

## EXPLANATORY MEMORANDUM TO

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

2018 No. 587

#### 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 2018 extend criminal legal aid to:
- Restricted status reviews for prisoners or those held in a young offender institution – ‘restricted status’ is a security classification reserved for those prisoners or young offenders who require special management because of the serious risk they pose to the public; the review of the individual’s classification may result in a downgrading to a less restrictive regime; and
  - Category A reviews for those held in a young offender institution – Category A is a security classification reserved for those young offenders for whom the very highest conditions of security are required; subject to their progression, the review may result in the young offender being moved to a less restrictive security classification.

#### 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 The instrument extends the scope of criminal legal aid funding to restricted status reviews and Category A reviews for those held in a young offender institution by amending regulation 12 of the Criminal Legal Aid (General) Regulations 2013 (S.I.2013/9) which prescribes the conditions which must be met 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.2013/471) so that applications for advice and assistance in respect of the two additional categories of prison law work can be means tested appropriately.

## **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, changes were implemented 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 Appeal<sup>1</sup> concluded that in the absence of legal aid or other suitable safeguards to allow the prisoner to participate effectively in the decision-making process, there was an unacceptable risk of unfair decision-making in relation to three categories of prison law.
- 7.3 In response to the Court of Appeal's judgment, the Lord Chancellor made regulations<sup>2</sup> (which came into force on 21 February 2018) to reinstate criminal legal aid for:
- 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.
- 7.4 As part of these amending regulations, the Lord Chancellor 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.
- 7.5 Given the close similarities in the regimes governing the detention of Category A and restricted status prisoners and inmates, the Lord Chancellor has since decided that criminal legal aid funding should also be extended to restricted status reviews in the same way that it was extended to Category A prisoner reviews.
- 7.6 As Category A is a classification that can apply to those held in a young offender institution as well as to prisoners, this instrument also specifies that criminal legal aid is available for the review of a young offender's Category A status.

### *Consolidation*

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

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<sup>1</sup> [2017] EWCA Civ 244

<sup>2</sup> The Criminal Legal Aid (Amendment) Regulations 2017 (S.I 2017/1319)

## **8. Consultation outcome**

- 8.1 These regulations are made in response to the Court of Appeal judgment. As the changes extend the provision of criminal legal aid, it was not considered necessary to undertake a consultation exercise.

## **9. Guidance**

- 9.1 The Director of Legal Aid Casework at the Legal Aid Agency 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:  
<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 extension of criminal legal aid funding to the prison law categories of work covered by this instrument is estimated to lead to an annual increased expenditure from the legal aid fund of around £12,500.
- 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, Criminal Legal Aid Policy, the Ministry of Justice (Telephone: 01562 514 666 or email: Stephen.Gascoigne@justice.gov.uk) can answer any queries regarding the instrument.