EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (REMUNERATION ETC.) (AMENDMENT) (No. 2) REGULATIONS 2015

2015 No. 2049

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.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 Part 3 of the Criminal Legal Aid (Remuneration etc.) (Amendment) Regulations 2015 (S.I. 2015/1369) ("the Amending Regulations") introduces new fixed fees for legal aid litigators in certain Crown Court cases, and for legal aid providers providing advice and assistance at the police station and magistrates' court representation, together with consequential amendments and clarifications, with effect from 11th January 2016. This instrument delays the coming into force of those amendments until 1st April 2016. It also reinstates reference to the 2010 Standard Crime Contract in relevant legal aid legislation and makes a correction to the Amending Regulations to ensure that advice and assistance provided by a Duty Lawyer at court is exempt from the means test.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument corrects an error in the Amending Regulations. Regulation 7 of the Amending Regulations amends regulation 5(2) of the Criminal Legal Aid (Financial Resources) Regulations 2013 (S.I. 2013/471), which defines "relevant advice and assistance" for purposes of the exemption by regulation 5(1) from the means test that otherwise applies to the determination of eligibility for advice and assistance for criminal proceedings. "Relevant advice and assistance" for purposes of regulation 5(1) is that which is provided for criminal proceedings under section 15 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the Act") and includes, among other things, advice and assistance provided by a solicitor on duty at court (i.e. the solicitor who provides advice and assistance to eligible individuals who appear at court without representation).

3.2 The amendments made by regulation 7 of the Amending Regulations purport to exempt from the means test advice and assistance for individuals in custody provided under section 13 of the Act. That is unnecessary, however, as section 13 of the Act makes no provision for means testing individuals in custody. Therefore, Regulation 4 of this instrument substitutes regulation 7 of the Amending Regulations to achieve the intended result: the exemption from the means test of advice and assistance for criminal proceedings provided under section 15 of the Act by a lawyer on duty at court. As regulation 7 of the Amending Regulations has not yet come into force, no-one has been affected by the error.

Other matters of interest to the House of Commons

3.3 As this instrument is subject to the negative 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 Part 1 of the Act governs the provision of legal aid. Sections 13 to 15 of the Act provide for advice, assistance and representation to individuals in custody or involved in criminal proceedings (criminal legal aid). The Criminal Legal Aid (Remuneration) Regulations (S.I. 2013/435) govern the fees paid for the provision of criminal legal aid. Part 3 of the Amending Regulations amends Schedules 2 and 4 to those Regulations to introduce new fixed fee schemes. Part 3 also makes amendments to the Criminal Legal Aid (Remuneration) Regulations, Criminal Legal Aid (General) Regulations (S.I. 2013/9), Civil Legal Aid (Remuneration) Regulations (S.I. 2013/422) and the Criminal Legal Aid (Financial Resources) Regulations (S.I. 2013/471) consequential on the introduction of new contracts governing the provision of criminal legal aid.

4.2 This instrument amends the Amending Regulations to delay commencement of Part 3 until 1 April 2016 and apply the amendments made by that Part to determinations made on or after that date. It also amends the consequential amendments made by Part 3 to the references to contracts in the legislation referred to above to retain reference to the 2010 Standard Crime Contract. Finally, it substitutes the amendment of the Criminal Legal Aid (Financial Resources) Regulations 2013 by regulation 7 of the Amending Regulations, as addressed in section 3 above (and retains reference to the 2010 Standard Crime Contract in the Financial Resources Regulations as well).

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 This instrument applies to 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 Part 3 of the Amending Regulations introduces fixed fees for litigators in certain Crown Court cases, and for legal aid providers undertaking police station and magistrates' court work, together with consequential amendments and clarifications, with effect from 11th January 2016. The current remuneration mechanism for criminal legal aid services is overly complex and administratively burdensome and the Government wanted to introduce fixed fees as far as is reasonably practicable.

7.2 This instrument delays the coming into force of those amendments until 1 April 2016. Currently, litigators provide criminal legal aid under the 2010 Standard Crime Contract ("the 2010 Contract"). This is due to be replaced by two new contracts, the 2015 Duty Provider Contract and the 2015 Own Client Contract ("the 2015

Contracts"). The Legal Aid Agency undertook a tender process for the contract covering duty work following the final decision to tender for a limited number of contracts as set out in Transforming Legal Aid: Crime Duty Contracts Consultation Response. The 2015 Contracts were due to commence from 11 January 2016. This process is currently subject to legal challenge, as a result of which injunctions are in place that prevent commencement of the duty contract in a number of procurement areas. The Government has therefore taken the difficult but necessary decision to delay the start of the new contracts until 1 April 2016. As a result, the 2010 Contract will continue to govern the provision of criminal legal aid. As the new fees schemes were intended to coincide with the new contracts, we have therefore decided to delay implementation of the new fee schemes until 1 April 2016.

7.3 Because the legislation makes express reference to the specific contracts, we need to update the references across the legislation to ensure that it continues to apply to all relevant contracts as necessary. The Amending Regulations had substituted the references to the 2010 Contract with reference to the 2015 Contracts. This instrument makes consequential amendments to retain the reference to the 2010 Contract (in addition to the 2015 Contracts), which will continue to apply until the new contracts take effect in April 2016.

7.4 Finally, it makes a correction to the Amending Regulations, to correct an amendment made to regulation 5 of the Criminal Legal Aid (Financial Resources) Regulations 2013, in relation to the exemption from means testing for advice and assistance for criminal proceedings. The intention of regulation 5 of those regulations is to exempt from means testing advice and assistance provided by a court duty lawyer in criminal proceedings under section 15 of the Act (among other things). The amendment made by regulation 7 of the Amending Regulations purports to exempt advice and assistance provided to an individual held in custody at a police station under section 13 of the Act instead. This is already achieved by section 13 itself, however (which makes no provision for assessing financial resources when determining eligibility for legal aid).

Consolidation

7.5 The regulations are not being consolidated.

8. Consultation outcome

8.1 The new fixed fees introduced by Part 3 of the Amending Regulations formed part of the public consultation '*Transforming Legal Aid: Next Steps'*, which was published on 5th September 2013 and closed on 1st November 2013. This consultation followed on from an earlier consultation, '*Transforming legal aid: delivering a more credible and efficient system',* which ran from 9 April 2013 to 4 June 2013. A detailed Government response to the further consultation exercise is available at:

https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps

8.2 The Government consulted further on the number of duty provider contracts to offer in autumn 2014 in *Transforming Legal Aid: Crime duty contracts*. The Government response was published on 27 November 2014.

8.3 We have not consulted on the delay to the introduction of the new fee schemes achieved by this instrument, as it is the result of litigation rather than a change in policy.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument. A programme of training and guidance for legal aid practitioners is being prepared by the Legal Aid Agency to support the transition to the new arrangements.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies other than where it affects a contractual relationship between the Legal Aid Agency and providers of legal aid services, which has been assessed as part of the above Impact Assessments.

10.2 There is no impact on the public sector arising from this instrument beyond those accounted for in the Impact Assessments.

10.3 The impacts of the legal aid reforms are set out in a series of Impact Assessments, which were updated following publication of the previous administration's response to the consultation *Transforming Legal Aid: Next Steps*. These impact assessments are available at:

https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps.

As set out in paragraph 40 of the Impact Assessment entitled *Transforming Legal Aid – Next Steps: Government Response, Procurement of Criminal Legal Aid Services – Impact Assessment*, the extent to which there would be a financial impact (positive or negative) on providers from introducing a fixed fee scheme will depend entirely on the case mix each provider undertakes. However the introduction of two fees for police station work (one for London, and one for outside London) and fixed fees which vary by case type, e.g. trial or guilty plea, for both magistrates' court work and Crown Court litigation should mitigate the extent of impact by minimising the gains or losses in revenue compared to the current scheme whilst still simplifying the system. The principle behind the 2015 Contracts is to provide a sufficiently large and varied case mix to minimise variation in revenue change.

10.4 Therefore, the impact of the delay in introducing the new schemes will also depend on the case mix of each provider.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses only insofar as it affects the contractual relationship between the Legal Aid Agency and providers of legal aid services. No specific action is proposed to minimise regulatory burdens on small businesses, however, as the instrument does not impose any new regulatory burdens on small businesses.

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 Legal Aid Agency. A review will be undertaken by an individual independent of Government to assess the impact of the litigators' fee

reduction and the dual contracting model on the access to justice and the quality of litigation and advocacy provision.

13. Contact

13.1 David Carter at the Ministry of Justice Telephone: 020 3334 4211 or email: David.Carter@justice.gsi.gov.uk can answer any queries regarding the instrument.