

EXPLANATORY MEMORANDUM TO
THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012
(AMENDMENT OF SCHEDULE 1) ORDER 2013

2013 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, in the following ways:

- to allow for civil legal aid to be provided for appeals on a point of law relating to council tax reduction schemes;
- to amend the definition of domestic violence in paragraphs 12, 28 and 29 of Part 1 of Schedule 1 to the Act so that it is consistent with the cross government definition;
- to allow for civil legal aid to be provided 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”); and
- 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. 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 This instrument 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 are dealt with in the Civil Legal Aid (Merits Criteria) Regulations 2013 (S.I. 2013/104). The requirements in relation to financial eligibility will be dealt with in regulations to be made under section 21 of the Act.

4.3 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 2013 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.

7.3 On 29th October 2012 the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012 was laid in Parliament. A motion approving the Order was passed by the House of Commons but the Order was defeated by the House of Lords. The previous Order contained the same provisions as Articles 5, 6 and 7 as this instrument. It also contained a provision allowing 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. There are no plans for this aspect of the previous Order to be brought forward in secondary legislation.

Article 3: Council tax benefits

7.4 Paragraph 8 of Part 1 of Schedule 1 to the Act makes available advice and assistance in relation to welfare benefit appeals on a point of law in the Upper Tribunal, the Court of Appeal and the Supreme Court. It also brings into scope representation for welfare benefit appeals in the Court of Appeal and Supreme Court. Appeals on a point of law relating to council tax benefit would fall within the scope of this paragraph.

7.5 As part of the welfare reforms, council tax benefit will be abolished and replaced with council tax reduction schemes, which will allow local authorities to determine council tax liability. Appeals on a point of law on the council tax reduction scheme will not fall within paragraph 8 of Part 1 of Schedule 1 because the appeal route for these appeals will be to the High Court from the Valuation Tribunal for England and the Valuation Tribunal for Wales.

7.6 This instrument therefore ensures that advice and assistance is available for appeals on a point of law in the High Court, the Court of Appeal and Supreme Court relating to a council tax reduction scheme, and for representation in the Court of Appeal and Supreme Court for these appeals. This ensures that equivalent civil legal services are available in relation to onward appeals relating to council tax reductions schemes as is currently available in relation to council tax benefit.

Article 4: Definition of domestic violence

7.7 This instrument amends the definition of domestic violence as set out in paragraphs 12(9), 28(5) and 29(4) of Part 1 of Schedule 1 to the Act which bring into scope private family law and certain immigration cases for victims of domestic violence. It amends the definition of domestic violence in these paragraphs to include controlling and coercive behaviour as domestic violence, and to introduce ‘patterns of incidents’ as well as ‘incidents’ of behaviour that constitutes domestic violence. The purpose of the amendments is to reflect the changes to the cross-Government definition of domestic violence that will be implemented in March 2013. During the passage of the Legal Aid, Sentencing and Punishment of Offenders Bill, the Government amended the definition of domestic violence in these paragraphs to more closely reflect the previous cross-Government definition used across Government. This instrument therefore ensures that the definition of domestic violence used in Schedule 1 to the Act continues to reflect the cross-Government definition.

Article 5: 2007 Hague Convention

7.8 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 6 and 7: Judicial review

7.9 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.

8.4 We have not consulted on the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2013.

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, the amendment to the domestic violence definition or the council tax benefits changes 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. 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

Andrew Tucker the Ministry of Justice (Tel: 020 3334 6387 or email: Andrew.Tucker@justice.gsi.gov.uk) can answer any queries regarding the instrument.