

**EXPLANATORY MEMORANDUM TO**  
**THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) REGULATIONS**  
**2015**

**2015 No. 882**

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 Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435) (“the 2013 Regulations”) in relation to the claiming and payment of fees for conducting legally aided criminal advocacy work pursuant to a determination under section 16 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”). Currently, the advocate who is the “instructed advocate” (meaning in most cases the first advocate instructed on the case) can claim and receive most fees payable for advocacy in the case. These Regulations make the fee payable in most instances to the “trial advocate” instead (meaning the advocate who attends the main hearing and, in relation to trials, the advocate who attends on the first day).
  - 2.2 No change is being made to the fees paid; simply to the mechanics of who is able to claim and receive the fees.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None.
4. **Legislative Context**
  - 4.1 This instrument is made in exercise of the Lord Chancellor’s powers conferred by section 2(3) of LASPO. Part 1 LASPO governs the provisions of legal aid. Section 16 of LASPO provides for legal aid for representation, including advocacy, for the purposes of criminal proceedings. The 2013 Regulations make provision for payment to persons who provide representation in criminal proceedings. These Regulations amend the 2013 Regulations in relation to claims for fees by advocates for proceedings in the Crown Court.
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 Currently, under the 2013 Regulations, most payments for advocacy in criminal legal aid cases in the Crown Court are made to the “instructed advocate” in the case. Regulation 2(1) of the 2013 Regulations defines an “instructed advocate” for most cases as “the first barrister or solicitor advocate instructed in the case, who has primary responsibility for the case...”
- 7.2 Paragraph 25 of Schedule 1 to the 2013 Regulations requires the instructed advocate to notify the Court upon appointment and makes provision by which to identify who the instructed advocate is where no advocate has been notified, depending on the circumstances of the proceedings. For example, where no instructed advocate has been notified to the Court by the time of the plea and case management hearing, the advocate who attends that hearing is deemed to be the instructed advocate. Paragraph 26 provides for the total fees payable for advocacy in the case to be paid to the instructed advocate.
- 7.3 The purpose of identifying and paying a single advocate is to encourage case ownership and facilitate effective management of the case by the court. Once paid, the instructed advocate is then responsible for apportioning the fee among any other advocates who may have represented the client at a different stage of the case.
- 7.4 However, that approach creates a position where the advocate who conducts the main hearing or trial (and therefore the majority of the advocacy), identified in the 2013 Regulations as the “trial advocate”, may *not* be the advocate who is paid directly by the Legal Aid Agency. Sir Brian Leveson, in his *Review of Efficiency in Criminal Proceedings* (published in January 2015), recommended changing these arrangements in order for case ownership to work in practice.
- 7.5 This instrument changes who can claim the fees for advocacy, and to whom the fees are paid, from the “instructed advocate” to the “trial advocate” so that payment is made to the advocate who conducts the majority of the advocacy (who will then apportion the fee among any other advocates involved in the case, as currently). No change is made to the actual fees payable.
- 7.6 The changes made by this instrument will apply to the provision of legal aid pursuant to a determination made on/after Tuesday 5 May 2015.

## **8. Consultation outcome**

8.1 The Ministry of Justice has not consulted on this instrument. The Ministry of Justice consider that because of the administrative nature of the change, public consultation was not necessary. Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings* resulted from widespread input from those affected by this change. In addition, the Ministry of Justice has discussed the principle of the changes with the main representative groups (The Bar Council and The Law Society), who support the change. The change has also been discussed in various consultative groups, consisting of practising barristers and solicitors, amongst others. The item was discussed in the Crime Contracts Consultative Group on 3<sup>rd</sup> March 2015. The Group raised no objections to the proposed change.

## **9. Guidance**

9.1 As this change concerns the administrative billing and payment arrangements for advocates providing legal aid services, no guidance is necessary for the general public. 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 There will be no impact on legal aid recipients as a result of this change. There may be a small to negligible impact on the cash flow of instructed advocates (if not conducting the advocacy at the main hearing), as they will no longer be paid the fee, and an equal counter impact on the cash flow of trial advocates (those conducting advocacy at the main hearing) in that they will now be paid the fee.

10.2 There is no impact on business, charities or voluntary bodies other than to the extent referred to above.

10.3 There is no impact on the public sector arising from this instrument, other than potential efficiencies in the court system (depending on the behaviours the change drives).

## **11. Regulation of small businesses**

11.1 The legislation applies to small business only insofar as it affects the payment arrangements for advocates providing legal aid services.

11.2 Given the limited impact identified above, the Ministry of Justice has not taken any specific steps to minimise the impact of the requirement on firms employing up to 20 people.

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

## **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 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**

13.1 David Stokes at the Ministry of Justice ([david.stokes@justice.gsi.gov.uk](mailto:david.stokes@justice.gsi.gov.uk)) can answer any queries regarding the instrument.