

EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (AMENDMENT) REGULATIONS 2017

2017 No. 1319

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 Criminal Legal Aid (Amendment) Regulations 2017 extend criminal legal aid to four specific categories of prison law work, namely:

- Pre-tariff¹ review hearings and other advice cases for life and other indeterminate sentence prisoners before the Parole Board – in such cases, the Parole Board cannot direct the prisoner's release but advises the Secretary of State on the suitability of a prisoner's move to open conditions (in a 'pre-tariff review case') or a return back to open conditions (in an 'advice case');
- Category A prisoner reviews – Category A is reserved for those prisoners for whom the very highest conditions of security are required; subject to their progression, the review may result in the prisoner being moved to a less restrictive security category;
- Directions as to a prisoner's placement in a close supervision centre of a prison – these units deal with prisoners who have demonstrated, or have evidenced a propensity to demonstrate, particularly violent or disruptive behaviour; and
- Directions as to a prisoner's placement in a separation centre within a prison – these centres are part of the Government's wider strategy to combat the spread of extremism in prisons.

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 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 instrument extends the scope of criminal legal aid funding for certain categories of prison law work by amending regulation 12 of the Criminal Legal Aid (General) Regulations 2013 (S.I.2013/No.9) which prescribes the conditions which must be met

¹ The tariff is the minimum length of time that the prisoner is ordered to stay in prison before they can be considered for release.

before advice and assistance for criminal proceedings may be available to an individual under section 15 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

- 4.2 This instrument also makes consequential amendments to the Criminal Legal Aid (Financial Resources) regulations 2013 (S.I.2013/No.471) and to the Criminal Legal Aid (Remuneration) Regulations 2013 (S.I.2013/No.435). These changes ensure, respectively, that applications for advice and assistance in respect of prison law work can be means tested appropriately and that remuneration arrangements for providers are extended to the additional categories of prison law work covered by this instrument.

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 In December 2013, former Ministers implemented changes which narrowed the scope of criminal legal aid for prison law categories of work. These changes were subsequently challenged by way of judicial review.
- 7.2 In its judgment of 10 April 2017, the Court of Appeal² concluded that in the absence of legal aid or other suitable safeguards to allow the prisoner to participate effectively, there was an unacceptable risk of unfair decision-making in relation to three categories of prison law:
- Pre-tariff review hearings and other advice cases involving life and other indeterminate sentence prisoners appearing before the Parole Board where the Board does not have the power to direct release but advises the Secretary of State on whether the prisoner is suitable for a move or return to open conditions;
 - Category A prisoner reviews;
 - Directions as to a prisoner's placement in a close supervision centre of a prison.
- 7.3 The Lord Chancellor has decided to address the concerns highlighted by the Court through reinstating the scope of criminal legal aid for the three categories of prison law affected. As part of the amending regulations, the Lord Chancellor has also decided to make criminal legal aid funding available for advice and assistance regarding directions as to a prisoner's placement in a separation centre within a prison. Given the strong parallels between the referral and review arrangements which

² [2017] EWCA Civ 244

apply to both close supervision centres and separation centres, the Lord Chancellor's decision recognises that similar safeguards should be in place.

Consolidation

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

8. Consultation outcome

8.1 These regulations are a direct response to the Court of Appeal judgment. They extend provision of legal aid, including for comparable separation centre directions, and, as a result, it was considered that no consultation was necessary.

9. Guidance

9.1 The Director will amend separate operational guidance to caseworkers and legal aid providers to reflect the changes, which will be found at the following website in due course.

9.2 <https://www.gov.uk/guidance/funding-and-costs-assessment-for-civil-and-crime-matters>

10. Impact

10.1 The impacts on businesses, the public sector and prisoners are set out in the Impact Assessment accompanying this statutory instrument which can be found on the gov.uk website. In summary, the expansion of prison law categories of work for which criminal legal aid funding is to be made available is estimated to lead to an increased annual spend from the legal aid fund of approximately £1.1 million.

10.2 There is no impact on charities or voluntary bodies other than where those organisations may have a contractual relationship with the Legal Aid Agency as a provider of legal aid services.

11. Regulating small business

11.1 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.

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.

13. Contact

13.1 Stephen Gascoigne at Criminal Legal Aid, the Ministry of Justice Telephone: 01562 514 666 or email: Stephen.Gascoigne@justice.gsi.gov.uk can answer any queries regarding the instrument.