

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

2013 No. 2877

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 Civil Legal Aid (Remuneration) Regulations 2013 (SI 2013/422) (the “Remuneration Regulations”). Specifically it amends remuneration for civil legal aid services in order to:

- harmonise the basis of payment to self-employed barristers with those of other advocates in civil non-family cases;
- remove the current 35% uplift paid in cases in the Immigration and Asylum Upper Tribunal; and
- reduce fees paid to most expert witnesses involved in civil and family cases by 20%.

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

3.1 None.

4. Legislative Context

4.1 This is one of a number of statutory instruments which implement the legal aid reform proposals set out in the document: *Transforming Legal Aid: Next Steps*.

4.2 The Remuneration Regulations make provision for the payment of remuneration by the Lord Chancellor to persons who provide civil legal services under arrangements for the purposes of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

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 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 to legal aid provision under Part 1 of LASPO. These include harmonising fees paid to self employed barristers with those paid to other advocates appearing in civil (non-family) proceedings; removing the uplift in the rate paid for immigration and asylum Upper Tribunal cases and reform of expert fees in civil cases. This instrument amends the Remuneration Regulations to implement those proposals.

7.3 To harmonise fees paid to self-employed barristers in civil (non-family) cases in the County Court, High Court or Upper Tribunal on the same basis as other advocates in those courts, payment will be made at the same hourly rates applicable for the activities of preparation and attendance, attendance at court or conference, advocacy and travel and waiting time. In addition, and as is applicable to other advocates, the level of remuneration will also depend on the court in which a case is heard. The new rates of payment for self-employed barristers are contained in Table 1 of Schedule 1 to this instrument. They will replace those currently contained in Schedule 2 to the Remuneration Regulations. Remuneration to a self-employed barrister providing legal services in a category not listed in Table 1 (or Table 2) will be based on the rates contained in Table 1 (i.e., where the civil legal aid services are provided in a court that equates to those categorised in Table 1), with the possibility of enhancement.

7.4 Table 2 of Schedule 1 to this instrument replicates the rates currently applicable to self-employed barristers involved in proceedings in the Court of Appeal or Supreme Court and for Queen's Counsel (in any court).

7.5 As is the case for other advocates, the revised rates payable to self-employed barristers in civil (non-family) proceedings in the County Court, High Court or Upper Tribunal will be eligible for enhancement, subject to satisfying specified criteria. To be eligible for enhancement to the prescribed rate of remuneration for self-employed barristers in the County Court, High Court or Upper Tribunal:

- the work must be done with exceptional competence, skill or expertise;
- the work must be done with exceptional speed; or
- the case must involve exceptional circumstances or complexity.

7.6 In terms of calculating the level of enhancement, regard must be given to:

- the degree of responsibility accepted by the barrister;

- the care, speed and efficiency with which the barrister prepared the case; and
- the novelty, weight and complexity of the case.

7.7 This criteria is set out in regulation 2(2)(b) of the instrument, which replaces regulation 7(3) of the Remuneration Regulations. The criteria equates to that applicable to other advocates involved in civil non-family proceedings who are working under a direct contract with the Lord Chancellor. As is the case for other advocates, the maximum level of enhancement is capped (depending on the level of court where the proceedings take place).

7.8 Regulation 2(3) of the instrument makes an amendment to regulation 9(4) and (6) of the Remuneration Regulations consequential to the Criminal Defence Service (Very High Cost Cases) (Funding) Order 2013 (S.I. 2013/2804) (“the Funding Order”). Regulation 9(4) of the Remuneration Regulations enables, in exceptional circumstances, remuneration for civil legal services provided in relation to an inquest in accordance with the rates applicable under Section 7 of the 2010 VHCC contract between the Lord Chancellor and a person for the provision of representation for the purposes of criminal proceedings under section 16 of LASPO. However, payment levels will no longer be set out in those contracts but will be contained in Schedule 2 to the Funding Order. The amendment being made is to provide for payment in accordance with the rates set out in Part 2 of Schedule 2 to that Order rather than the VHCC contracts, therefore. There is no change in the applicable rates. This consequential amendment will apply in all cases from 2nd December 2013.

7.9 By omitting Table 8(b) from Part 2 of Schedule 1 to the Remuneration Regulations, the instrument provides for the rates in Table 8(c) of that Schedule to apply to legal representation in Immigration and Asylum Upper Tribunal cases which is Controlled Work. The effect of this change will be to remove the 35% uplift currently payable for such work, which reflected an older, defunct scheme of retrospective funding where all work on an immigration or asylum appeal was undertaken at financial risk to the legal professional involved in the case.

7.10 To reduce the fees paid to most expert witnesses in civil and family proceedings by 20%, the revised rates, as shown in Schedule 2 to this instrument, will replace those currently contained in Schedule 5 to the Remuneration Regulations. These ensure that the fees paid to expert witnesses under legal aid deliver value for money to the taxpayer and reflect more closely the fees paid for expert services elsewhere in Government, in particular the Crown Prosecution Service.

7.11 This instrument also sets out, in Part 2, the transitional provisions that apply to the amendments made by regulations 2(2) and (4) to (6) of the instrument. The transitional provisions provide that those amendments will not apply to:

- (a) applications for civil legal services made before this instrument comes into force;

(b) applications for civil legal services made on or after the date on which this instrument comes into force, but which relate to the same case in which services have already been provided to the applicant as a result of an application made before this instrument comes into force (where the further application is for a different form of service which falls within the same variety of work as the earlier form of service);

(c) 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 has decided that the certificate should cover both sets of proceedings).

7.12 Provision is also made to determine when different forms of application (e.g., for Controlled Work, Licensed Work, emergency representation and telephone applications to the CLA advice line) will have been made before this instrument comes into force. The provision in respect of applications made to the CLA reflects its operating hours (i.e., an application cannot be made after 12.30pm on Saturdays, when the lines close for the weekend).

7.13 There are no current plans to produce a consolidated version of the Remuneration Regulations.

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 16,00 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 respondents to the consultation to ensure their implementation was fully consistent with the 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. This includes the current rates contained in the Remuneration Regulations for surveyors in housing (disrepair) cases and the increased fees currently payable to neonatologists, neurologists and neuroradiologists in clinical negligence (cerebral palsy) cases which will be codified by this instrument. In addition, fees payable to interpreters in London will be retained and the reduction in rates payable to interpreters outside London will be limited 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, however, consulted specifically on this instrument.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument. 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 this instrument.

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, which have been assessed as part of the above Impact Assessments.

10.3 There is no impact on the public sector arising from this instrument 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 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. This review will also consider the operation of the secondary legislation, including this instrument.

13. Contact

13.1 Any enquiries about the contents of this memorandum should be addressed to: Jean McMahon, Legal Aid Policy and Legal Services, Ministry of Justice, 102 Petty France, London SW1H 9AJ
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