

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

**2015 No. 898**

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (“the instrument”) amend the Civil Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/422) (“the Remuneration Regulations”) by providing for the circumstances in which the Lord Chancellor is permitted to pay remuneration for work carried out on an application for permission in a judicial review.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 This instrument replaces S.I. 2014/607, which was quashed by the High Court by order dated 19th March 2015 following judgement in the case of *Ben Hoare Bell and others v the Lord Chancellor* [2015] EWHC 523 (Admin) (“the judgement”). This instrument will commence on 27 March 2015, less than 21 days after it was laid. It is considered appropriate to bring the instrument into force as soon as possible to minimise the uncertainty for legal aid providers of the regulations as to the state of the law in the period between the quashing of S.I. 2014/607 and commencement of this SI (which replicates S.I. 2014/607 in part) and to minimise the effect on savings resulting from the quashing order.

4. **Legislative Context**

- 4.1 The Remuneration Regulations make provision for remuneration by the Lord Chancellor to persons who provide civil legal services under arrangements for the purposes of Part 1 of LASPO.

- 4.2 This instrument amends the Remuneration Regulations to provide that the Lord Chancellor must not pay remuneration for civil legal services that consist of making an application for judicial review (where that application is issued by the court) unless one of five provisions is met. First, payment will be made where permission to bring judicial review proceedings is given by the court. Second, payment will be made where the Lord Chancellor considers that it is reasonable for payment to be made in cases where the

court neither refuses nor gives permission to bring judicial review proceedings and the Lord Chancellor considers that it is reasonable to pay remuneration in the circumstances of the case, taking into account the circumstances of the case and in particular, the factors set out at regulation 5A(1)(b).

4.3 Third, payment will be made where the defendant withdraws the decision that is being challenged, leading to permission being refused or not being considered. Fourth, payment will be made where the application for permission is adjourned to an oral hearing (by court order); and lastly payment will be made where the Court orders a rolled-up hearing (at which permission is considered at the same time as the substantive claim).

4.4 In practice the Lord Chancellor's function will be delegated to the Legal Aid Agency (LAA) through an authorisation.

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

## **7. Policy background**

7.1 As set out in *Judicial Review – proposals for further reform: the Government response*<sup>1</sup>, the Government continues to believe that limited legal aid resources should be properly targeted at those judicial review cases where they are needed most, if the legal aid system is to command public confidence and credibility.

7.2 The Government amended the Remuneration Regulations to give effect to the policy announced in that response (S.I. 2014/607).

7.3 The amending instrument was the subject of a judicial review. Although the judgement concludes that overall, the purpose of amending instrument was lawful, the Court found that in three specific scenarios, the effect of the amending instrument was not rationally connected to its purpose. To that extent, the Court held that the amending regulations were inconsistent with the purpose and effect of the statutory scheme and subsequently quashed the instrument.

7.4 This instrument replaces the quashed instrument taking account of the specific scenarios outlined in the judgment. This instrument introduces a new regulation 5A(1) in the Remuneration Regulations which provides that

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<sup>1</sup> <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>

legal aid practitioners will not be paid for their work on making an application for permission in a judicial review case (where the application is issued) unless certain conditions are met. As in S.I. 2014/607, payment will be made if: (a) permission is given or (b) permission is neither given nor refused, and the Lord Chancellor considers that it reasonable to make payment (looking at the circumstances of each individual case in the round, taking into account, in particular factors set out under 5A(1)(b)).

7.5 Additionally, this instrument now provides that legal aid practitioners will be paid for their work on making an application for permission in a judicial review case if any of the following three conditions is met:

- (c) the defendant withdraws the decision to which the application for judicial review relates and the withdrawal results in the court—
  - (i) refusing permission to bring judicial review proceedings, or
  - (ii) neither refusing nor giving permission;
- (d) the court orders an oral hearing to consider whether to give permission to bring judicial review proceedings, or
- (e) the court orders a rolled-up hearing.

7.6 As in S.I. 2014/607, the new regulation 5A does not affect the payment of reasonable disbursements (other than Counsel’s fees) such as expert fees and court fees, incurred in accordance with the contract under which the civil legal services are provided. These will continue to be paid, even if permission is not given by the court. New regulation 5A also does not affect the discretion of the Lord Chancellor to make payments on account in accordance with the relevant contract.

7.7 Regulation 12 of the Remuneration Regulations makes provision for the Lord Chancellor to make payments on account direct to barristers in independent practice. Regulation 2(6) of this instrument amends regulation 12 to provide that where the Lord Chancellor does not pay remuneration for the application for judicial review under regulation 5A, the barrister must repay any amount paid to them under regulation 12 of the Remuneration Regulations for services consisting of the making of the application for judicial review.

7.8 The Regulations also set out the transitional provisions that apply to the amendments made by regulation 2. The transitional provisions provide that those amendments will not apply to:

- a) applications for civil legal services made before this instrument comes into force; and
- b) applications for civil legal services made on or after the date on which this instrument comes into force, but which relate to a case in which Licensed Work has already been provided to the applicant as a result of an application made before this instrument comes into force (and the Director of Legal Aid Casework has decided that the certificate should cover both sets of proceedings).

## 8. Consultation outcome

8.1 It is not considered necessary to consult on this statutory instrument. This instrument varies from S.I. 2014/607 only so far as necessary to take account of the specific scenarios outlined in the judgment but otherwise maintains the previous policy intent. The policy implemented by S.I. 2014/607 was the subject of consultation. That consultation, *Judicial review - Proposals for further reform*, was published on 6 September 2013 and closed on 1 November 2013. The response paper *Judicial Review – proposals for further reform: the Government response* was published on 5 February 2014.

8.2 In response to the consultation, some respondents recognised that the proposal had been modified from the original policy to allow the Lord Chancellor to pay legal aid practitioners in certain cases which conclude prior to a permission decision, thereby seeking to address some of the concerns expressed about the original proposal. In general respondents remained opposed to the proposal, in particular arguing that the uncertainty and financial risk for legal aid practitioners would impact on the number of Practitioners willing to carry out public law work and the kinds of cases they would be willing to take on in future. A detailed Government response to the consultation exercise is available at <https://consult.justice.gov.uk/digital-communications/judicial-review>.

## 9. Guidance

9.1 Guidance is not being prepared specifically on this instrument. The Legal Aid Agency is preparing communications to practitioners to support the transition to the new arrangements. There is no need for public guidance on these changes as they apply only to remuneration paid to legal aid practitioners.

## 10. Impact

10.1 An impact assessment has not been prepared for this instrument or the previous instrument. However, a full impact assessment of the effect of the policy implemented by S.I. 2014/607 on the costs to businesses and the voluntary sector was produced with the Government's response to consultation, *Judicial Review – proposals for further reform: the Government response*, and is available at <https://consult.justice.gov.uk/digital-communications/judicial-review>.

10.2 Although an impact assessment has not been prepared for this instrument, we have considered the impact of the three additional scenarios in which payment will be made (as a result of the judgment). As the original policy scheme was expected to make a savings of £1m to £3m, the revised scheme will result in a reduction in the savings achieved. The further scenarios in which payment will be made, which are set out in this instruments also mean that the financial risk to practitioners is lessened.

10.3 The impacts on business were assessed as part of the previous impact assessment. As before, it remains our view that under this instrument there is no impact on charities or voluntary bodies, other than where it affects a contractual relationship between the Legal Aid Agency and providers of legal aid services or the payment arrangements for barristers, which has been assessed as part of the above Impact Assessment.

10.4 There is no impact on the public sector arising from this instrument beyond those accounted for in the Impact Assessment.

## **11. Regulating small business**

11.1 The legislation applies to small business only insofar as it affects the contractual relationship between the Legal Aid Agency and providers of legal aid services or the payment arrangements for barristers.

11.2 The Ministry of Justice has not taken any specific steps to minimise the impact of the requirements 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 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. The Department will consider the impact of this instrument as part of the monitoring of operations using data and intelligence from the Legal Aid Agency to identify any problems in practice should they emerge.

## **13. Contact**

13.1 Shirley Benson at the Ministry of Justice (Tel: 020 3334 5390 or email: [shirley.benson@justice.gsi.gov.uk](mailto:shirley.benson@justice.gsi.gov.uk)) can answer any queries regarding the instrument.