EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) (NO. 4) REGULATIONS 2023

2023 No. 1140

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 increase the fixed legal aid fee within the Advocates' Graduated Fee Scheme to enhance remuneration for defence advocacy in cases where the Court has issued a special measures direction provided for by section 28 of the Youth Justice and Criminal Evidence Act ("YJCEA") 1999 in respect of pre-recorded cross-examination or re-examination of vulnerable witnesses. The instrument increases the fixed fee per case to £1,000 to be payable to the trial advocate for all such pre-recorded cross-examinations or re-examinations.

2.2 The instrument also increases the fixed fee for police station advice and assistance in the Justice Scheme of Llanelli to £204.63.

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

6.2 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, which sets out the details for remuneration of advocates in the Crown Court at Schedule 1, and for police station advice and assistance at Schedule 4.

6.3 Section 28 of the YJCEA 1999 provides for a Court to issue a special measures direction for a video recording of a vulnerable witness' cross-examination (and any re-examination) to be made and admitted as evidence.

7. Policy background

What is being done and why?

7.1 Section 28 YJCEA 1999 provides for vulnerable and intimidated victims and witnesses to be cross-examined or re-examined via pre-recorded video, supporting them to give their best evidence. The new fixed fee for all video recorded cross-examination (including re-examination) which is admissible by virtue of a special measures direction, in cases in which a special measures direction is given ("section 28 cases") of £670 plus VAT was agreed as part of the overall response to the Criminal Legal Aid Independent Review (CLAIR).

7.2 The new fee for video recorded cross-examination (including re-examination) in section 28 cases was part of a wider package of proposals announced by the government on 30th September 2022 as part of the response to CLAIR. The Government committed to reviewing the fee and having concluded that review the Lord Chancellor is increasing the fee to £1,000 plus VAT. As set out in the Impact Assessment (IA)[1] published in January 2023 there is a high degree of uncertainty regarding the expected number of section 28 cases per annum in steady state. The IA shows that it has been estimated that in steady state the number of section 28 cases could range from 2,200 to 4,600 per year with a central estimate of 3,000 per year. Therefore, this increase in section 28 fee to £1,000 (excluding VAT) is estimated to take the total cost to between £2.6m to £5.5m including VAT per year in steady state, with a central estimate of expected spend of £3.6m including VAT.

7.3 The Government has committed to consult on increasing police station advice and assistance fees by £16m per annum later this year. Ahead of that, Dyfed-Powys Police have closed the custody centre in Amman Valley Justice Scheme and moved all cases to the Llanelli Justice Scheme. This has had an impact on providers from the Amman Valley as the fixed police station fee for Llanelli is £159.51 (excluding VAT), which is lower than the Amman Valley fixed fee of £204.63 (excluding VAT). In 2022-23 there were 1,542 police station attendances in Amman Valley and 328 in Llanelli. Therefore, as an interim measure, ahead of the wider increase in fees, the Lord Chancellor is increasing fees for Llanelli police station advice to match the Amman Valley fees. This increase is expected to cost £18,000 (including VAT) per annum.

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.

[1] The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2023 - Impact Assessment (legislation.gov.uk)

10. Consultation outcome

10.1 The section 28 fee increase follows engagement with the members of the Criminal Legal Aid Advisory Board established by the Lord Chancellor and a sub-group of that Board.

10.2 The change to the Llanelli fixed police station fee follows engagement with the Law Society and providers in the local area.

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 advocacy in section 28 cases and for police station advice and assistance in Llanelli is set out in section 7 above.

12.2 There is no significant impact on the public sector.

12.3 An Impact Assessment has not been prepared.

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 James MacMillan at the Ministry of Justice Telephone: 07542 945 596 or email: james.macmillan2@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 Minister Argar at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.