EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) REGULATIONS 2021

2021 No. 80

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 corrects two errors in relation to the payment rates of advocates and litigators for the review of unused material introduced by the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020 ("the 2020 Regulations").

2.2 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.

2.3 The 2020 Regulations amended the AGFS and the LGFS contained in Schedules 1 and 2 respectively of the Criminal Legal Aid (Remuneration) Regulations 2013 ("the Remuneration Regulations") and introduced, inter alia, provisions on remuneration for advocates and litigators for work on unused material across both AGFS and LGFS. Unfortunately, the 2020 Regulations contained two errors, which this instrument now corrects.

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)(a), (b), (2)(a) and (3)(c) 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.

7. Policy background

What is being done and why?

7.1 This instrument amends paragraph 20A(2) of Schedule 2 to the Remuneration Regulations to correct an error and set payment for the review of unused material (where such review takes less than 3 hours) at all trials and cracked trials at a fixed payment of £64.68. In error, the 2020 Regulations introduced six different rates, which were intended only to apply in claims for more than three hours work on unused material.

7.2 This instrument also amends paragraph 17A(2) of Schedule 1 to the Remuneration Regulations to correct a typographical error in the basic consideration fee for work on unused material payable to a "Junior alone or led Junior" which should have been £59.09, rather than £59.01.

7.3 The policy intention and the rates for the fees were described in the consultation document and the response to consultation[1] that preceded the making of the 2020 Regulations. We stated that there would be a new fee to remunerate solicitors for between 0-3 hours' work reviewing unused material, and the payment would also apply where there is no review of unused material. The intended fee was based on the London Grade B rate of £43.12 per hour. As we said in the response to consultation, we consider that the London Solicitor rate was an appropriate mid-range rate to add to all LGFS fees (as LGFS fees generally do not differentiate between levels of seniority as they do in the AGFS).

7.4 Following the laying of the 2020 Regulations the Joint Committee on Statutory Instruments ("the Committee") reported the SI for elucidation[2] in relation to the fact that the instrument provided that the fixed basic consideration fee (for the review of unused material under 3 hours) was to be paid "whether or not such consideration actually occurred".

7.5 In a memorandum from the Ministry of Justice to the Committee, the Ministry of Justice responded to the Committee that the LGFS operates on the basis of proxies for complexity (e.g. offence type, trial length and volume of evidence) to produce an

[1] https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/

[2] https://committees.parliament.uk/publications/2894/documents/28024/default

overall graduated fee for a case. The schemes operate on a "swings and roundabouts" principle meaning the fees paid are an average for a case of a particular type, whether or not the actual work involved was less than or more than the average. In the majority of cases (65%), reviewing unused material is a necessary part of case preparation that has not necessarily been adequately captured by the graduated fee schemes in the past. For this reason, we included this fixed payment for unused material in cases on indictment in the Crown Court where a graduated fee is payable.

7.6 The fixed payment also allows for the minority of cases where there has been no consideration of unused material because of the swings and roundabouts principle, set out above, and the fact that the majority of cases have at least some unused material. The fixed payment is also intended to avoid the necessity for small claims, which would require practitioners to provide evidence of up to 3 hours work, which would be disproportionate for both practitioners and the Legal Aid Agency.

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.

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 There are some impacts as a result of our policy proposals, which were set out in the impact assessment and equalities statement that accompanied the consultation document and the response to consultation, which took into account the fees we are introducing. 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.

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

15.3 Alex Chalk MP, Legal Aid Minister, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.