EXPLANATORY MEMORANDUM TO

THE CIVIL LEGAL AID (IMMIGRATION INTERVIEWS (EXCEPTIONS) AND REMUNERATION) (AMENDMENT) REGULATIONS 2022

2022 No. 1379

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. Purpose of the instrument

2.1 This instrument sets five new fees for immigration legal aid services to ensure that legal aid providers receive appropriate remuneration for their work.

2.2 This instrument removes the list of specified immigration removal centres where a legal aid provider can attend an immigration interview with their detained client as part of the Detained Asylum Cases ("DAC") scheme. It replaces the list with reference to the definition of an immigration removal centre to ensure that legal aid provision is available in all detention locations in England and Wales. It also clarifies the policy intention that legal aid providers can be paid to attend all types of immigration interviews where their client is under 18 years old.

2.3 This instrument makes minor corrections to improve clarity and ensure consistency.

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 extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

Immigration legal aid fees

6.1 The Civil Legal Aid (Remuneration) Regulations 2013 ("the Remuneration Regulations") set the fees and rates payable by the Lord Chancellor to legal aid providers who provide civil legal services for the purposes of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). This instrument amends Part 1 of Schedule 1 to the Remuneration Regulations by introducing five new fees for civil legal services.

6.2 The fees and rates set out in the Remuneration Regulations are subject to the definitions and payment schemes contained in the contracts made between the Lord

Chancellor and a legal aid provider. The relevant contract is the 2018 Standard Civil Contract ("the 2018 Contract") and the Immigration and Asylum Specification, which are publicly available at the following link: https://www.gov.uk/government/publications/standard-civil-contract-2018.

Immigration interviews

6.3 Schedule 1 of Part 1 to LASPO sets out what services can and cannot be funded through civil legal aid. Paragraph 30 provides that civil legal aid is available for applications for rights to enter and to remain in the UK in certain circumstances. Paragraph 30(3) expressly excludes the attendance of a legal aid provider at an immigration interview conducted on behalf of the Home Secretary with a view to reaching a decision on an application to enter or remain in the UK unless regulations provide otherwise.

6.4 The Civil Legal Aid (Immigration Interviews) (Exceptions) Regulations 2012 ("the Immigration Interviews Regulations") sets out the three exceptions in which a legal aid provider can attend an immigration interview with their client. The first is if their client is under 18 or is being treated as under 18 years old. The second is where an adult is detained in one of three specified immigration removal centres. The third is where an adult lacks capacity. This instrument amends the Immigration Interview Regulations by removing the list of specified immigration removal centres and replacing it with reference to the definition of immigration removal centres, and also clarifies that legal aid providers can attend all types of immigration interview where their client is under 18 years old or is being treated as under 18 years old.

Corrections to Schedule 1

6.5 Table 7 of Schedule 1 of the Remuneration Regulations sets the standard fee payable to legal aid providers who hold a 2014 or 2016 Standard Civil Contract to provide advice on welfare benefits. This instrument amends the Remuneration Regulations to provide that the standard fee in Table 7 is also payable to legal aid providers who hold the 2018 Contract and the Welfare Benefits Specification and provide advice on welfare benefits.

6.6 Minor corrections are being made to Part 2 and Part 3 of the Remuneration Regulations to ensure clarity on whether a rate is paid per hour or per item.

6.7 The relevant contract is the 2018 Contract and the Welfare Benefits Specification, which can be found at the following link: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738520/2018_Standard_Civil_Contract__Welfare_Benefits__Category_Specific_Rules__August_2018_.pdf.

7. Policy background

Immigration legal aid fees

What is being done and why?

7.1 This instrument introduces new fees payable to immigration legal aid providers who have a contract with the Lord Chancellor. The fees are set at levels to remunerate legal aid providers for the work they do under the legal aid contract. Changes to fees cannot be made without a statutory instrument.

7.2 The first set of new fees are for asylum and immigration (non-asylum) cases appealing to the First-tier Tribunal (Immigration and Asylum Chamber) ("the Tribunal") and who are using the Tribunal's online system for lodging and progressing a case. This system has been mandatory since the start of the Covid-19 pandemic unless it has been agreed by the Tribunal that it is not possible to use it.

7.3 In May 2020, the department set two new standard fees for cases using the online system, one for asylum cases and one for non-asylum cases, to reflect the additional work required by the online system. Following litigation, the department revoked those two standard fees and since October 2020 has been using the online system to pay by hourly rates as set out in Table 8(ca) of the Remuneration Regulations (with the exception of advocacy services which remained as a standard fee in Table 4(ca)). Payment by hourly rates was intended as an interim position until enough evidence was gathered to inform future standard fees. Standard fees are preferred due to the simplicity and efficiency of administration when compared to hourly rate cases, which are individually assessed.

7.4 The department has carried out a call for evidence and a survey of legal aid providers who use the online system to inform future fees policy. Sufficient evidence was gathered to propose new standard fees which were subsequently consulted on. This instrument sets four new standard fees, payable dependent on whether the case is an asylum or non-asylum case, and whether the case results in a hearing before the Tribunal. These standard fees have been reached by using the previous standard fees as a baseline and the additional case time reported to us by legal aid providers in the survey.

7.5 A further standard fee is being introduced by this instrument, which sets the payment for a new type of legal aid service contained within the Nationality and Borders Act 2022 ("NABA"). The NABA has expanded the scope of legal aid by providing advice on referral into the National Referral Mechanism, the government's system for identifying victims of modern slavery, to individuals already receiving legally-aided immigration advice. As this is a new service introduced through the NABA, no appropriate remuneration currently exists within the Remuneration Regulations, and as such, a fee needs to be set to ensure legal aid providers will be remunerated for providing this advice.

Immigration interviews

7.6 The Detained Asylum Casework (DAC) is a Home Office-led scheme which expedites individuals through the asylum process where asylum is unlikely to be granted. This instrument removes the specified list of three immigration removal centres included in the DAC scheme in which a legal provider can attend an immigration interview with their client.

7.7 It is the Government's position that because the process under DAC is an expedited process for those unlikely to be granted asylum, additional legal aid should be provided in the form of legal representative attendance at an asylum interview via the duty solicitor DAC scheme.

7.8 This instrument replaces the list of three immigration removal centres with reference to the definition of an immigration removal centre. This change will ensure that if the DAC scheme is expanded to further immigration removal centres in England and Wales, this additional legal aid provision will be available in those centres without requiring further amendments to the Immigration Interviews Regulations.

7.9 This instrument also makes a clarification in relation to interviews for individuals under 18 or who are being treated as under 18 years old. The policy intention is that a legal aid provider can attend both the screening (preliminary) interview and the substantive interview with their client. The department considers that Regulation 3 of the Immigration Interviews Regulations could be more clearly expressed to convey that policy intention.

Corrections to Schedule 1

7.10 This instrument amends Table 7 of the Remuneration Regulations to provide that the standard fee within Table 7 is payable to legal aid providers holding a 2018 Contract and delivering welfare benefits advice. Table 7 currently only refers to the previous 2014 and 2016 Standard Civil Contracts, which have been replaced by the 2018 Contract and the Welfare Benefits Specification contained within it.

7.11 It was publicly communicated during the tender process for the 2018 Contract that the standard fee in Table 7 would be payable to welfare benefit providers who were successful in obtaining the 2018 Contract, since this was the policy intention: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584854/headline-intentions.pdf.

7.12 This instrument corrects this, ensuring that legal aid providers of welfare benefits advice who hold a 2018 Contract are correctly paid the fee in Table 7.

7.13 Other minor corrections are being made to Part 2 and Part 3 of the Remuneration Regulations to ensure clarity on whether a rate is payable per item or per hour, reflecting the true position of the Remuneration Regulations.

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 There are no plans to consolidate the Remuneration Regulations or the Immigration Interviews Regulations at this time.

10. Consultation outcome

Immigration fees

10.1 A policy consultation on these immigration fees was carried out from 13 June 2022 to 5 September 2022. The consultation was targeted at current and future immigration legal aid providers and their representative bodies, who are directly affected by new legal aid fees, but responses were welcomed from any interested parties.

Standard fees for online appeals

10.2 Respondents to the consultation did not agree with the proposed new standard fees for online appeals, strongly advocating for the permanent adoption of hourly rates. Two key themes emerged as part of the findings. Firstly, respondents argued that standard fees may encourage providers to 'work within the fee' rather than to do all that is necessary for a case, suggesting that this impacts the overall quality of advice. Secondly, they also highlighted that civil legal aid standard fees and hourly rates have

not been increased since 2012 and called for an immediate rise of all fees to reflect inflation.

10.3 Despite the opposition, we remain of the view that the standard fees proposed offer a fair remuneration package for providers and are advantageous in providing certainty of payment, simplicity of administration and enable better forecasting of expenditure. The proposed changes to online appeals work are a result of extensive policy development work and utilised evidence gathered in 2021, based on actual reported data from paying these cases are hourly rates on an interim basis.

Standard fees for NRM referral

10.4 Around 70% of respondents did not agree with the consultation's proposed bolt-on fee of £75 for advice on referral into the National Referral Mechanism (NRM), with the majority arguing the fee was too low.

10.5 With the benefit of the consultation responses, we have doubled the bolt-on fee to £150, which equates to about 3 hours of advice.

10.6 The policy consultation and Government's response can be found at the following link: Immigration Legal Aid: A consultation on new fees for new services - GOV.UK (www.gov.uk).

10.7 The Legal Aid Agency will carry out the necessary contractual consultation with the Contract Consultative Bodies (the Legal Aid Practitioners' Group, the Law Society, the Advice Services Alliance and the Bar Council) in accordance with clause 13.8 of the 2018 Contract. This clause requires a consultation to be carried out for any change required to the 2018 Contract. The contractual consultation does not consider the policy change itself or opine on the merits or otherwise of the policy. The contractual consultation seeks to ensure that the intention of the new policy has been clearly translated into the rules and processes that legal aid providers must follow within their contract. As such, the contractual consultation cannot start until the policy has been finalised.

Immigration interviews

10.8 No policy consultation has been undertaken on replacing the list of immigration removal centres included in the Detained Asylum Casework scheme with a definition of an immigration removal centre or on attendance at interviews where their client is, or is being treated as, under 18. This is because there is no change to the policy intention, which remains that legal aid providers can attend an immigration interview with their detained client (or both interviews if their client is, or is being treated as, under 18), irrespective of which immigration removal centre they are detained in.

10.9 The Legal Aid Agency will not be carrying out a contractual consultation with the Contractive Consultative Bodies as no change to the 2018 Contract is required for the clarification on attendance at immigration interviews.

10.10 A full procurement exercise will need to be carried out by the Legal Aid Agency if the Detained Asylum Casework scheme is intended to be established at other immigration removal centres. The tender will be publicly available at the following link: Legal aid guidance for professionals: Tenders - detailed information - GOV.UK (www.gov.uk).

Corrections to Schedule 1

10.11 No policy consultation has been undertaken on the corrections to Schedule 1 because these are minor corrections intended to expressly show what the relevant fee is for legal aid providers of welfare benefits advice within the 2018 Contract and to clarify whether a rate is payable per hour or per item. None of these clarifications change the fees payable themselves, and legal aid providers have been paid the correct fees irrespective of these errors.

10.12 The Legal Aid Agency will not be carrying out a contractual consultation with the Contractive Consultative Bodies as no change to the 2018 Contract is required for these amendments. The Welfare Benefit Specification does not expressly specify Table 7 or any payment rates.

11. Guidance

11.1 The Legal Aid Agency will update its guidance to legal aid providers on how to claim these fees on its website as is usual practice.

12. Impact

12.1 The impact on business, charities or voluntary bodies is limited to the business and charities who hold an immigration contract and will be affected by the changes in this statutory instrument.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website. The introduction of five standard fees as well as the expansion of legal aid for immigration interviews in an increased number of IRCs is expected to cost between £2.4m-£8m per year, with our best estimate of £4.4m per year.

13. Regulating small business

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

13.2 The legislation applies to small businesses only insofar as it affects specific operational arrangements, as set out in operational guidance, of the Legal Aid Agency and providers of legal aid services.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is undertaken by the Ministry of Justice and the Legal Aid Agency, who together monitor the operation and expenditure of legal aid scheme.

15. Contact

15.1 Abi Marx at the Ministry of Justice. Telephone: 07976766336 or email: civil.legalaid@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Lizzie Checkley, Deputy Director for Legal Aid Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Bellamy KC, Parliamentary Under Secretary at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.