

EXPLANATORY MEMORANDUM TO
THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) (NO. 2)
REGULATIONS 2021

2021 No. 497

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 introduces new criminal legal aid payments for pre-charge engagement undertaken by defence practitioners in line with the Attorney General's Guidelines on Disclosure¹. Schedule 4 of the Criminal Legal Aid (Remuneration) Regulations 2013 ("the Remuneration Regulations") prescribes the rates of remuneration for criminal legal aid work undertaken in accordance with the 2017 Standard Crime Contract.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 This instrument is made in exercise of the Lord Chancellor's powers conferred by sections 2(3) and 41(1)(a) and (b), and (2)(a) and (b) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO").
6.2 Part 1 of LASPO relates to the provision of legal aid. Section 2(3) empowers the Lord Chancellor to make regulations about remuneration for those providing services under

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946082/Attorney_General_s_Guidelines_2020_FINAL_Effective_31Dec2020.pdf.

arrangements made under LASPO. In this context we mean criminal legal aid services.

- 6.3 The Remuneration Regulations provide for the remuneration of litigators and advocates in respect of advice, assistance and representation made available under sections 13, 15 and 16 of LASPO (i.e. criminal legal aid).
- 6.4 Regulation 8 of the Remuneration Regulations sets out the circumstances where fees can be claimed for certain categories of work to which the Standard Crime Contract applies.

7. Policy background

What is being done and why?

- 7.1 At the beginning of 2019, the Ministry of Justice decided to undertake a comprehensive review into the criminal legal aid fee schemes and wider market, aiming to reform the system holistically to ensure work done was fairly remunerated, that the provider market was flexible and delivered value for money for the taxpayer and that the legal aid system supports an effective and efficient criminal justice system.
- 7.2 In light of pressing concerns from practitioners identified early on, it was decided to accelerate consideration of some aspects of the fee schemes. In February 2020, we consulted on four policy proposals as part of the review and following consultation, we laid a statutory instrument² on 27 August 2020 implementing revisions to the criminal legal aid fee schemes.
- 7.3 We then undertook a consultation, between 14 December 2020 to 25 January 2021, on a proposal for remuneration of pre-charge engagement following the publication of new disclosure guidelines by the Attorney General, which came into force on 31 December 2020. Pre-charge engagement may involve, but is not limited to:
 - Giving the suspect the opportunity to comment on any proposed further lines of inquiry.
 - Ascertaining whether the suspect can identify any other lines of inquiry.
 - Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation.
 - Discussing ways to overcome barriers to obtaining potential evidence, such as revealing encryption keys.
 - Agreeing any key word searches of digital material that the suspect would like carried out.
 - Obtaining a suspect's consent to access medical records.
 - The suspect identifying and providing contact details of any potential witnesses.
 - Clarifying whether any expert or forensic evidence is agreed and, if not, whether the suspect's representatives intend to instruct their own expert, including timescales for this.
- 7.4 Pre-charge engagement is encouraged by the Code for Crown Prosecutors and may impact decisions as to charge.

² The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020.

- 7.5 Following careful consideration of all the responses to our public consultation, the Government decided to proceed with the proposals as set out at consultation.
- 7.6 Pre-charge engagement will be remunerated whenever it is agreed between the parties that it may assist the investigation. Such engagement will be paid at an hourly rate and at the same rate as the current Police Station Advice and Assistance rates with an upper limit beyond which providers will be required to apply to the Legal Aid Agency (“LAA”) for an extension. We chose to introduce fees equivalent to police station work because they are currently used to remunerate similar work in the police station. The upper limit is set at the same level as the other form of pre-charge advice and assistance currently paid at hourly rates, Free Standing Advice and Assistance.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 None.

10. Consultation outcome

- 10.1 On the 14 December 2020, the Government consulted on its policy proposals for amending the criminal legal aid fee scheme to allow payment for pre-charge engagement. The consultation closed on 25 January 2021.
- 10.2 A total of 12 responses to the consultation were received. All responses received were from the legal profession and included representative bodies such as The Law Society, The Chartered Institute of Legal Executives and the Young Legal Aid Lawyers. We also received a response from the Big Firms Group.
- 10.3 The main themes throughout the responses focused on the requirement of a “written agreement” between the relevant parties before pre-charge engagement can be provided. A broad range of consultees also expressed some concerns with our estimation of cases. The view was that the department has underestimated the yearly number of cases which could potentially trigger pre-charge engagement. We noted that there are uncertainties about volumes and costs, as this is new work, and reflected consultees views in the sensitivity analysis in the Impact Assessment.
- 10.4 Based on the responses received to the consultation, the Government decided to proceed with the proposals broadly as set out at consultation, but to allow for informal agreement between the defence practitioners and the prosecutors/police, rather than requiring “written agreement”, in order to address the concern raised.

11. Guidance

- 11.1 The LAA is currently consulting on consequential changes to the 2017 Standard Crime Contract that will take effect on the date that this instrument comes into force in order to implement this policy. The LAA will also set out guidance to reflect the changes brought in by this statutory instrument, ensuring the process is clear for practitioners who are providing legal aid services prior to it coming into force.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is an increase in fees paid to criminal legal aid practitioners, estimated to be £0.3m to £1.8m.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 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.

14. Monitoring & review

- 14.1 The operation of and expenditure on the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency. We recognise the need for sustained and constructive dialogue with the profession to ensure the changes detailed in this document have the desired intention. As such, we will monitor the impact of this scheme immediately after implementation.

15. Contact

- 15.1 James MacMillan at the Ministry of Justice (Telephone: 07542 945 596 or email: james.macmillan2@justice.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Jelena Lentzos, Deputy Director for Legal Aid Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Lord Chancellor and Secretary of State for Justice, the Rt Hon Robert Buckland QC MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.