EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) REGULATIONS 2020

2020 No. 903

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 The Advocates' Graduated Fee Scheme ("AGFS") is the fee scheme through which criminal defence advocates are paid for carrying out publicly funded work in the Crown Court and the Litigators' Graduated Fee Scheme ("LGFS") is the fee scheme through which criminal litigators are paid for carrying out public funded work in the Crown Court.

2.2 The purpose of this instrument is to amend the AGFS and the LGFS contained in Schedules 1 and 2 respectively of the Criminal Legal Aid (Remuneration) Regulations 2013 ("the Remuneration Regulations"). It also amends provisions relating to claims for fees for certain categories of work to which the Standard Crime Contract applies contained in Schedule 4 of the Remuneration Regulations. These amendments when implemented will amend provisions relating to the way in which:

- advocates and litigators are paid for work on unused material across both AGFS and LGFS;
- advocates are paid for work on paper heavy cases within AGFS;
- advocates are paid for cracked trials in the Crown Court within AGFS; and
- litigators are paid for work relating to the sending of cases to the Crown Court.

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), 41(1), (2) and (3) in Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO").

6.2 Part 1 of LASPO relates to the provision of legal aid. Section 2(3) empowers the Lord Chancellor to make regulations about remuneration for those providing services under arrangements made under LASPO. In this context we mean criminal legal aid services.

6.3 The Remuneration Regulations provide for the remuneration of litigators and advocates in respect of advice, assistance and representation made available under sections 13, 15 and 16 of LASPO (i.e. criminal legal aid).

6.4 Regulations 4, 5, 23 and 24 set out the circumstances under which a litigator or advocate can make a claim for fees under the LFGS and AGFS.

6.5 Regulation 8 sets out the circumstances where fees can be claimed for certain categories of work to which the Standard Crime Contract applies

7. Policy background

What is being done and why?

7.1 This instrument will ensure litigators and advocates will be more fairly paid for the work they do and will represent a first step towards the resumption of the wider criminal legal aid review.

7.2 At the beginning of 2019, the Ministry of Justice decided to undertake a comprehensive review into the criminal legal aid fee schemes and wider market, aiming to reform the system holistically to ensure work done was fairly remunerated, that the provider market was flexible and delivered value for money for the taxpayer and that the legal aid system supports an effective and efficient criminal justice system.

7.3 In light of pressing concerns from practitioners identified early on, it was decided to accelerate consideration of some aspects of the fee schemes. The areas of consideration would impact the AFGS and LGFS.

7.4 The areas we decided to accelerate were -

- How litigators and advocates are paid for work on unused material;
- How advocates are paid for work on paper heavy cases;
- How advocates are paid for cracked trials in the Crown Court;
- How litigators are paid for work on sending cases to the Crown Court;
- How litigators are paid for pre-charge engagement.

7.5 In February 2020, we announced that we would consult on four of the five policy proposals. For pre-charge engagement, we will formalise and consult on a proposal

for remuneration following the publication of new disclosure guidelines by the Attorney General, which were recently subject to public consultation.

7.6 Following careful consideration of all the responses to our public consultation which ran until 17th June 2020, the Government decided to proceed with the proposals as set out at consultation, except for how litigators are paid for work on sending cases to the Crown Court. For this proposal, the department decided to increase the payment from two hours' worth of work to four hours and will make payment under the magistrates' court scheme and the Legal Aid Agency (LAA) will consult on associated amendments to the Standard Crime Contract.

7.7 For unused material, paper heavy cases and cracked trials, the department decided to proceed with the policy proposals detailed in the consultation. These policy proposals were as follows –

7.8 **Unused Material (AGFS and LGFS)** – We will pay a fixed payment to litigators and advocates equivalent of 1.5 hours' work for 0-3 hours spent reviewing unused material disclosed to the defence. This will apply to all cracked trials and trials but excludes guilty pleas. For cases where more than 3 hours is spent reviewing unused material, we will make payment at hourly rates equivalent to the existing AGFS or LGFS special preparation hourly rates, subject to an assessment of those claims by the LAA.

7.9 **Paper Heavy cases (AGFS)** – Advocates will be able to claim additional payments in cases where pages of prosecution evidence (PPE) exceed a new set of page thresholds. Payments will be made at hourly rates equivalent to special preparation rates, subject to the assessment of those claims by the LAA.

7.10 **Cracked trials in the Crown Court (AGFS)** – Cracked trial fees will be expanded to all cases that crack after the first Crown Court hearing (at which a plea is entered), usually the Plea and Trial Preparation Hearing, removing the current thirds distinction from the AGFS. Also, we will increase the cracked trial basic fee from 85% to 100% of the basic fee.

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 None.

10. Consultation outcome

10.1 On the 28 February 2020, the Government consulted on its policy proposals for the accelerated package of measures amending the criminal legal aid fee schemes. The consultation was due to close on 28th March 2020, however the COVID-19 pandemic led the Ministry of Justice to pause the consultation in order to focus on measures which were able to provide immediate relief to the profession.

10.2 The consultation closed on 17th June 2020 and we received a total of 498 responses. The majority (72%) were from members of the barrister profession, while 24% were received from solicitors. We also received representations from professional representative bodies and other members of the legal profession.

10.3 Respondents were broadly in support of the proposals regarding how advocates are paid for cracked trials in the Crown Court and how litigators are paid for work on sending cases to the Crown Court, although further evidence was provided on the effort involved in this work. However, respondents broadly disagreed with our proposals with regards to how litigators and advocates are paid for work on unused material and how advocates are paid for work on paper-heavy cases due to the proposed rates and the administrative burden of making claims for payment at hourly rates.

10.4 Based on the responses received to the consultation, the Government proceeded with the proposals as set out at consultation, except for how litigators are paid for work on sending cases to the Crown Court. For this proposal, in light of the evidence provided by consultees, the Government decided to increase the payment from two hours' worth of work to four hours and will now make payment under the magistrates' court scheme.

11. Guidance

11.1 The Legal Aid Agency will set out guidance to reflect the changes brought in by this statutory instrument, ensuring the process is clear for litigators and advocates who are providing legal aid services prior to it coming into force.

12. Impact

12.1 The impact on business, charities or voluntary bodies is an increase in criminal legal aid fees. There are also some other impacts as a result of our policy proposals. Where defendants facing trial proceedings in the Crown Court are currently required to pay contributions, the amount of contributions may change. As our proposals will result in an overall increase in AGFS and LGFS spend, the total value of contributions from legal aid clients could increase. Although the data we have available is limited and as such we are unable to provide a detailed analysis on the impacts on clients, in 2018-19 only 9% of Crown Court defendants were required to pay an income contribution and in many of these cases, these contributions did not meet the full defence costs of the case and as such, the client's income contributions would not be affected by any increase in fees.

12.2 There is no 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.

12.4 For the LAA an increase in annual cost to the Legal Aid fund is expected to be £35m - £51m. This figure comprises of increased funding for advocates and litigators. We also expect additional LAA administration costs as a result of our changes, including a one-off cost of £0.5m and ongoing annual costs of £0.7m. Overall, the total ongoing cost of these measures is estimated to be £36m - £51m per annum.

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. We recognise the need for sustained and constructive dialogue with the profession to ensure the changes detailed in this document have the desired intention. As such, we will monitor the impact of this scheme immediately after implementation

15. Contact

15.1 Leonard Leslie at the Ministry of Justice (Telephone: 07889 413518 or email: Leonard.Leslie@justice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 David Parkin, Deputy Director for Civil Justice and Law Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt. Hon, Robert Buckland QC MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.