EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) (NO. 2) REGULATIONS 2023

2023 No. 366

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 The purpose of this instrument is to introduce an additional fixed legal aid fee to the Advocates' Graduated Fee Scheme to enhance remuneration for additional preparation beyond the expected norm. The instrument provides for a single fixed fee per case to be payable to the trial advocate for preparation in all cracked trials and trials.

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 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 the Legal Aid, Sentencing and Punishment of Offenders Act 2013 ("LASPO").

6.1 Section 2(3) LASPO authorises the Lord Chancellor to make provision in regulations in respect of the remuneration of practitioners supplying publicly-funded criminal defence services. These provisions are set out in the Criminal Legal Aid (Remuneration) Regulations 2013.

7. Policy background

What is being done and why?

7.1 The new fee implemented by this instrument is part of the overall response to the Criminal Legal Aid Independent Review (CLAIR).

7.2 The new fixed fee will remunerate special (where the advocate is required to conduct an activity which goes beyond the usual preparatory workload of a case) and wasted

(where the advocate has committed time in good faith to preparation but is then required to return the brief for reasons beyond their control) preparation. This is in recognition of both the work on preparation for ineffective trials and the increase of the scope and volume of written and audio-visual material work requirements. Currently advocates can be paid for special and wasted work in particular circumstances and this fee expands the categories of work covered and includes consideration of digital, video, audio-visual material and written work. The Government has committed to reviewing the implementation of this fee, commencing in July 2023.

7.3 Regulation 2 of these Regulations inserts paragraph 18A after paragraph 18 of Schedule 1 of the 2013 Regulations to provide for enhanced remuneration for additional preparation. It provides for a fee of £62 plus VAT per case payable to the trial advocate in respect of all such preparation.

7.4 These Regulations also clarify that, for the purposes of identifying the "trial advocate" in paragraph 26(4A) (payment of fees to trial advocate) that "trial" excludes any cross-examination or re-examination to which paragraph 13A(3)(b) of Schedule 1 (fee for video recorded cross-examination or re-examination) applies.

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 None.

10. Consultation outcome

10.1 On 30 November 2022 the Government published its full response to the Criminal Legal Aid Independent Review.

10.2 Following further discussions with stakeholders, and as part of the overall response to the consultation, this instrument introduces an additional fee for advocates for additional preparation.

10.3 We received a total of 203 responses, mainly from solicitors, advocates and representative bodies. Overall respondents welcomed an increase in fees and although many felt the increase was insufficient, they felt it should come into force as quickly as possible.

11. Guidance

11.1 The Legal Aid Agency will update its existing published guidance to reflect the changes brought in by this statutory instrument. The guidance is used by both providers and Legal Aid Agency caseworkers.

12. Impact

12.1 The impact on business, charities or voluntary bodies is an increase in criminal legal aid fees for advocates undertaking additional preparation.

12.2 There is no significant impact on the public sector.

12.3 An Impact Assessment is submitted with this memorandum and is 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 Reducing Regulation Committee or Regulatory Policy Committee clearance.

14. Monitoring & review

14.1 The operation of, and expenditure on, the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency.

15. Contact

15.1 Elliot Miller at the Ministry of Justice Telephone: 07469 579048 or email: elliot.miller@justice.gov.uk can be contacted with any queries regarding the instrument.

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

15.3 Minister Freer at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.