

EXPLANATORY MEMORANDUM TO

The Civil Legal Services (Financial) (Amendment No.2) Regulations (Northern Ireland) 2019

SR No. 203

1. Introduction

- 1.1. This Explanatory Memorandum has been prepared by the Department of Justice to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2. The Statutory Rule is made under Article 13 of the Access to Justice (Northern Ireland) Order 2003 and is subject to the negative resolution procedure.

2. Purpose

- 2.1. The purpose of the amending Regulations is to exempt certain applications for advice and assistance in potential proceedings or representation in certain proceedings or potential proceedings before the Review Tribunal, under the Mental Capacity Act (Northern Ireland) 2016 ("the 2016 Act"), from financial eligibility assessments.
- 2.2. The amending Regulations substitute regulation 4(1)(c) of the original Civil Legal Services (Financial) Regulations (Northern Ireland) 2015. The substituted regulation 4(1)(c) adds; applications to the Review Tribunal under section 45, references to the Tribunal under sections 47 and 48, applications to the Tribunal for the appointment of a nominated person where the client is the person to whom the application relates and applications to the Tribunal for the revocation of a Tribunal's appointment of a nominated person where the client regains capacity under section 83(2), of the 2016 Act, to the list of civil legal services that are available without reference to a client's financial resources.

3. Background

- 3.1. In a health or social care setting, it is lawful to arrange or provide care or treatment in a way that amounts to deprivation of liberty (DoL) only if the person is detained in hospital under the Mental Health (Northern Ireland) Order 1986 or, if the person lacks capacity, there is a declaratory order made by the High Court authorising the deprivation. There are no statutory provisions in Northern Ireland which authorise DoLs outside these processes.
- 3.2. In 2014 in the case of *Cheshire West*, the Supreme Court found that a person is deprived of his or her liberty if he or she is under continuous supervision and control, is not free to leave and the state is, in some way, involved in the deprivation of liberty.
- 3.3. The Department of Health is commencing certain provisions in the 2016 Act, on 2 December 2019 to provide a statutory framework for authorising deprivations of liberty. Persons deprived of liberty will be provided with a safeguard by means of a right of appeal against authorisations of

deprivation of liberty to the Review Tribunal. Legal aid provision is available for such proceedings, however, the applicant could not avail of legal aid to challenge their detention if their means exceeded the prescribed financial eligibility limits, without this legislative change.

4. Consultation

- 4.1. From 23 September 2019 to 14 October 2019 the Department completed a targeted consultation with a range of bodies with an interest, including the Lord Chief Justice, Attorney General, Human Rights Commission, Law Society and Bar. Consultees were contacted and asked for their views on
- 4.2. • the policy proposal;
- 4.3. • impact screenings of the policy (human rights; equality, rural, privacy/data protection and regulatory) none of which identified the need for full or further impact assessments to be carried out;
- 4.4. • the draft legislation giving effect to the proposed changes.
- 4.5. The Law Society and Bar responded to the consultation to endorse the proposals.

5. Equality Impact

- 5.1. The Draft Regulations were screened in compliance with section 75 of the Northern Ireland Act 1998. There is no adverse or differential impact on any of the S.75 groups.
- 5.2.

6. Regulatory Impact

- 6.1. The draft Regulations were screened for Regulatory Impact. A Regulatory Impact Assessment is not required.

7. Financial Implications

- 7.1. The financial cost could be between £560,000 and £654,00 per year.

8. Section 24 of the Northern Ireland Act 1998

- 8.1. The Regulations are compliant with section 24 of the Northern Ireland Act 1998

9. EU Implications

- 9.1. Not applicable

10. Parity or Replicatory Measure

- 10.1. The measure replicates the provision of legal aid in England without reference to a client's financial resources.

11. Additional Information

- 11.1. Not applicable