

EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) REGULATIONS 2018

2018 No. 220

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 amends the Advocates' Graduated Fee Scheme ("AGFS") contained in Schedule 1 of the Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435) ("the Criminal Remuneration Regulations"). These amendments implement a reformed AGFS that: a) rewards the work done by defence advocates in Crown Court cases more accurately; b) is simpler and clearer; and c) supports other reforms to the criminal justice system such as the Better Case Management ("BCM") programme.
- 2.2 The amendments reduce reliance on Pages of Prosecution Evidence ("PPE"), served by the prosecution, as a means of calculating the work done by an advocate in a case and the fee they will be paid. The increasing use of electronic evidence and its conversion into pages means PPE is no longer an accurate method of calculating the work an advocate needs to do or how much they should be paid. The current scheme is also complicated, using a formula that makes it difficult for advocates to know how much they will be paid before they take on a case. The AGFS also needs to reflect the BCM reforms that are being implemented in the criminal justice system.

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 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 This instrument is made in exercise of the Lord Chancellor's powers conferred by sections 2(3) and (5) and 41(1) to (3) of Part 1 the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). Part 1 of LASPO governs the provision of legal aid. Section 2(3) allows the Lord Chancellor to make regulations about remuneration for those providing legal services and section 2(5) allows the Lord Chancellor to make different arrangements for the provision of legal aid in relation to different areas in England and Wales, different types of case, and different classes of person. Section 41(1) to (3) makes further provision about the exercise of powers under Part 1 to make orders, regulations, and directions. For example, it provides that

regulations may make different provision for different cases, circumstances or areas. Section 16 of LASPO provides for legal aid for representation, including advocacy, for the purposes of criminal proceedings. The Criminal Remuneration Regulations make provision for payment to persons who provide representation in criminal proceedings. This instrument amends Schedule 1 of the Criminal Remuneration Regulations in relation to claims for fees by advocates for proceedings in the Crown Court.

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 the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 The AGFS is the fee scheme through which criminal defence advocates are paid for carrying out publicly funded work in the Crown Court. This instrument reforms the scheme so that it remunerates the work done by advocates in Crown Court cases more accurately; is simpler and clearer; and supports other criminal justice system reforms.
- 7.2 The current AGFS calculates advocates' fees through a complex formula, which comprises a "graduated" fee and several "fixed" fees. The main component is the graduated fee, which uses a series of proxies to categorise the likely complexity of a case and, in turn, how much a defence advocate should be paid. These proxies include the number of prosecution witnesses and the amount of evidence served by the prosecution. One of the most important proxies is the number of PPE served. The graduated fee also includes several "bundled" payments that include, amongst other things, attendance at the first and second day of a trial, attendance at the Plea and Trial Preparation Hearing ("PTPH"), and attendance at four "standard appearances" (a standard appearance includes any appearance at a hearing which does not form part of the main hearing, and which is not provided for by a fixed fee e.g. preliminary hearing, mention, pre-trial review). These bundled payments are paid regardless of whether they occur in a case or not.
- 7.3 The current AGFS was last subject to major change in 2007. The Government considers it requires reform for several reasons. First, when calculating the work done by an advocate in a case and their subsequent fee, the current scheme does not reflect changes to the way that evidence is served. Electronic evidence, including video footage, and mobile phone and hard-drive data, is increasingly served by the prosecution. Under the current AGFS, some of this electronic material is converted into PPE so that it can be counted. The Government considers this does not reflect the work done by advocates. The Government believes that other factors, such as the type of offence and the number of trial days, afford a better way of capturing the complexity of a case and the work done by an advocate.

- 7.4 Secondly, the Government considers that the current AGFS is unnecessarily complicated, for both advocates and administrators alike. It is often unclear to an advocate how much they will be paid, when they are taking on a new case.
- 7.5 Thirdly, the Government believes that the reformed AGFS is needed to complement reforms of the BCM programme. These reforms follow Sir Brian Leveson's recommendations in his *Review of Efficiency in Criminal Proceedings*. They are transforming the way our criminal courts operate through improved case management procedures and a reduction in the number of hearings. The AGFS must be consistent with and, where appropriate, support these reforms.
- 7.6 This instrument makes a number of changes to the AGFS. It dispenses with the number of witnesses, and reduces reliance on PPE, when calculating the complexity of a case and the fee that an advocate is paid. Instead payment is based on a more detailed categorisation of the offence that the defendant is charged with. Under the current scheme, there are eleven offence categories. The reformed AGFS has forty-eight. The categories reflect the average complexity and amount of work required in a typical case. The new offence categories will therefore ensure payment is for work done.
- 7.7 This instrument increases the weight given to the amount of time spent by an advocate performing their duties, when determining the fee they will be paid. This will further ensure more accurate payment for work done.
- 7.8 This instrument also provides that certain tasks (e.g. standard appearances, PTPHs) are paid for individually. These were bundled together as part of the graduated fee. A smaller bundled fee is consistent with BCM reforms. As BCM reduces the number of unnecessary hearings, a fee scheme based on an average number of hearings per case would no longer be a reliable reflection of work done.
- 7.9 The reformed scheme will likely be of interest to legal professionals only, and of particular interest to criminal barristers. In 2016-17, 82% of fees paid under the AGFS went to self-employed advocates (generally barristers), while 18% went to employed advocates (generally solicitor advocates). More fees are paid to self-employed advocates because they undertake a higher volume of, and more complex, cases.

Consolidation

- 7.10 There have been other changes made to the Criminal Remuneration Regulations, but there are currently no plans to consolidate these Regulations.

8. Consultation outcome

- 8.1 The Government consulted on proposals to reform the AGFS for eight weeks, from 5 January 2017 to 2 March 2017. The Ministry of Justice received 408 responses, the vast majority of which were from barristers and solicitor advocates that conduct publicly funded defence work in the Crown Court. Responses were also received from representative bodies and other legal professionals.
- 8.2 43% to 50% of respondents agreed that the new categorisation of offences, which forms the foundation of the new AGFS, should be introduced. There was concern amongst consultees about the potential impact of the proposed scheme on junior advocates. Respondents believed that some of the proposed reductions to fees for less complex work would have a negative impact on junior advocates. Some respondents, including the Bar Council, also raised a concern that the consultation proposals were

designed to be cost neutral against 2014-15 AGFS data and that costs had increased since that time. These respondents felt using more recent data would allow the concerns about junior advocates to be addressed. The new AGFS scheme was adjusted in response to these concerns as set out below.

- 8.3 First, while the consultation proposals were designed to be cost neutral against 2014-15 AGFS data, where spend was £213m, the Government made the new scheme cost neutral against 2016-17 AGFS data. When this decision was made, the most up to date available figures, published in June 2017, showed a 2016-17 spend of £224m.
- 8.4 Second, this change allowed the Government to increase certain fees for junior advocates, while still ensuring that work done was remunerated accurately. For example, the Government increased fees for certain hearings and appearances that are often undertaken by juniors (e.g. standard appearances, PTPHs). We also recategorised certain offences to raise fees for those cases that are more likely to be conducted by junior advocates.
- 8.5 Further details can be found in the consultation documentation at: <https://consult.justice.gov.uk/digital-communications/reforming-the-advocates-graduated-fee-scheme/>

9. Guidance

- 9.1 The Legal Aid Agency will be updating the relevant guidance for advocates providing legal aid services (“Crown Court Fee Guidance”) prior to the Regulations coming into force.

10. Impact

- 10.1 The impact on the legal aid fund varies according to the mix of work advocates undertake. For example, advocates conducting more trials are likely to be paid more under the new AGFS. Advocates who take guilty pleas are likely to receive lower fees. There is no impact on charities or voluntary bodies.
- 10.2 The cost of the new scheme has been modelled against actual cases that the LAA processed between 2014-15 to 2016-17, using year end caseload data (published in June 2017). Against the most recently published spend figures, this analysis shows that the new scheme would have cost £9m more than the actual spend of £213m in 2014-15, £3m more than actual spend of £227m in 2015-16, and £2m less than actual spend of £226m in 2016-17. However, the steady state cost of the scheme is unknown because scheme spend is highly dependent upon case mix and volumes in a given year. Given this, future expenditure could be higher or lower depending on case mix and volumes in the Crown Court.
- 10.3 Also to note, under the current scheme, where a defendant has been charged with multiple offences on the indictment, advocates can bill the Legal Aid Agency for their work under any of the offences. In these cases, advocates will normally bill for the most expensive offence type. The Government expects this to continue under the new scheme. The modelling described at paragraph 10.2 above is based on an assumption that where a defendant has been charged with several offences the advocates will continue to choose the same offence for billing terms that they previously chose under the old scheme.
- 10.4 However, under the new scheme, there is a much more detailed categorisation of offences and considerable changes to the associated fees. Due to data limitations, the

Government could not ascertain in the main modelling whether or not another offence on a defendant's indictment would attract a higher fee under the new scheme. The Government could only model the offence billed to the LAA under the current scheme. This creates a risk to the cost of the scheme and additional modelling has been carried out to estimate the potential financial impact. According to this analysis, there is a likely risk that spend will be higher than estimated. The most up to date analysis of this risk estimates an additional £9m per year spend against the modelled spend figures set out at paragraph 10.2 above.

- 10.5 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

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. The Government also recognises the need for continued, constructive engagement with the professions to ensure that the new scheme is working as intended, and will therefore undertake an appraisal of the reforms following implementation. We will share our findings with representatives of the professions. Given the need to allow the changes to reach steady state before making an informed assessment, we will look to undertake this appraisal between 18 months and two years following implementation.

13. Contact

- 13.1 John Foster at the Ministry of Justice, telephone: 020 33344334 or email: John.Foster@justice.gov.uk can answer any queries regarding the instrument.