

## EXPLANATORY MEMORANDUM TO

### THE CIVIL LEGAL AID (PROCEDURE) (AMENDMENT) REGULATIONS 2020

2020 No. 439

#### 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.

#### 2. Purpose of the instrument

- 2.1 This instrument amends the Civil Legal Aid (Procedure) Regulations 2012 (the Procedure Regulations).

- 2.2 It makes provision for:

- the removal of the mandatory requirement to contact the Civil Legal Aid (CLA) Telephone Gateway for those seeking legal aid in discrimination, debt and special educational needs matters, reinstating immediate access to face-to-face advice in these cases;
- the introduction of a discretion for the Director of Legal Aid Casework (DLAC) to determine legal help funding, in relation to inquests, earlier than the date of determination;
- the amendment of the evidence requirements that need to be satisfied in order to qualify for legal aid in proceedings where the applicant needs to prove that they are a victim of or at risk of being a victim of domestic abuse; and
- the removal of the mandatory requirement that an applicant for legal aid for Family Mediation must always attend the mediator's premises in order to make their application for legal aid.

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

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

- 3.1 None.

*Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.2 This entire instrument applies to England and Wales only.

- 3.3 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

#### 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 set out in Section 3 under “Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)”.

## **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**

### Gateway Work

6.1 The Procedure Regulations make provision about the different categories into which civil legal services funded under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) are classified. Part 2 of the Procedure Regulations make provision about Gateway Work. Regulation 20 defines Gateway Work as legal help for cases in relation to debt, discrimination and special educational needs.

6.2 Civil legal services funded under LASPO are classified into different categories, namely Gateway Work, Controlled Work, Licensed Work, and services which require special procedures (such as Special Case Work, emergency representation, family mediation and cases under the Exceptional Case Funding (ECF) scheme).

6.3 Regulation 17 sets out that an individual (other than an exempted person) must apply to the Gateway for a determination about Gateway Work. An individual is not permitted to contact a face-to-face provider in the first instance to make the determination.

6.4 Regulation 18 sets out that an application for Gateway Work may be made, by telephone, email, “electronic format” or post.

6.5 Regulation 19 sets out that a determination must note whether services are to be provided by either a face-to-face or telephone provider. It also sets out that a determination may be amended with respect to the description of provider specified.

### Legal help funding for inquests

6.6 Regulation 21(2) of the Procedure Regulations defines legal help as a form of Controlled Work.

6.7 Regulation 10(1) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 sets out that DLAC has the discretion to disapply the financial eligibility limits for applications for legal help and Exceptional Case Funding in relation to inquests.

6.8 Regulation 68(1) of the Procedure Regulations sets out that DLAC has a discretion to treat a determination of Exceptional Case funding as having effect from a date earlier than the date of determination (i.e. a discretion to backdate). However, DLAC does not have a discretion to “backdate” a funding decision for legal help for inquests, including in cases where an application for the means assessment to be waived has been successful.

### Domestic Abuse evidence requirements

- 6.9 The Procedure Regulations make provision about the making and withdrawal of determinations that an individual qualifies for civil legal services under Sections 9 and 10 of LASPO.
- 6.10 Regulation 33 of the Procedure Regulations sets out that, for the purposes of applying for civil legal services described in paragraph 12 of Part 1 of Schedule 1 to LASPO, specified evidence of domestic violence must be provided. Schedule 1 of the Procedure Regulations lists the evidence which will be accepted for this purpose. Paragraph 12, Part 1 of Schedule 1 brings certain civil legal services into scope for legal aid where the applicant is or is at risk of being a victim of domestic violence.

### Mediation

- 6.11 Part 1 of the Procedure Regulations sets out that legal aid is available for “Family Mediation”. This includes the provision of an assessment by the mediator of whether, in light of all the circumstances the case is suitable for mediation and provision of legal aid for the purposes of payment of a mediator.
- 6.12 Regulation 22 sets out that an individual applying for Controlled Work must be made in person at the provider’s office unless the proposed provider decides that attendance is not necessary in accordance with their legal aid arrangements or one of the listed exceptions is satisfied.
- 6.13 Regulation 61 sets out that an individual applying for family mediation must attend the mediator’s premises in person; complete the application form specified by the Lord Chancellor; and, provide any additional information and documents requested by the Director in order for a determination to be made in relation to the application. Unlike regulation 22 the mediator is unable to determine that attendance is not necessary and no other exceptions apply to the requirement.

## **7. Policy background**

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

#### Removal of the mandatory requirement to seek legal advice in relation to debt, discrimination and special educational needs through the CLA telephone gateway

- 7.1 This instrument reinstates immediate access to face-to-face legal advice in the categories of debt, discrimination and special educational needs. This will provide individuals with a choice of accessing legal advice either face-to-face, or over the phone.
- 7.2 The Post Implementation Review of LASPO provided evidence that the requirement to seek advice over the telephone may be limiting access to legal advice in the format that best suited certain individuals. This review encompassed a range of engagement from April 2018 including multiple rounds of stakeholder roundtable events and written submissions from over 80 organisations. The current change addresses this by allowing access to face-to-face advice in the first instance.
- 7.3 Legislation is necessary to achieve this change as the gateway is set out in statute, specifically in the Procedure Regulations. Those Regulations set out that to access publicly funded legal services relating to debt, discrimination and special educational needs, a person must use the CLA telephone gateway service in the first instance. Only if they are eligible for legal aid, and if either telephone advice is determined

inappropriate or if the applicant expresses a specific preference for face to face advice, is a person able to access face-to-face advice. A statutory change is required to implement this change in policy.

- 7.4 Part 2 of the Procedure Regulations will be removed, removing the category of “Gateway Work”. Debt, discrimination and education related legal advice will be classified in future as “Controlled Work”. Following the processes set out in Part 3 of the Procedure Regulations, those seeking legal help in these areas will now be able to access face-to-face advice from a local provider in the first instance.
- 7.5 This change represents the fulfilment of a government commitment set out in the 2019 Legal Support Action Plan.

*Introducing a discretion for DLAC to determine legal help funding for inquests earlier than the date of determination*

- 7.6 Legal help is the advice and assistance level of legal aid that covers preparatory work. For inquests, this work can include drafting questions to put to the coroner, preparing statements and providing help with filling out forms. Legal help can also fund someone to attend an inquest as a “McKenzie Friend”, to offer informal advice, provided that the coroner gives permission. Legal help is available for all inquests, subject to a means and merits test.
- 7.7 DLAC has a discretion to treat a determination as having effect from a date earlier than the date of determination (i.e. backdate) for ECF determinations. However, DLAC does not have a discretion to “backdate” a funding decision for legal help for inquests, even where an application for the means assessment to be waived has been successful. Instead, as DLAC does not have such a discretion, funding takes effect from the date of the determination by DLAC, not at an earlier time.
- 7.8 Since 2014, DLAC has had power to waive the financial means test assessment if he/she decides that considering all the circumstances, it would not be reasonable to expect the family to bear the full costs of legal assistance at the inquest. This means that an applicant who would not otherwise satisfy the means test criteria might still be eligible for legal help and legal aid for legal representation.
- 7.9 In general, determinations for controlled work are delegated to providers themselves, and they are the assessing authority for the client’s means under Regulation 10(1) of the Means Regulations. If the applicant is therefore assessed as passing the means and merits test, the provider would be able to grant legal help.
- 7.10 Where an assessment is made by a provider that a client is financially ineligible for legal help in relation to an inquest, providers can apply to the Legal Aid Agency (LAA) for the financial eligibility limits to be waived. It is only after DLAC has waived the financial eligibility criteria that clients are granted legal help. The provision of legal help can only commence therefore, after DLAC has waived the eligibility criteria. All applications for legal help funding are determined within five working days.
- 7.11 In February 2019, the Ministry of Justice published its Review of Legal Aid for Inquests. From 19 July 2018 to 31 August 2018, the Ministry held a public call for evidence to seek views on people’s experiences of the current inquests system. The evidence collated as part of the call for evidence indicated that the current position on backdating legal help has caused operational difficulties. Without the power to backdate the legal help waiver, providers maintained that families were often forced to

pay privately in the early stage of the process, in order to enable solicitors to carry out work pending the disclosure of materials ahead of a preliminary inquest review hearing.

- 7.12 This amendment introduces a discretion for DLAC to specify that a determination of legal help funding in relation to inquests, after DLAC has waived the financial eligibility criteria, can have effect from the date that the application for funding was made, rather than from the DLAC's date of determination.

*Amendment of Domestic Abuse evidence requirements*

- 7.13 Legal aid is not generally available for private family disputes. However, legal aid may be available to a victim of domestic violence for private family matters so long as they are able to provide objective evidence of domestic violence or a risk of domestic violence. The types of evidence which can be accepted as sufficient are set out in schedule 1 to the Procedure Regulations.
- 7.14 These evidence requirements have been amended on several occasions since they were first brought into force in April 2013, most recently in January 2018. The 2018 amendments introduced new forms of evidence, for example evidence provided by a domestic violence support organisation that has provided support related to the applicant's needs as a victim of domestic violence. The 2018 amendments also expanded the scope of existing evidence, for example replaced the specific list with a broader definition of "appropriate health professional".
- 7.15 Following the January 2018 amendments, we have continued to consider further amendments following feedback from stakeholder groups. As a result of these discussions, we concluded that the following three amendments should be made now to the current evidence requirements to ensure that the evidence requirements are up to date and consistent:
- i. amend the Independent domestic violence advisor (IDVA) and independent sexual violence advisor (ISVA) evidence requirement. Under schedule 1 of the regulations a letter from a IDVA and ISVA confirming they are providing support to the victim is acceptable evidence. The amendments will expand this so that a letter confirming past support to the applicant from either ISVA and IDVA is acceptable. This amendment is being made to enable consistency with other evidence provisions in schedule 1 of the regulations which allow for prior support relating to domestic abuse issues to be used as evidence.
  - ii. extend the geographical scope of evidence from Domestic Abuse support organisations. Under Schedule 1, regulation 17 a letter from an organisation providing domestic violence support may be acceptable evidence if it contains specified statements and confirmations. Currently the letter must confirm that the organisation is situated in England and Wales. The amendment will change this particular requirement to the United Kingdom rather than England and Wales (E+W). This will ensure consistency with the other evidence provisions that allow evidence from bodies within the UK rather than just E+W.
  - iii. Amend wording within Schedule 1 paragraph 20 of the Regulations to make it in line with the Home Office immigration rules. This amendment removes the wording "under paragraph 289B of the Immigration Rules" as this references the old immigration rules before changes were made on 9<sup>th</sup> July

2012. The wording now references “victims of domestic abuse” in relation to the immigration rules.

*Amending Mediation provision*

- 7.16 The Family Mediation Council (FMC) as well as mediators themselves highlighted that there are some cases where a person may be some distance apart from another to participate in mediation. This issue can make it difficult to achieve the requirements in regulations that the mediator’s premises must be attended in person to make an application for legal aid for family mediation.
- 7.17 Often the first time the parties will meet the mediator will be at the Mediation Initial Assessment Meeting (MIAM) where the mediator discusses whether the matter is suitable for mediation. This is often when the parties will apply for legal aid for the mediation. Under the FMC Code of Practice for family mediators the MIAM can be held either in person or via video connection. However, under the current regulations an application for legal aid has to be made in person at the mediator’s premises. We have therefore amended the regulations to allow for exceptions to the mandatory requirement for face-to-face attendance at the mediator’s premise for the purposes of applying for legal aid. Legislation is necessary to achieve this change as the requirement for face-to-face mediation is set out in the Procedure Regulations 2013.
- 7.18 The change will also ensure consistency with other types of legal aid where applications do not have to be made in person. In particular, the amended regulation 61 will now mirror regulation 22(1) which provides similar requirements for controlled work. We hope that this change will encourage greater use of mediation via digital means and remove the need for applications for legal aid to be made in person.

**8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 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 The Department carried out informal consultations with stakeholders on these changes, as part of the Post Implementation Review of LASPO and the Review of Legal Aid for Inquests. The Department is acting on commitments made in the Legal Support Action Plan which was announced alongside the Post Implementation Review of LASPO and the Review of Legal Aid for Inquests in February 2019.

**11. Guidance**

- 11.1 The LAA will issue guidance to providers in advance of the changes coming into force via its website.
- 11.2 The Ministry of Justice will issue amendments to the Lord Chancellor’s Guidance regarding the changes before they come into force.

## **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 has not been prepared for this instrument because the legislation will produce a low-level impact on business and the public sector. In relation to backdating legal help payments, at present, the LAA process payments from the date of DLAC's decision. Backdating payments to the date of application therefore, will not significantly impact the LAA. The decision to remove the mandatory status of the CLA Telephone Gateway for cases of discrimination, debt and special educational needs may mean an increased caseload for some legal aid providers in these areas. The changes may lead to a slight increase in the workload for both private and not for profit face to face providers of legal advice in the areas of debt, discrimination and special educational needs, but this is not expected to be significant as face to face advice can be accessed under the current arrangements when suitable. The changes to the evidence requirements and the mediation provision will lead to a slight increase in caseload for the LAA as well for legal aid providers, however this will not be a significant increase as these changes will still fall under the current types of cases.

## **13. Regulating small business**

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.
- 13.2 The legislation applies to small business only insofar as it affects specific operational arrangements, as set out in operational guidance, of the LAA and providers of legal aid services.

## **14. Monitoring & review**

- 14.1 The operation and expenditure of the legal aid scheme is continually monitored by the Ministry of Justice and the LAA.

## **15. Contact**

- 15.1 Tom Bioletti at the Ministry of Justice. Telephone: 07815 173637 or email: [thomas.bioletti@justice.gov.uk](mailto:thomas.bioletti@justice.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Jelena Lentzos, Deputy Director, Legal Aid Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Alex Chalk MP, Parliamentary Under Secretary of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.