

EXPLANATORY MEMORANDUM TO
THE CRIMINAL LEGAL AID (REMUNERATION) (AMENDMENT)
REGULATIONS 2023

2023 No. 97

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 introduce an additional fixed legal aid fee to the Advocates' Graduated Fee Scheme to enhance remuneration for defence advocacy in cases where the Court has issued a special measures direction provided for by section 28 of the Youth Justice and Criminal Evidence Act ("YJCEA") 1999 in respect of pre-recorded cross-examination or re-examination of vulnerable witnesses. The instrument provides for a single fixed fee per case to be payable to the trial advocate for all such pre-recorded cross-examinations or re-examinations.

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 ensure that advocates are able to claim the new fee as soon as possible. The stakeholders most affected by these amendments are defence advocates, and we have engaged closely with their representatives in making this instrument so that they are made aware.

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)(a) and (b) of the Legal Aid, Sentencing and Punishment of Offenders Act 2013 ("LASPO").
- 6.2 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.

- 6.3 Section 28 of the YJCEA 1999 provides for a Court to issue a special measures direction for a video recording of a vulnerable witness' cross-examination (and any re-examination) to be made and admitted as evidence.

7. Policy background

What is being done and why?

- 7.1 The new fee implemented by this instrument has been agreed as part of the overall response to the Criminal Legal Aid Independent Review (CLAIR). Section 28 made provision for vulnerable and intimidated victims and witnesses to be cross-examined or re-examined via pre-recorded video, supporting them to give their best evidence. It enables those eligible to have their cross examination pre-recorded on video ahead of the trial. This video is then played back during the trial. The aim is to enhance the quality and reliability of evidence by improving witness experiences of cross-examination and enhancing event recall by reducing the time between complaint and cross-examination.
- 7.2 Section 28 YJCEA 1999 has been available for vulnerable witnesses (those under the age of 18 or suffering from a mental or physical disorder or impairment that would diminish the quality of their evidence) in all Crown Courts since November 2020, and as of September 2022 is available for complainants of sexual and modern slavery offences in all Crown Courts.
- 7.3 Cases featuring recordings admissible under Section 28 YJCEA 1999 currently attract a graduated fee for a trial, with attendance at pre-recorded cross-examination hearings claimed as daily attendance fees, and the appropriate fee for any preceding Ground Rules hearing. The additional fee represents further investment of £4 million over the remainder of the current Spending Review in the criminal bar and solicitors.
- 7.4 The new section 28 fee 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 Criminal Bar Association, in the light of strike action from criminal barristers last year.
- 7.5 Regulation 2(7) of these Regulations inserts paragraph 13A after paragraph 13 of Schedule 1 of the 2013 Regulations to provide for enhanced remuneration of the trial advocate in cases where a special measures direction has been issued for a video recording of a witness' cross-examination (including re-examination) to be made and admitted as evidence. It provides for a fee of £670 plus VAT per case payable to the trial advocate in respect of all such cross-examination and re-examination.
- 7.6 These Regulations also clarify that, for the purposes of identifying the "trial advocate" in certain provisions in the 2013 Regulations concerning payment of advocates, the trial does not include such a cross-examination or re-examination.

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 conducting s.28 hearings.
- 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 update its existing published guidance to reflect the changes brought in by this statutory instrument. The guidance is used by both providers and Legal Aid Agency caseworkers.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is an increase in criminal legal aid fees for advocacy in Section 28 cases.
- 12.2 There is no significant impact on the public sector.
- 12.3 An Impact Assessment is submitted with this memorandum and is published alongside the Explanatory Memorandum on the [legislation.gov.uk](https://www.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 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.