

EXPLANATORY MEMORANDUM TO
THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) REGULATIONS
2013

2013 No. 2803

AND

THE CRIMINAL DEFENCE SERVICE (VERY HIGH COST CASES) (FUNDING)
ORDER 2013

2013 No. 2804

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 instruments

2.1 These instruments make provision to:

- reduce the fees paid for legal aid services provided in criminal Very High Cost Cases (VHCCs) which are the subject of a contract between the Lord Chancellor¹ and members of the Very High Case Contract (Crime) Panel; a 2010 VHCC contract; or a 2013 VHCC contract;
- reduce fees paid to most expert witnesses involved in legally aided criminal cases by 20%; and
- amend the category of work in which a provider of legal aid services can claim a fixed fee, consequential to the changes in the scope of criminal legal aid for prison law, which will be brought forward in separate legislation.

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

3.1 None.

4. Legislative Context

4.1 These instruments are part of a number of statutory instruments which implement legal aid reform proposals set out in the document: *Transforming Legal Aid: Next Steps*. The Criminal Legal Aid (Remuneration) Regulations 2013 (SI 2013/435) (“the 2013 Regulations”) make provision for the funding and remuneration of advice, assistance and representation made available under sections 13, 15 and 16 of LASPO, which came into force on 1 April 2012. The Criminal Defence Service (Funding) Order 2007 (SI

¹ The property, rights, powers, duties and liabilities of the Legal Services Commission were transferred to the Lord Chancellor by paragraph 7 of Schedule 4 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c.10) (LASPO).

2007/1174) (“the 2007 Order”) makes provision for the remuneration of services provided under Part 1 of the Access to Justice Act 1999 (c.22) as part of the Criminal Defence Service. Although repealed by LASPO, the AJA (and legislation made under it) is subject to savings in respect of “pre-commencement” cases (as set out in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Consequential, Transitional and Saving Provisions) Regulations 2013 (SI 2013/534)).

4.2 The Criminal Legal Aid (Remuneration) (Amendment) Regulations (“the Remuneration Regulations”) amend the 2013 Regulations to: set out the reduced fees for work undertaken on or after 2 December 2013 in VHCCs which are the subject of a 2013 VHCC contract; reduce most expert fees by 20%; and make an amendment to the category of work in which a provider can claim a fee consequential to amendments to be made to the Criminal Legal Aid (General) Regulations (S.I. 2013/9) which will change the scope of criminal legal aid for prison law. The Criminal Defence Service (Very High Cost Cases) (Funding) Order 2013 (“the Funding Order”) sets out the reduced fees for work undertaken on or after 2 December 2013 in VHCCs which are the subject of a contract between the Lord Chancellor and members of the Very High Case Contract (Crime) Panel (“the 2008 panel”) or a 2010 VHCC contract. It also amends the 2007 Order to provide for the fees applicable to advocates who are not members of the 2008 panel.

5. Territorial Extent and Application

5.1 These instruments apply to England and Wales.

6. European Convention on Human Rights

6.1 As the instruments are subject to the negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

7.1 Following on from the reforms set out in LASPO, the Government consulted on a package of reform proposals. The primary objective of the reform package is to bear down on the cost of legal aid, ensuring that every aspect of expenditure is justified and that we are getting the best deal for the taxpayer. Unless the legal aid scheme is targeted at the persons and cases where funding is most needed, it will not command public confidence or be credible.

7.2 *Transforming Legal Aid: Next Steps* sets out a number of reforms which the Government intends to make under Part 1 of LASPO. These include a reduction in fees payable in VHCCs; the reform of expert fees in criminal cases and changes to the scope of criminal legal aid for prison law.

7.3 VHCCs are long running cases (in which defendants are in receipt of criminal legal aid) which, because of their duration and cost, are managed by the Legal Aid

Agency under specific contracts with the service providers. There are currently three different contractual systems governing VHCCs, depending on the system in operation at the time a case is classified as a VHCC. These instruments reduce by 30% the fees, which are currently set out in contracts, for work undertaken on or after 2 December 2013 in VHCCs, under both new and exiting contracts. The Remuneration Regulations make provision for remuneration in new cases and those subject to existing 2013 VHCC contracts. The Funding Order makes provision for remuneration for cases subject to existing contracts with members of the 2008 panel (including in respect of advocates who are not members of the panel) or a 2010 VHCC contract. The new rates will apply to any contract entered into on or after 2 December 2013. Transitional arrangements provide that in respect of existing contracts, the current rates apply to cases in which, before 2nd December, the court has set a trial date and the date is before 1 April 2014. In addition, in respect of existing contracts, the current fees will apply to work undertaken pursuant to a Task List agreed between the litigator or advocate and the Lord Chancellor before 2nd December 2013; the new rates will apply to work done pursuant to any Task List agreed on or after 2nd December 2013.

7.4 The Remuneration Regulations also reduce the fees paid to expert witnesses in criminal proceedings, in most cases by 20%. The revised rates, as shown in Schedule 1 of the Remuneration Regulations, will replace those in Schedule 5 to the 2013 Regulations. These ensure that the fees paid to expert witnesses under legal aid deliver value for money to the taxpayer and are reflect more closely the fees paid elsewhere for such services, in particular the Crown Prosecution Service.

7.5 These Regulations also make an amendment to the category of work in which a provider can claim a fee to remove the reference to cases in which a prisoner is challenging their treatment in prison. This is a technical amendment to take account of changes in the scope of criminal legal aid for prison law which will be brought forward in separate legislation.

8. Consultation outcome

8.1 The consultation '*Transforming Legal Aid: Delivering a more credible and efficient system*' was published on 9 April 2013 and closed on 4 June 2013. Around 16,000 responses were received from representative bodies, practitioner and other organisations, individual members of the judiciary, members of the House of Commons and Lords, individual solicitors and barristers and members of the public. The Ministry of Justice held 14 stakeholder events throughout the consultation period.

8.2 The majority of responses did not support the Government's original proposals for reform, although there was some support for particular measures. Some of the original proposals were modified in light of the comments received from consultees to ensure their implementation is fully consistent with Government's wider objectives, for example:

- the proposals on prison law have been amended to ensure criminal legal aid remains available for all proceedings before the Parole Board in which it has the

power to direct release, as opposed to all cases that engage Article 5.4 of the European Convention on Human Rights (ECHR). Sentence calculation cases where the date of release is disputed will also be retained.

- the residence test was revised to include exceptions for certain cases which broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children.
- changes to expert fees will proceed, subject to retaining the rates payable to experts in those areas where recent increases have been made to address market supply issues. Fees payable to interpreters in London will be retained and the reduction in rates payable to interpreters outside London will be limited (to 12.5%) to ensure these do not fall below rates paid by CPS.

8.3 A detailed Government response to the consultation exercise is available at https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/user_uploads/annex-b-response-to-consultation.pdf.

8.4 We have not consulted separately on these instruments.

9. Guidance

9.1 Guidance is not being prepared specifically on these instruments. A programme of training and guidance for providers is being prepared by the Legal Aid Agency to support the transition to the new arrangements.

10. Impact

10.1 The impacts of the Government's programme of legal aid reforms are set out in a series of Impact Assessments, which were updated following publication of *Transforming Legal Aid: Next Steps*. These impact assessments are available at https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view. An Impact Assessment has not been prepared specifically for these instruments.

10.2 There is no impact on business, 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 or experts.

10.3 There is no impact on the public sector arising from these instruments beyond those accounted for in the Impact Assessments.

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 or experts.

11.2 MoJ has not taken any specific steps to minimise the impact of the requirements on firms employing up to 20 people.

11.3 These instruments do 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 MoJ and the LAA. 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 these instruments.

13. Contact

James MacMillan at the Ministry of Justice, Tel: 020 3334 4258 or email: james.macmillan2@justice.gsi.gov.uk can answer any queries regarding these instruments.