

**EXPLANATORY MEMORANDUM TO**  
**THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012**  
**(AMENDMENT OF SCHEDULE 1) ORDER 2012**

**2012 No. [DRAFT]**

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 Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“the Act”), which sets out when civil legal aid may be made available. This instrument would allow for civil legal aid to be provided in relation to a review by the First-tier Tribunal where it had identified an error of law in its own decision on a welfare benefit appeal, and in relation to applications under the Convention on the international recovery of child support and other forms of family maintenance concluded at The Hague on 23 November 2007 (the “2007 Hague Convention”). The instrument also amends Schedule 1 to ensure that legal aid for judicial review is available only as set out in paragraph 19 of Part 1 of Schedule 1 to the Act.

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

3.1 None.

**4. Legislative Context**

4.1 This instrument is made under section 9(2) of the Act, and is the first use of this power to amend Schedule 1 to the Act. This instrument is one of a number of statutory instruments which give effect to Part 1 of the Act. These instruments will be laid in time for the Act to come into force on 1 April 2013.

4.2 In a Written Ministerial Statement on 18 September 2012 (18 September 2012: column 42WS), the Government announced that advice and assistance would be available for those welfare benefit cases in the First-tier Tribunal where it had identified an error of law in its own decision. The Government undertook to lay an Order in due course under section 9 of the Act to reflect this position; this is that instrument.

4.3 This instrument also facilitates in part the requirements of the 2007 Hague Convention. Articles 14, 15 and 17 of the 2007 Hague Convention make provision about the circumstances in which legal aid should be available for applications under the Convention for the recognition, enforcement or establishment of a decision in relation to maintenance. This instrument amends the Act to ensure that legal aid can be provided in relation to such applications. The specific requirements of the 2007 Hague Convention in relation to merits criteria will be dealt with in regulations to be made under section 11 of

the Act (the Civil Legal Aid (Merits Criteria) Regulations 2012). The requirements in relation to financial eligibility will be dealt with in regulations to be made under section 21 of the Act.

4.4 The Proposal for a Council Decision on the conclusion by the European Community of the 2007 Hague Convention was subject to Parliamentary Scrutiny in 2009, clearing House of Commons scrutiny in November and House of Lords scrutiny in December 2009.

## **5. Territorial Extent and Application**

5.1 This instrument applies to England and Wales.

## **6. European Convention on Human Rights**

The Minister of State for Justice, Lord McNally, has made the following statement regarding Human Rights:

In my view the provisions within the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012 are compatible with the Convention Rights.

## **7. Policy background**

7.1 The Act gives effect to the Government's policy position on Legal Aid. The Government believes that legal aid has expanded far beyond its original intentions and is available for a wide range of issues, many of which need not be resolved through the courts. Irrespective of the current economic situation, a wide ranging programme of reform is required to ensure that legal aid is targeted to those who need it most, for the most serious cases in which legal advice and representation is justified.

7.2 The Act sets out what services can and cannot be funded through civil legal aid in Schedule 1.

### *Article 3: Review of decision of First-tier Tribunal relating to welfare benefits*

7.3 This instrument adds to Schedule 1 to the Act civil legal services in relation to a review by the First-tier Tribunal where it had identified an error of law in its own decision on a welfare benefit appeal. This follows a commitment by the Government during Commons Consideration of Lords Amendments of the Legal Aid, Sentencing and Punishment of Offenders Bill 2012, to consider whether there was a way for independent verification to be used to identify those First-tier Tribunal welfare appeals which involved a point of law (17 April 2012: column 226). As set out in the Written Ministerial Statement referred to above, having considered the matter carefully, the Government considered that a system of independent verification was not feasible. However, the Government said it would make available advice and assistance for those welfare benefit

cases in the First-tier Tribunal where the First-tier Tribunal had itself identified an error of law in its own decision. The instrument would allow for legal aid to be provided to an individual to make representations to the First-tier Tribunal, when the Tribunal invites them to do so as part of its review. It would also allow for legal aid to be provided in relation to an application for action to be set aside and for the decision to be reviewed again where such action was taken as a result of the review without first giving every party an opportunity to make representations.

#### *Article 4: 2007 Hague Convention*

7.4 This instrument adds to Schedule 1 to the Act civil legal services in relation to applications under Article 10 of the 2007 Hague Convention for recognition, enforcement or establishment of a decision in relation to maintenance and direct requests to a competent authority for recognition and enforcement of a decision where the individual previously received legal aid in the State of origin. This will allow for legal aid to be provided, as required by Article 14, 15 and 17 of the 2007 Hague Convention. The provision is similar to that made for cases brought under the EU Maintenance Regulations, already in scope in paragraph 18(2) and (3) of Part 1 of Schedule 1 to the Act, which provides for recovery of child support and family maintenance in Member States. This amendment to Schedule 1 makes similar provision for applicants from 2007 Hague Convention signatory countries.

#### *Article 5 and 6: Judicial review*

7.5 The effect of these amendments is to ensure that legal aid is available for judicial review only as set out in paragraph 19 of Part 1 of Schedule 1 to the Act, which is subject to the general and specific exclusions set out in sub-paragraph (2) to (8) of that paragraph. These amendments are being made to ensure the policy intention, set out in the Government response to the consultation ‘Proposals for the reform of legal aid in England and Wales’ and made clear in debates during the passage of the Legal Aid, Sentencing and Punishment of Offenders Bill, that legal aid should be available for judicial review subject to some general and specific exclusions (which are reflected in the exclusions in paragraph 19 of Part 1 of Schedule 1 to the Act). An arguable effect of paragraph 1 of Part 4 of Schedule 1 is that judicial review may be in scope under other paragraphs of Part 1 of Schedule 1, which are not subject to the same general and specific exclusions set out in paragraph 19. This instrument makes a technical amendment to put the matter beyond doubt.

## **8. Consultation outcome**

8.1 The consultation ‘Proposals for the reform of legal aid in England and Wales’ was published on 15 November 2010 and closed on 14 February 2011. Over 5,000 responses were received from representative bodies, practitioner and other organisations, individual members of the judiciary, members of the House of Commons and Lords, individual solicitors and barristers and members of the public.

8.2 The majority of responses did not support the Government's original proposals for reform, although there was some support for particular measures. Some of the original proposals were modified in light of the comments received from consultees. Most changes widened access to legal aid for certain types of case compared to the original proposals, for example an expansion of the criteria to qualify for legal aid in a private family law case involving domestic violence. However, other changes further limited access to legal aid, such as removing funding for certain immigration and asylum judicial reviews where there has been an appeal or judicial review to a tribunal or court on the same issue or a substantially similar issue within a period of one year.

8.3 A detailed Government response to the consultation exercise is available on the MoJ Website at [www.justice.gov.uk/consultations/legal-aid-reform](http://www.justice.gov.uk/consultations/legal-aid-reform).

8.4 We have not consulted on the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012.

## **9. Guidance**

9.1 Guidance is not being prepared specifically on this instrument. A programme of training and guidance is being prepared by the Legal Services Commission to support the transition to the new arrangements. This will be made available to legal aid providers ahead of the commencement of the Act on 1 April 2013.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is likely to be positive, as additional legal aid work will be available to organisations offering such services. However, as noted below, these impacts are likely to be negligible.

10.2 There is no impact on the public sector of the changes in relation to judicial review and welfare benefits beyond that set out in the Royal Assent Impact Assessment. The impact on the public sector of including the 2007 Hague Convention, with its current signatory countries, in the scope of civil legal services is expected to be negligible, given the very small number of cases expected. However, there will be additional financial implications for the legal aid fund if more countries not currently covered by the EU Maintenance Regulations sign up to the 2007 Hague Convention.

10.3 The impacts of the Government's programme of legal aid reform are set out in an Impact Assessment, which was updated following the Act receiving Royal Assent. This is available at [www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information](http://www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information). An Impact Assessment has not been prepared specifically for this instrument.

## **11. Regulating small business**

11.1 The legislation does not apply to small business.

## **12. Monitoring & review**

12.1 The Ministry of Justice will conduct a post-implementation review of the Act between three to five years after implementation. This review will also consider the operation of the secondary legislation.

## **13. Contact**

Olga Kostiw at the Ministry of Justice (Tel: 020 3334 6400 or email: [olga.kostiw@justice.gsi.gov.uk](mailto:olga.kostiw@justice.gsi.gov.uk)) can answer any queries regarding the instrument.