

EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) (AMENDMENT) (NO. 2) REGULATIONS 2022

2022 No. 1035

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to apply a 15% uplift to certain fees payable under the Advocates' Graduated Fee Scheme ("AGFS") and some fees payable under the Litigators' Graduated Fee Scheme ("LGFS") through the Criminal Legal Aid (Remuneration) Regulations 2013 ("the Remuneration Regulations"). Following the amendments, the uplift will apply to those Crown Court cases where a representation order was granted on or after the 17th September 2020 and where the main hearing (as defined in the Remuneration Regulations) takes place after the coming into force of this instrument.
- 2.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Regrettably, this instrument will breach the 21-day rule for laying in Parliament and will be laid on 11th October 2022 and come into force on 31st October 2022 in order to implement the changes it makes as quickly as possible. We needed to wait for the outcome of the Criminal Bar Association (CBA) ballot on strike action on 10th October to finalise the policy.
- 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 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), 41(1)(a) and (b), (2)(a) and (b) and (3)(c) in Part 1 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 arrangements made under LASPO.
- 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 The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2022 (“the 2022 Regulations”) amended the Remuneration Regulations to apply an increase of 15% to various fees, including some fees payable under the AGFS and the LGFS. These increases applied to matters where a representation order was granted after the coming into force of the 2022 Regulations.

7. Policy background

- 7.1 The fee uplifts implemented by this instrument have been agreed as part of the overall response to the Criminal Legal Aid Independent Review (CLAIR). This represents further investment of £42 million in the criminal bar and solicitors.
- 7.2 This instrument applies the increases implemented by the 2022 Regulations to those cases in the LGFS and AGFS where a representation order was granted on or after 17th September 2020 but before 30th September 2022 and where the main hearing takes place on or after 31 October 2022.
- 7.3 This widens the scope of the LGFS and AGFS fee increases to the vast majority of existing cases.
- 7.4 This is part of a wider package of proposals announced by the government on 30th September 2022 as part of the response to CLAIR, including through discussions with stakeholders, including the CBA, in the light of strike action from criminal barristers. Criminal barristers have now voted to end strike action.

8. European Union Withdrawal and Future Relationship

- 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 15 March the Government published its response to the Criminal Legal Aid Independent Review and consulted on proposals to take forward fee increases and wider reforms of the criminal justice system. The interim response to consultation was published alongside the laying of the 2022 instrument.
- 10.2 Following further discussions with stakeholders and as part of the overall response to the consultation, this instrument applies the increases implemented by the 2022 Regulations to those cases in the LGFS and AGFS where a representation order was signed on or after 17th September 2020 (when the structure of the AGFS changed substantially) and but before 30th September 2022 and where the main hearing takes place on or after 31 October 2022. A full response to all the consultation proposals will be published in the autumn.

10.3 We received a total of 203 responses, mainly from solicitors, advocates and representative bodies. Overall respondents welcomed an increase in fees and although many felt the increase was insufficient, they felt it should come into force as quickly as possible.

11. Guidance

11.1 The Legal Aid Agency will set out guidance to reflect the changes brought in by this statutory instrument, ensuring the process is clear for litigators and advocates 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 a 15% increase in criminal legal aid fees on cases with a main hearing on or after 31 October 2022. Our current best estimate based on expected case mix and historic caseload in a similar period is £28m for AGFS and £14m for LGFS. The actual value of this 15% could be higher or lower than estimated depending on case mix and court hearing schedules.

12.2 There is no impact on the public sector.

12.3 An Impact Assessment will be published alongside our Response to our consultation following the Independent Review of Criminal Legal Aid later this year.

13. Regulating small business

13.1 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. 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 Lizzie Checkley, Deputy Director for Legal Aid Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister Johnson at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

