EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) REGULATIONS 2017

2017 No. 1019

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 Litigators' Graduated Fee Scheme ("LGFS") contained in Schedule 2 of the Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435) ("the Criminal Remuneration Regulations") to reduce the "PPE (Pages of Prosecution Evidence) cut-off figure" from 10,000 to 6,000 pages. The LGFS provides for a graduated fee to be payable for litigation services following a determination under section 16 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") that an individual involved in criminal proceedings in the Crown Court is eligible for legal aid. The graduated fee is based primarily on the number of pages of evidence served by the prosecution. The calculation of the graduated fee is subject to a "PPE cut-off figure" and where PPE exceeds the PPE cut-off figure evidence above the threshold is remunerated as "special preparation" on the basis of hourly rates, based on the time reasonably taken to consider the evidence. This instrument reduces the PPE cut-off figure from 10,000 to 6,000 in order to reduce the maximum graduated fee payable for work carried out by the litigator in Crown Court proceedings. This means that more cases will be considered under the special preparation regime, which entails greater scrutiny of the work done before payment is made.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

Other matters of interest to the House of Commons

3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The Criminal Remuneration Regulations were made under sections 2(3), 5(2) and (4), 30(2) and 41(1) to (3) of LASPO. Regulation 5 provides that claims for fees by litigators in proceedings in the Crown Court must be made and determined in accordance with the provisions of Schedule 2. Schedule 2 has been amended several times. In particular, the tables following paragraph 8 were substituted by SIs 2014/415 (first table only) and 2016/313 (both tables).

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

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

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

7.1 Remuneration for criminal litigation services in the Crown Court is made by way of "graduated fee" based on factors intended to be proxies for case complexity. The primary factor that affects the graduated fee is the number of PPE served, subject to a cut-off threshold which has the effect of capping the graduated fee. If the amount of PPE exceeds the threshold, providers may make a claim for additional payment, known as "special preparation" which will be assessed by the Legal Aid Agency ("LAA") on the basis of the time reasonably taken to consider the material in accordance with paragraph 20 of Schedule 2 of the Criminal Remuneration Regulations.

7.2 The original policy intention of using PPE as a proxy for case complexity was to reflect the fact that where more written evidence (particularly witness statements and paper exhibits) is served by the prosecution, more work has to be done by defence litigators and advocates. However, the Government was of the view that electronic evidence should be assessed differently, as its volume does not reflect complexity in the same way as paper evidence. For this reason, from 2008 to 2012, evidence served electronically was paid at hourly rates for the time reasonably taken to view the relevant material in accordance with paragraph 20 of Schedule 2 of the Criminal Remuneration Regulations.

7.3 In 2012, the regulations were amended to reflect the fact that more evidence was being served digitally. The policy intention was to ensure that electronic material that would formerly have been served on paper would count as PPE for LGFS purposes but that other electronic material would remain excluded from the definition of PPE.

7.4 However, the Costs Judge's decision in *R v Napper (Costs)* [2014] 5 Costs L.R. 947 broadened the circumstances in which electronic evidence could be paid as PPE beyond those which the policy had intended to include. Since this decision, despite caseloads falling, average costs under the LGFS have risen sharply. Between 2013-14 and 2015-16 LGFS expenditure increased from £292m to £336m (around 15%) while volumes decreased by around 2%. Between 2013-14 and 2015-16, there was a 28% increase in the number of bills submitted to the LAA with PPE between 6,000 and 9,999 and a 180% increase in those bills with PPE of 10,000 or more. This equates to a 41% increase in estimated expenditure on bills between 6,000 and 9,999 PPE and 158% increase in estimated expenditure on bills with PPE of 10,000 or more.

7.5 Rather than changing the treatment of electronic evidence within the LGFS, the Government has decided to target the small number of cases (around 2% of overall cases) that have more than 6,000 PPE. Therefore, these regulations amend the cut-off figure that gives rise to the maximum graduated fee from 10,000 to 6,000 and provide

that pages above 6,000 will be considered under the special preparation provisions. The increase in cases with 6,000 or more pages is caused in part by electronic evidence now coming within the definition of PPE, most commonly mobile phone or computer downloads in serious drugs and fraud cases. Changes in the mix and volume of cases have also affected expenditure. Applying the special preparation provisions will allow for greater scrutiny of these claims. Where there are more than 6,000 pages the LAA will still allow payment for work reasonably and actually undertaken.

Consolidation

7.6 It is not intended to consolidate the regulations at this time.

8. Consultation outcome

8.1 The Government has consulted on the changes made by this instrument, and the relevant documents can be found here:- https://www.gov.uk/government/consultations/litigators-graduated-fees-scheme-and-court-appointees The vast majority of the 1,015 respondents were solicitors undertaking criminal defence work. Responses were also received from representative bodies, other legal professionals and some members of the public. Almost all of the respondents opposed the proposals and raised concerns that a reduction in fees will damage the sustainability of the supplier base. Respondents argued that the cases targeted by these proposals were the ones that keep firms going and made up for the less profitable cases. They also said there was not a problem to be addressed as savings had been made through a reduction in volumes and that more savings are likely to be made in future. They argued that cases with more than 6,000 pages would be paid between 13% and 34% less than they were paid currently.

8.2 We believe PPE is no longer a good proxy for complexity, which is particularly acute at the high end, and we are reducing the threshold to target this small proportion of cases by applying greater scrutiny to claims. Particularly complex material can attract a higher rate for its consideration, factoring in the nature of the material and relevance to the client; and if the work is reasonably and necessarily undertaken in considering additional served material it will be paid on merit. Around half of the firms receiving payments under the LGFS will see a few of their bills affected by the proposals. The changes are important in managing the pressure on the legal aid fund as part of the Department's financial plans.

9. Guidance

9.1 Guidance has been prepared by the LAA to assist providers, and can be found here:- https://www.gov.uk/guidance/funding-and-costs-assessment-for-civil-and-crime-matters

10. Impact

10.1 The impact on business is set out in the Impact Assessments accompanying the response to consultation, and can be found here:- https://www.gov.uk/government/consultations/litigators-graduated-fees-scheme-and-court-appointees In summary, the impact is estimated to be a reduction of between approximately £26 million and approximately £36 million per year to legal aid providers. There is no impact on charities or voluntary bodies.

10.2 The impact on the public sector is a reduction in the amount of public funds paid to lawyers conducting the work covered by the changes, estimated to be between approximately £26 million and approximately £36 million per year.

11. Regulating small business

11.1 This instrument applies to small business only insofar as it affects the contractual relationship between the LAA and providers of legal aid services.

11.2 Although this instrument has an impact on business, the Ministry of Justice does not consider that any specific steps are required to minimise the impact on firms employing up to 20 people. We are seeking to return payments to pre-Napper levels, when the market was sustainable. The instrument does not impose any additional regulatory burdens on small firms.

12. Monitoring & review

12.1 The operation of, and expenditure on, the legal aid scheme is continually monitored by the Ministry of Justice and the LAA.

13. Contact

13.1 David Carter at Criminal Legal Aid, the Ministry of Justice Telephone: 07824 537252 or email: David.Carter@justice.gsi.gov.uk can answer any queries regarding the instrument.