EXPLANATORY MEMORANDUM TO

THE PROHIBITION OF CROSS-EXAMINATION IN PERSON (FEES OF COURT-APPOINTED QUALIFIED LEGAL REPRESENTATIVES) (AMENDMENT) REGULATIONS 2024

2024 No. 624

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Laura Farris, Parliamentary Under Secretary of State at the Ministry of Justice, confirms that this Explanatory Memorandum meets the required standard.

2.2 Helen White, Deputy Director for Rape, Serious Sexual Offences, and Domestic Abuse Policy at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Sarah Roskrow at the Ministry of Justice (Telephone: 07926066264 or email: sarah.roskrow@justice.gov.uk) can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument amends the Prohibition of Cross-Examination in Person (Fees of Court-Appointed Qualified Legal Representatives) Regulations 2022 ("the Fee Scheme Regulations").

4.2 This instrument increases the fixed fees paid to qualified legal representatives ("QLRs") appointed in family and civil proceedings by 10%, exclusive of value added tax ("VAT"). The instrument makes no change to the costs that can be claimed by QLRs in connection with their appointment, for example, overnight accommodation.

4.3 This instrument also introduces a new fee payable in respect of 'terminated appointments'. This fee may be claimed by QLRs where the court has terminated their appointment before a hearing, but where the QLR has already undertaken at least thirty minutes of preparatory work. The provisions also allow the recovery of any costs incurred in anticipation of attending the hearing. The new 'terminated appointment' fee is payable at the same rates as the fee which is payable in respect of cancelled hearings.

Where does the legislation extend to, and apply?

4.4 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.5 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. Policy Context

What is being done and why?

5.1 Sections 65 and 66 of the Domestic Abuse Act 2021 operate in family and civil proceedings to prohibit cross-examination in person between a party and a witness in specified circumstances, including where there is evidence of domestic abuse between them. Where the prohibition applies, the court can appoint a QLR to cross-examine a witness on behalf of the prohibited party, and they are paid out of central funds for this work.

5.2 His Majesty's Courts and Tribunal Services ("HMCTS") has reported that courts are experiencing difficulties with appointing QLRs in certain geographical areas, and this is supported by feedback from senior judges. HMCTS' management data suggests that some QLRs have also chosen to withdraw from the scheme. Stakeholders, including current and past QLRs, legal professional bodies and the senior judiciary, suggest that the fees for QLRs are not high enough to incentivise uptake of the work, and that they do not reflect the sensitivity and expertise that QLRs must display when cross-examining vulnerable witnesses.

5.3 By increasing the fixed fees that QLRs can claim by 10% (exclusive of VAT), we intend to recognise QLRs' expertise and the unique nature of the role and hope to incentivise more legal professionals to register for the scheme and accept appointments for this important work.

5.4 Under the Fee Scheme Regulations, QLRs can claim a fee when a hearing is cancelled and they have already undertaken at least thirty minutes of preparatory work. This is intended to fairly remunerate QLRs for their time. This instrument introduces a new fee in respect of 'terminated appointments', which allows QLRs to claim a similar fee where they have been appointed and undertaken at least thirty minutes of preparatory work, but their appointment is then terminated by the court. Circumstances in which the fee would be payable include where the prohibited party subsequently instructs their own legal representative and the QLR is no longer needed. The new terminated appointment fee remunerates QLRs for the preparatory work they had already completed for the hearing and permits recovery of costs incurred (such as purchase of a train ticket).

What was the previous policy, how is this different?

5.5 This instrument has increased the fixed fees that QLRs can claim, as set out in the Fee Scheme Regulations, by 10% exclusive of VAT. This means that all the fees payable for attendances at preliminary and cross-examination hearings in family and civil proceedings, and the advocates' bundle bolt-on fee (where applicable), have increased by 10%. There is no change for the costs that QLRs can claim in connection with their appointment.

5.6 Previously there was no prescribed fee in respect of appointments that were terminated by the court and where the hearing proceeded without the QLR (meaning the 'cancelled hearing' provisions did not apply). Following feedback from the sector, we have introduced a new fee that is payable in those particular circumstances.

6. Legislative and Legal Context

How has the law changed?

6.1 The instrument makes minor amendments to the Fee Scheme Regulations which underpin the QLR scheme.

6.2 The amendments made by this instrument increase the fees that are prescribed in the Schedule to those Regulations and also make provision in respect of the fees and costs of a QLR whose appointment is terminated by the court.

Why was this approach taken to change the law?

6.3 This is the only possible approach to make the necessary changes, since the fees and costs payable to QLRs are prescribed in the Fee Scheme Regulations and the changes do not require those Regulations to be re-made.

7. Consultation

Summary of consultation outcome and methodology

7.1 The Ministry of Justice engages regularly with QLRs, legal professionals, legal professional bodies, and the Family Procedure Rule Committee to understand implementation challenges with the QLR scheme. This engagement includes surveys, focus groups, and regular meetings. Stakeholders frequently raised low renumeration for work undertaken as a contributing factor to low uptake. Feedback from these stakeholders on QLR fees has been considered in the development of changes to the Fee Scheme Regulations.

7.2 The statutory prohibition of cross examination in person, introduced as part of a range of provisions in the Domestic Abuse Act 2021, was also part of a broader public consultation in 2018. That consultation, response and Impact Assessment are available from the GOV.UK website.[1]

8. Applicable Guidance

8.1 To reflect the changes made by this instrument, the Ministry of Justice will update the statutory guidance on the role of a QLR [2] and the guidance for claiming fees under the QLR scheme.[3] Both sets of guidance will be publicly available on GOV.UK from 31 May 2024. These will replace the previous versions which are currently available on GOV.UK.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because no, or no significant, impact on the private, voluntary, or public sectors is foreseen. A separate Impact Assessment was published for all the provisions of the Domestic Abuse Act 2021, including those which introduced the statutory prohibition of cross-examination in person and powers of the court to appoint a centrally-funded QLR in specified

[1] https://www.gov.uk/government/publications/domestic-abuse-consultation-response-and-draft-bill
[2] Qualified legal representative appointed by the Court: Statutory guidance - GOV.UK (www.gov.uk)
[3] Qualified Legal Representative: claiming guidance - GOV.UK (www.gov.uk)

circumstances. Copies of the Impact Assessment can be obtained from the Ministry of Justice, 102 Petty France, London, SW1H 9AJ, or from the GOV.UK website.[4]

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities, or voluntary bodies because they have little involvement in the QLR scheme in family and civil courts. The changes may, however, be of interest to the domestic abuse victims and advocacy charity sector because the changes are intended to encourage more QLRs to register and accept appointments, and QLRs are likely to work on cases involving domestic abuse.

9.3 The legislation does not impact small or micro businesses.

9.4 The impact on the public sector is minimal. The changes can be met within existing departmental budgets and had no additional financial impact on the public sector. The Legal Aid Agency ("LAA") is responsible for paying fees to QLRs under the Fees Regulations. LAA need to make minor administrative changes to operationalise the 10% increase to fixed fees and in respect of the new terminated appointments fee. HMCTS is responsible for administering the QLR Scheme, and judges are responsible for determining when a QLR is needed in line with the legislation and statutory guidance. The impact on both HMCTS and the judiciary is minimal, and they will just need to be aware of the changes to QLR fees.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 This legislation will be reviewed periodically, and over the next year as part of our continued consideration of the QLR scheme.

10.2 The instrument does not include a statutory review clause.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1007463/DA_Act_2021_Impact_Assessment.pdf