

EXPLANATORY MEMORANDUM TO
THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) (No. 2)
REGULATIONS 2014

2014 No. 2422

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 Criminal Legal Aid (Remuneration) (Amendment) (No.2) Regulations 2014 make amendments to the Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435) (“the 2013 Regulations”) to introduce interim payment of fees for litigators in proceedings in the Crown Court and provide for payment to both litigators and advocates under the graduated fee scheme (instead of a fixed fee) when a trial is a cracked trial because the prosecution offer no evidence on all counts against a defendant and the judge directs a verdict of not guilty.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 These regulations are made under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”). This is one of several statutory instruments which implement the legal aid reforms set out in the Government’s response to the *Transforming Legal Aid: Next Steps* consultation, published on 27th February 2014. The 2013 Regulations, which came into force on 1st April 2013, make provision for the remuneration of advice, assistance and representation made available under sections 13, 15 and 16 of LASPO. These regulations amend the provision of remuneration to litigators and advocates in respect of representation for criminal proceedings pursuant to a determination under section 16 LASPO that an individual qualifies for legal aid.

5. Territorial Extent and Application

5.1 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

7.1 Following the reforms set out in LASPO, the Government consulted on a package of proposals to continue to bear down on the cost of legal aid, to ensure that the Government is getting the best deal for the taxpayer and that the system commands public confidence.

7.2 As part of the response to the *Transforming Legal Aid: Next Steps* consultation we identified a number of measures to cushion the impact of the fee reductions, including by speeding up payments and improving cashflow. This instrument implements two of those measures.

7.3 The Government are introducing interim payments for litigators in proceedings in the Crown Court. A litigator may make a claim for an interim payment at one or both of two stages in proceedings. The first is where a not guilty plea is entered following a plea and case management hearing, or alternatively, where a retrial is ordered and representation has been transferred to a new litigator. The second stage is where a trial has commenced that is expected to last for 10 or more days. In all cases the claim must be made before the final claim for payment.

7.4 Any payment already made under hardship provisions will be deducted from a subsequent interim payment. Similarly the rates of the interim payments themselves are also set at the minimum that might be payable however the case concludes. These two provisions ensure that the Legal Aid Agency does not over-pay providers (necessitating repayment at the conclusion of the case).

7.5 The interim payment at the plea and case management hearing (PCMH) stage of proceedings is currently set at 75% of the cracked trial rate plus any uplift for multiple defendants. Where a retrial is ordered and representation transferred to a new litigator, the payment is currently set at 50% of the cracked trial rate plus any uplift for multiple defendants. The determination of the cracked trial rate will depend on the number of pages of prosecution evidence served on the court and the class of offence.

7.6 At the trial stage, the payment is the sum of either the basic fee set out in the table following paragraph 7(2) of Schedule 2 to the 2013 Regulations or the final fee calculated in accordance with paragraph 9(2) of that Schedule and any uplift for multiple defendants, less any previous interim payment. The trial is presumed to last one day (which determines the "PPE Cut-off" for each offence under paragraph 5(2) of Schedule 2, which in turn determines whether paragraph 7(2) or 9(2) applies). Thus the number of pages of prosecution evidence served and the class of offence are relevant to the calculation of the trial stage payment as well.

7.7 Second, in certain elected either way cases we are restoring the graduated cracked trial fees for both litigators and advocates. In elected either way cases which crack because the prosecution offers no evidence on all counts against a defendant and the judge directs a not guilty verdict, the graduated fee will apply rather than the fixed fee currently payable. This is to ensure that defence advocates do not lose out when the prosecution decides not to proceed.

8. Consultation outcome

8.1 *Transforming Legal Aid: Next Steps*, published in September 2013, set out a number of legal aid reforms and also contained a further consultation in relation to the procurement of criminal legal aid services and advocacy fee reforms. The Government's response to the further consultation *Transforming Legal Aid: Next Steps* was published on 27th February 2014 and set out the decisions taken in relation to the procurement of criminal legal aid services and advocacy fee reforms.

8.2 The consultation was published on 5th September 2013 and closed on 1st November 2013. Around 3,000 responses were received from representative bodies, practitioner and other organisations, individual members of the judiciary, members of the House of Commons and Lords, individual solicitors and barristers and members of the public. Respondents did not generally support a reduction in fees. Interim payments and fees in elected either way cases were matters raised by respondents. The policy on interim payments for litigators was worked up in consultation with the Law Society.

8.3 A detailed Government response to the further consultation exercise is available at https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view.

8.4 We have not consulted separately on the Criminal Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2014.

9. Guidance

9.1 Guidance is not being prepared on the changes made by this instrument. A programme of training and guidance for legal aid practitioners has been devised by the Legal Aid Agency to support the transition to the new arrangements. Guidance will also be updated for LAA staff.

10. Impact

10.1 The impacts of the Government's programme of legal aid reforms are set out in a series of Impact Assessments, which were updated following publication of the Government response to *Transforming Legal Aid: Next Steps*. These impact assessments are available at https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view. An Impact Assessment has not been prepared specifically for this instrument.

10.2 We do not anticipate a significant impact on the Legal Aid Agency, individuals or legal aid providers as a result of this instrument. However, there will be a positive impact for legal aid litigators who will be eligible for earlier payments of fees for work done pursuant to a section 16 determination to improve cashflow. There will also be a positive impact for both litigators and advocates who will receive higher payments for cracked trials in elected either-way cases where the prosecution offers no evidence on all counts.

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

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

11. Regulation of small businesses

11.1 The legislation applies to small business only insofar as it affects the contractual relationship between the Legal Aid Agency and legal aid practitioners or the payment arrangements for advocates.

11.2 The Ministry of Justice has not taken any specific steps to minimise the impact of the requirements on firms employing up to 20 people.

11.3 The instrument does not impose any additional regulatory burdens on small firms.

12. Monitoring and 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. The Ministry of Justice will conduct a post-implementation review of LASPO between three to five years after implementation. This review will also consider the operation of the secondary legislation, including this SI.

13. Contact

James MacMillan at the Ministry of Justice (Tel: 020 3334 4258 or email: james.macmillan2@justice.gsi.gov.uk) can answer any queries regarding the instrument.