

**EXPLANATORY MEMORANDUM TO**  
**THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT)**  
**REGULATIONS 2016**

**2016 No. 313**

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

**2. Purpose of the instrument**

- 2.1 This instrument does two things. Firstly, it revokes the Criminal Legal Aid (Remuneration etc.) (Amendment) Regulations 2015 (S.I. 2015/1369) (“the Amending Regulations”) (in part) and the Criminal Legal Aid (Remuneration etc.) (Amendment) (No. 2) Regulations 2015 (S.I. 2015/2049), the effect of which is that the fixed fee schemes for remuneration of criminal legal aid services provided for by Part 3 of the Amending Regulations will not come into force. Secondly, this instrument amends the existing fee schemes for remuneration of criminal legal aid services by increasing the fees for advice, assistance and representation made available under sections 13, 15 and 16 of the Act.

**3. Matters of special interest to Parliament**

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

- 3.1 The Ministry of Justice has considered the JCSI’s comments on S.I. 2015/1571 in its 5th report in drafting regulation 5 of this instrument (application and transitional provision). The JCSI reported that S.I. for defective drafting and requiring elucidation, taking the view that the transitional provision in regulation 3 was not in fact transitional in nature and was unnecessary. The JCSI were also unconvinced that the provision achieved the policy aim. In regulation 5, the Ministry of Justice has made provision by reference to the determinations to which the instrument *does not* apply, consistent with the elucidation required in respect of the earlier S.I. The Ministry of Justice is satisfied that this provision is genuinely transitional in nature because the pool of proceedings to which the instrument does not apply is temporary and diminishing. The provision is necessary to prevent the amendments applying more broadly than intended (i.e. to all work done after commencement in cases in which there are determinations made before and after 1 April 2016).

*Other matters of interest to the House of Commons*

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

#### **4. Legislative Context**

- 4.1 Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“the Act”) governs the provision of legal aid. Sections 13 to 15 of the Act provide for advice, assistance and representation to individuals in custody or involved in criminal proceedings (criminal legal aid). The Criminal Legal Aid (Remuneration) Regulations (S.I. 2013/435) govern the fees paid for the provision of criminal legal aid.
- 4.2 The Amending Regulations (which are revoked in part by this instrument) do two things. Part 2 reduced the fees payable for criminal legal aid services under Schedules 2 to 4 of those Regulations (from July 2015). Part 3 of the Amending Regulations amends Schedules 2 and 4 to those Regulations to introduce new fixed fee schemes. Part 3 also makes amendments to the Criminal Legal Aid (Remuneration) Regulations, Criminal Legal Aid (General) Regulations (S.I. 2013/9), Civil Legal Aid (Remuneration) Regulations (S.I. 2013/422) and the Criminal Legal Aid (Financial Resources) Regulations (S.I. 2013/471) consequential on the introduction of new contracts governing the provision of criminal legal aid (the 2015 Duty Provider Crime Contract and the 2015 Own Client Crime Contract).
- 4.3 S.I. 2015/2049 delayed the commencement date of Part 3 of the Amending Regulations from 11 January to 1 April 2016. That S.I. also reinstated references to the 2010 Standard Crime Contract in relevant legal aid legislation and made a correction to the amendments made by the Amending Regulations to ensure that advice and assistance provided by a Duty Lawyer at court is exempt from the means test for eligibility for criminal legal aid.
- 4.4 Subject to the exceptions in regulation 3, regulation 2 of this instrument revokes regulations 1(2)(b) and 2(2) and Part 3 of, and Schedules 4 to 13 to, the Amending Regulations and S.I. 2015/2049 so that the fixed fee schemes provided for by Part 3 of the Amending Regulations will not come into force. Regulation 3 ensures that the minor clarifications to the Criminal Legal Aid (Remuneration) Regulations 2013 in regulation 6 of the Amending Regulations are not revoked. Regulation 4 of, and Schedules 1 to 3 to, this instrument amend the existing fee schemes by increasing the fees for advice, assistance and representation made available under sections 13, 15 and 16 of the Act.

#### **5. Extent and Territorial Application**

- 5.1 The extent of this instrument is England and Wales.
- 5.2 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**

##### *What is being done and why*

- 7.1 Currently, litigators provide criminal legal aid under the 2010 Standard Crime Contract (“the 2010 Contract”). This was due to be replaced by two new contracts, the 2015 Duty Provider Crime Contract and the 2015 Own Client Crime Contract (“the 2015 Contracts”). The Legal Aid Agency undertook a tender process for the contract

covering duty work following the final decision to tender for a limited number of contracts as set out in Transforming Legal Aid: Crime Duty Contracts Consultation Response on 27 November 2014. The 2015 Contracts were originally due to commence from 11 January 2016. This process was subject to legal challenge, as a result of which injunctions were in place that prevented commencement of the duty contract in a number of procurement areas. As a result of the legal challenges, commencement was delayed until April 2016.

- 7.2 The Government has carefully considered the position in relation to the dual contract approach, and has decided not to proceed with it. As a result, the 2010 Contract will be extended so as to continue to govern the provision of criminal legal aid until a replacement contract comes into force later this year. The decision not to proceed with the new contracts is explained in a Written Ministerial Statement dated 28 January 2016:- <https://www.gov.uk/government/speeches/changes-to-criminal-legal-aid-contracting>.
- 7.3 Part 3 of the Amending Regulations introduces fixed fees for litigators in certain Crown Court cases, and for legal aid providers undertaking police station and magistrates' court work. This instrument revokes that part of the Amending Regulations that introduces fixed fees. This decision has been taken because the proposed new fee schemes were linked to the new contracts. Having taken the decision not to proceed with the dual contract approach, it follows that the new fee schemes should also not be implemented.
- 7.4 This instrument also increases the fees for work done pursuant to a legal aid determination made on or after 1 April 2016, by reversing the fee reduction introduced by Part 2 of the Amending Regulations. This is intended to be a 12 month suspension until April 2017, during which time work will continue with the profession to improve the efficiency and quality of representation in the criminal courts. The Ministry of Justice will bring forward a further instrument in relation to the fees if appropriate in due course.

### ***Consolidation***

- 7.5 The regulations are not being consolidated.

## **8. Consultation outcome**

- 8.1 We have not consulted on not introducing the new fee schemes as it is consequential on the decision to not introduce the 2015 Contracts. We have not consulted on the decision to increase the fees payable, because these provisions simply revert to the position prior to July 2015.

## **9. Guidance**

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

## **10. Impact**

- 10.1 There is no impact on the public sector arising from this instrument beyond those accounted for in the Impact Assessments referred to in paragraph 10.3 below. Due to the fee increase, the savings identified in the Impact Assessment will no longer be made in full.

- 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.
- 10.3 An Impact Assessment has not been prepared for this instrument. The impacts of the legal aid reforms which are no longer being introduced are set out in a series of Impact Assessments, which were updated following publication of the previous administration's response to the consultation *Transforming Legal Aid: Next Steps*. These Impact Assessments are available at <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps>. As set out in paragraph 40 of the Impact Assessment entitled *Transforming Legal Aid – Next Steps: Government Response, Procurement of Criminal Legal Aid Services – Impact Assessment*, the extent to which there would have been a financial impact (positive or negative) on providers from introducing a fixed fee scheme would have depended entirely on the case mix each provider undertakes.
- 10.4 Therefore, the impact of the decision not to implement the new schemes will be that providers will continue to receive the same remuneration as currently, except that for services provided pursuant to a legal aid determination made on or after 1 April 2016 the fees will be increased to the level at which they were before the second fee reduction in July 2015.

## **11. Regulating small business**

- 11.1 The legislation applies to activities that are undertaken by small businesses only insofar as it affects the contractual relationship between the Legal Aid Agency and providers of legal aid services. No specific action is proposed to minimise regulatory burdens on small businesses, however, as the instrument does not impose any new regulatory burdens on small businesses.

## **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.

## **13. Contact**

- 13.1 David Carter at the Ministry of Justice Telephone: 07824 537252 or email: [David.Carter@justice.gsi.gov.uk](mailto:David.Carter@justice.gsi.gov.uk) can answer any queries regarding the instrument.