

**EXPLANATORY MEMORANDUM TO**  
**THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT) (NO. 3)**  
**REGULATIONS 2023**

**2023 No. 542**

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

**2. Purpose of the instrument**

- 2.1 The purpose of this instrument is to correct an error in the Criminal Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2023, which were made on 27 March 2023 (the “March Regulations”). The March Regulations introduced an additional fixed legal aid fee to the Advocates’ Graduated Fee Scheme to enhance remuneration for additional preparation beyond the expected norm. This instrument revokes the March Regulations, and remakes the substantive content with the error corrected.

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

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

- 3.1 We regret that this instrument will not observe the usual 21-day period before coming into force. This is because we want to correct an error made in the Criminal Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2023. The preamble to that instrument stated that it was made by the Secretary of State, whereas the power to make regulations is conferred on the Lord Chancellor. It is not anticipated that the amendments made by this instrument will have a material impact for providers.

**4. Extent and Territorial Application**

- 4.1 The territorial 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) and 41(1) to (3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2013 (“LASPO”).
- 6.1 Section 2(3) LASPO authorises the Lord Chancellor to make provision in regulations in respect of the remuneration of practitioners supplying publicly-funded criminal

defence services. These provisions are set out in the Criminal Legal Aid (Remuneration) Regulations 2013.

## **7. Policy background**

- 7.1 The new fee implemented by the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2023, which were laid in March (the “March Regulations”) was part of the overall response to the Criminal Legal Aid Independent Review (CLAIR). The March Regulations came into force on 17<sup>th</sup> April 2023.
- 7.2 The new fixed fee introduced by the March Regulations remunerates special (where the advocate is required to conduct an activity which goes beyond the usual preparatory workload of a case) and wasted (where the advocate has committed time in good faith to preparation but is then required to return the brief for reasons beyond their control) preparation. This is in recognition of both the work on preparation for ineffective trials and the increase of the scope and volume of written and audio-visual material work requirements. Currently advocates can be paid for special and wasted work in particular circumstances and this fee expands the categories of work covered and includes consideration of digital, video, audio-visual material and written work. The Government has committed to reviewing the implementation of this fee, commencing in July 2023.
- 7.3 The intention was that the March Regulations were made under powers conferred on the Lord Chancellor (as stated in the Explanatory Memorandum for that instrument), however the preamble to the March Regulations erroneously stated that they were made by the Secretary of State. This instrument therefore revokes the March Regulations and remakes them with the same substantive content, correcting the error.
- 7.4 Regulation 2 revokes the March Regulations 2023 and omits the amendments made by regulation 2 of those Regulations.
- 7.5 Regulation 3 of these Regulations inserts paragraph 18A after paragraph 18 of Schedule 1 of the 2013 Regulations to provide for enhanced remuneration for additional preparation. It provides for a fee of £62 plus VAT per case payable to the trial advocate in respect of all such preparation.
- 7.6 These Regulations also clarify that, for the purposes of identifying the “trial advocate” in paragraph 26(4A) (payment of fees to trial advocate) that “trial” excludes any cross-examination or re-examination to which paragraph 13A(3)(b) of Schedule 1 (fee for video recorded cross-examination or re-examination) applies.
- 7.7 This instrument applies to cases where a determination is made on or after 17<sup>th</sup> April and the main hearing takes place on or after 16<sup>th</sup> May.
- 7.8 This instrument makes technical amendments to clarify the individual who exercised the power, and it is not anticipated that it will have a material impact for providers.

## **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 30 November 2022 the Government published its full response to the Criminal Legal Aid Independent Review.
- 10.2 Following further discussions with stakeholders, and as part of the overall response to the consultation, this instrument introduces an additional fee for advocates for additional preparation.
- 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 updated its existing published guidance to reflect the changes brought in by the March Regulations. The guidance is used by both providers and Legal Aid Agency caseworkers. This instrument will not require changes to the guidance.

## **12. Impact**

- 12.1 There is no, or no significant impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant impact on the public sector.
- 12.3 An Impact Assessment was submitted with the memorandum for the Criminal Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2023 and was published alongside that Explanatory Memorandum on the [legislation.gov.uk](https://legislation.gov.uk) website.

## **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.

## **15. Contact**

- 15.1 Elliot Miller at the Ministry of Justice Telephone: 07469 579048 or email: [elliott.miller@justice.gov.uk](mailto:elliott.miller@justice.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Claire Cooper, Deputy Director for Legal Aid Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister Freer at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.