EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) (NO. 2) REGULATIONS 2018

2018 No. 1323

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.

2. Purpose of the instrument

2.1 This instrument amends the Advocates' Graduated Fee Scheme ("AGFS") contained in Schedule 1 of the Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435) ("the Criminal Remuneration Regulations"). On 1 April 2018, the Government implemented a reformed AGFS through the Criminal Legal Aid Remuneration (Amendment) Regulations 2018 (S.I. 2018/220). One of the main objectives of the reformed AGFS was to more fairly remunerate the work done by Crown Court defence advocates. Following concerns from advocates that the reformed scheme did not meet this objective, this instrument implements several changes to the AGFS that are designed to ensure the scheme better reflects the work done by advocates in Crown Court cases.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial 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

6.1 This instrument is made in exercise of the Lord Chancellor's powers conferred by sections 2(3) and 41(1) to (3) of Part 1 the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). Part 1 of LASPO governs the provision of legal aid. Section 2(3) allows the Lord Chancellor to make regulations about remuneration for

those providing legal services. Section 41(1) to (3) makes further provision about the exercise of powers under Part 1 to make orders, regulations, and directions. Section 16 of LASPO provides for legal aid for representation, including advocacy, for the purposes of criminal proceedings. The Criminal Remuneration Regulations make provision for payment to persons who provide representation in criminal proceedings. This instrument amends Schedule 1 of the Criminal Remuneration Regulations, the legal aid fees that are payable to advocates in proceedings in the Crown Court.

7. Policy background

What is being done and why?

7.1 The AGFS is the fee scheme through which criminal defence advocates are paid for carrying out publicly funded work in the Crown Court. This instrument amends the AGFS so that the fees paid under the scheme better reflect the work done by advocates in Crown Court cases.

7.2 These amendments seek to address several concerns about fees within the scheme following the implementation of a reformed AGFS on 1 April 2018. The scheme implemented in April was the tenth version of the AGFS since its inception or "Scheme 10".

7.3 The Government considered that Scheme 10's predecessor, known as "Scheme 9", required reform for several reasons. Scheme 9 relied too heavily on outdated proxies such as Pages of Prosecution Evidence (PPE) in determining the complexity of a case, meaning that payment no longer fully reflected the work required of Crown Court defence advocates. It was unnecessarily complicated, for both advocates and administrators alike. It was often unclear to an advocate what their fee would be at the point of taking on a case. It also did not align with the wider reforms that are transforming how our criminal courts operate.

7.4 On this basis, the design of Scheme 10 was guided by certain principles. These included, amongst other things, reducing reliance on PPE as a proxy for complexity, more fairly rewarding the work done by advocates, reducing bureaucracy, increasing cost certainty for advocates, and complementing wider system reforms.

7.5 To meet these principles, Scheme 10 implemented several structural changes to the scheme. It introduced a modernised and simplified formula for calculating fees, which greatly reduced reliance on PPE. This was supported by the introduction of a new, more sophisticated offence categorisation system, which built in relativities between offences based on their complexity. It provided for certain tasks (e.g. standard appearances and Plea and Trial Preparation Hearings ("PTPHs")) to be remunerated individually rather than being bundled together as part of the graduated fee. It also placed a greater focus on in-court advocacy in determining advocates' fees.

7.6 These changes were subject to a full public consultation. While the Government heard concerns about elements of Scheme 10 at consultation, many of which we responded to positively, respondents were generally in favour of the new structure. The Government published its consultation on a proposed Scheme 10 on 5 January 2017 and its response on 23 February 2018. Scheme 10 was implemented on 1 April 2018 through the Criminal Legal Aid Remuneration (Amendment) Regulations 2018 (S.I 2018/220).

7.7 Following the publication of the Government's response, many criminal defence advocates expressed concerns that the fees in Scheme 10 were too low to properly reflect the work done in Crown Court cases. These concerns led to some advocates refusing to accept instructions for work under Scheme 10.

7.8 Ministry of Justice officials engaged extensively with practitioners and representatives of the advocacy profession to better understand these concerns. The concerns focused in particular on the level of fees in relation to: fees in the specific offence categories of sexual offences involving children, dishonesty offences, and drugs offences; fees for work typically undertaken by junior advocates; and fees more generally, with advocates indicating they wanted to see an uplift to all fees. Having carefully considered these concerns that Scheme 10 did not achieve its objective of more fairly remunerating work done, the Government decided to launch a consultation on a proposed "Scheme 11" on 31 August 2018.

7.9 This consultation set out proposals to allocate an additional £15m to the scheme, using 2016-17 AGFS caseload and spend data as the "baseline" for the proposed changes. This means that the proposed Scheme 11 was designed to cost £15m more than actual AGFS spend in 2016-17, when applied to AGFS claims processed by the Legal Aid Agency ("LAA") in 2016-17. Through a range of fee increases, the proposed Scheme 11 was designed to address advocates' concerns about Scheme 10 and more fairly remunerate the work done by Crown Court defence advocates.

7.10 The Government proposed: fee increases focused on fees in the specific offence categories of sexual offences involving children, dishonesty offences, and drugs offences; fee increases for work typically undertaken by more junior advocates; and a 1% increase to all AGFS fees from April 2019.

7.11 Following concerns raised by respondents to elements of these proposals, which are set out in more detail below, this instrument implements a revised version of the proposals consulted upon. The instrument allocates an additional £23m to the scheme, against the "baseline" of 2016-17 caseload and spend data, which is £8m more than the scheme consulted on. This overall spend of £23m is focused on fee increases in the specific offence categories noted above, fees for work typically undertaken by more junior advocates, and includes a 1% increase to all other fees from the coming into force date of Scheme 11.

7.12 The instrument also makes some minor amendments to the Criminal Remuneration Regulations as follows: the terms "very unusual" and "factual issue" are restored to the qualifying criteria for special preparation claims; the fee payable where a guilty plea is entered at a PTPH is amended from a fixed fee to a guilty plea fee; the 20% uplift to fees for each additional defendant that the advocate represents at a hearing is extended to PTPHs and Further Case Management Hearings (FCMHs); a graduated fee, rather than a fixed fee, will be payable in cases where the defendant elects to have their case dealt with in the Crown Court, the defendant pleads guilty to one or more counts on the indictment and the prosecution offer no evidence on a remaining count, or otherwise do not proceed to trial on a remaining count.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

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 have been other changes made to the Criminal Remuneration Regulations, but there are currently no plans to consolidate these Regulations.

10. Consultation outcome

10.1 The Government consulted on the proposed Scheme 11 for six weeks, from 31 August 2018 to 12 October 2018. The Ministry of Justice received 156 responses, the majority of which were from barristers and solicitor advocates that conduct publicly funded defence work in the Crown Court. Responses were also received from representative bodies.

10.2 Whilst broadly welcoming the proposals put forward at consultation, respondents generally felt that the proposed Scheme 11 did not meet its objective of better reflecting and paying for the work done by Crown Court defence advocates. Concerns focused on: the level of fees in the proposed Scheme 11, particularly for more junior advocates; a perceived delay in implementing Scheme 11; the structure of the proposed Scheme 11; and the need to apply Scheme 11 fees to Scheme 10 cases.

10.3 Following careful consideration of these concerns, the Government made two key changes to the scheme consulted upon. First, the Government decided to spend a further £8m on the scheme against the "baseline" of 2016-17 AGFS caseload and spend data, on top of the £15m proposed at consultation, focusing this additional spending on fee increase for work typically undertaken by more junior advocates. Second, the Government decided to bring forward the proposed 1% increase to all fees from April 2019 to the coming into force date of Scheme 11, meaning that advocates will benefit from this increase to fees sooner.

10.4 With regards to concerns about the structure of the AGFS, the Government recognises that there is scope to further improve the way we pay Crown Court defence advocates to better reflect the work they do. However, these concerns require further assessment, including the collection of new evidence and data and we will be undertaking a wider review of criminal legal aid fee schemes that is due to begin in January 2019.

10.5 We consulted on the basis that any determination for criminal legal aid representation (a Representation Order) made after the date the new regulations come into force will be afforded the increase in fees. This is in line with the application of the previous amending regulations on AGFS that came into force on 1 April 2018. It is also long-standing practice that new criminal legal aid fee schemes only apply in cases where a Representation Order was granted after the regulations came into force. The Government remains of the view that this practice should be maintained.

10.6 Further details can be found in the consultation documentation at: https://consult.justice.gov.uk/digital-communications/amending-the-advocates-graduated-fee-scheme/

11. Guidance

11.1 The Legal Aid Agency ("LAA") will be updating the relevant guidance for advocates providing legal aid services ("Crown Court Fee Guidance") prior to the Regulations coming into force.

12. Impact

12.1 The impact on the legal aid fund varies according to the mix of work advocates undertake. For example, if there are more cases of sexual offences involving children, dishonesty offences and drugs offences, which will attract higher fees, the impact will be greater. There is no impact on charities or voluntary bodies.

12.2 The cost of the new scheme has been modelled against actual cases that the LAA processed in 2016-17 to 2017-18, using year end caseload and spend data published in September 2018. Against the "baseline" of 2016-17 AGFS caseload and spend data, this analysis shows that the new scheme would cost an estimated £23m more than the actual spend in 2016-17. Against 2017-18 AGFS caseload and spend data, the new scheme would cost an estimated £15m more than the actual spend in 2017-18. Therefore, we expect to see an increase in total expenditure on the legal aid fund. However, the steady state cost of the scheme is unknown because scheme spend is highly dependent upon case mix and volumes in a given year. Given this, future expenditure could be higher or lower depending on case mix and volumes in the Crown Court.

12.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 Legal aid is out of scope of the regulatory agenda. It is excluded by Section 22(4)(c) of the Small Business Enterprise and Employment Act 2015 on the grounds that it relates to 'the giving of grants or other financial assistance by or on behalf of a public authority'. The measure does not require clearance from the Reducing Regulation Committee or Regulatory Policy Committee.

14. Monitoring & review

14.1 The Ministry of Justice will proactively monitor the impact of the scheme, in terms of costs, and behavioural changes, from the point of implementation. However, and as detailed in the consultation response, the Government intends to commence a review of criminal legal aid fee schemes in January 2019 which will include consideration of the AGFS. Given the length of criminal proceedings, and the time lag of any changes to work their way through the system, we expect no impacts on billing data that we can robustly assess for at least 18 months from the point of implementation. However, the Ministry of Justice will proactively monitor trends and feedback from users throughout this period to determine how this reform is working in practice and will consider this as part of the wider review of criminal legal aid.

15. Contact

15.1 John Foster at the Ministry of Justice, telephone 020 3334 4334, email: John.Foster@justice.gov.uk can be contacted with any queries regarding the instrument.

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

15.3 Lucy Frazer QC MP, Parliamentary Under Secretary of State at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.