important reforms to Divorce law to reduce conflict within the legal process of divorce.

## 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 Before making this Order to amend the FPFO in relation to changes made to facilitate the DDSA, the Lord Chancellor has consulted persons pursuant to sections 92(5) and 109(4A) of the Courts Act 2003. The persons that were consulted were the Lord Chief Justice and the President of the Family Division,

10.2 As part of the inflationary fee increases in the 2021 Order the Lord Chancellor performed his statutory obligation to consult the judiciary and, as appropriate, the Civil Justice Council when prescribing fee income and fee remissions as provided in sections 92(5) and (6) of the Courts Act 2003. The consultation that was carried out in relation to the 2021 Order is applicable to the fee being increased within this instrument.

10.3 The Ministry of Justice conducted a public consultation exercise between 22 March 2021 and 17 May 2021 and received a total 89 responses to their published consultation paper and Impact Assessment. An online survey was made available during the consultation period. Responses were received from a number of key stakeholders working in the legal sector, the public sector and members of the public. A quarter of these respondents work as solicitors and a sixth of respondents worked for local authorities. Further responses were received from those working in a range of industries, with a significant number working in the property sector, such as lessors and real estate agents. Several stakeholders came from associations that represented stakeholder groups, including solicitors, those working in credit services or enforcement, court users, families, mental health services and social care services.

10.4 Respondents were split on whether they agreed with the proposal that fees should be increased periodically in line with inflation. Respondents who disagreed with the proposed increase raised concerns that it was not the right time to increase court fees due to the impacts of Covid-19 and argued that the fee increases could reduce access to justice. Furthermore, several respondents were concerned that the proposed increases were unjustifiable due to the current quality of service levels provided by HMCTS and because increased digitisation and wider reform programme resulting in lower running costs, fees should not be increased.

10.5 The Ministry of Justice has carefully considered the concerns raised by stakeholders and has published a response on 31 August 2021 to the consultation paper and accompanying Impact Assessments which can be accessed via: https://www.gov.uk/government/consultations/increasing-selected-court-fees-and-help-with-fees-income-thresholds-by-inflation.

10.6 The Ministry of Justice did not consider it necessary to conduct a public consultation relating to the DDSA related amendments made by this Order, since those amendments are purely technical and the DDSA itself was fully debated in Parliament.

## 11. Guidance

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

## 12. Impact

12.1 In regard to changes as a result of the DDSA there is no significant impact on business, charities, or voluntary bodies.

12.2 There is no significant impact on the public sector.

12.3 The full impact assessment on the costs of business, the voluntary sector and the public sector that was carried out and published in relation to the Court Fees (Miscellaneous Amendments) Order 2021 (S.I. 2021/985) is applicable to the fee being increased within this instrument. That impact assessment is available from the Ministry of Justice, 102 Petty France, London SW1H 9AJ and is published alongside S.I. 2021/985 on https://legislation.gov.uk.

## 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) 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.