

EXPLANATORY MEMORANDUM TO
THE EARLY LEGAL ADVICE PILOT SCHEME ORDER 2022

2022 No. [XXXX]

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 Order establishes a scheme to pilot the provision of legal aid for certain civil legal services, to be known as the Early Legal Advice Pilot Scheme (“the pilot scheme”).

2.2 It modifies Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) to bring civil legal services for certain housing, debt, and welfare benefits issues “in scope” of legal aid for the purposes of the pilot scheme.

2.3 The Order also modifies secondary legislation to make work delivered as part of the pilot scheme non-means and non-merits tested and introduces a new fee to remunerate providers delivering work in the pilot scheme.

3. Matters of special interest to Parliament

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

3.1 None.

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.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State for Justice Lord Wolfson of Tredegar QC has made the following statement regarding Human Rights:

“In my view the provisions of the Early Legal Advice Pilot Scheme Order 2022 are compatible with the Convention rights.”

6. Legislative Context

6.1 LASPO makes provisions about civil and criminal legal aid.

6.2 Civil legal aid is currently only available to an individual if the legal service in question is one described within a list of civil legal services found in Part 1 of Schedule 1 to LASPO. Services in that list are described as being “in-scope” of civil legal aid.

6.3 LASPO does allow for services that are not “in scope” under Exceptional Case Funding (ECF) as set out in Section 10 of LASPO. ECF can be provided to an individual, where the services are not in-scope services but where a failure to grant

legal aid funding would breach or risk breaching the individual’s rights under the European Convention on Human Rights, or an enforceable retained EU right.

- 6.4 The pilot scheme will add new “in scope” services for early legal advice for individuals with housing, debt and welfare benefit issues. The new services are not currently in scope and would not be likely to be eligible for funding under the ECF scheme.
- 6.5 To receive legal aid for either in scope services or through the ECF scheme, ordinarily the individual would also have to pass a financial eligibility test (the “means test”) and a merits test. The merits test takes into consideration factors such as the prospects of the case succeeding and the benefit to the individual or others. There are some exceptions to the merits test, for example care proceedings.
- 6.6 The means test is set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (“Means Regulations”) and the merits criteria are set out in the Civil Legal Aid (Merits Criteria) Regulations 2013 (“Merits Regulations”).
- 6.7 This instrument amends both the Means Regulations and Merits Regulations so that individuals selected to participate in the pilot will not be subject to these criteria – i.e. participants in the pilot will not have to pass a merits test or a means test, the only requirement to receive legal aid will be that they have been selected to take part in the scheme.

Scope of the pilot scheme

- 6.8 The pilot scheme will bring early legal advice services for housing, debt and welfare benefit issues into scope of legal aid. However, the pilot scheme will be time limited (from 1 April 2022 until 31 March 2024) and limited to two specific geographical areas (see paragraph 7.9). The Lord Chancellor has the power to create time and geographically limited pilot schemes under LASPO, although no such pilot scheme has been put in place previously.

Remuneration

- 6.9 The Civil Legal Aid (Remuneration Regulations) 2013 (“the Remuneration Regulations”) set out how much legal aid providers who provide civil legal services can be paid. This Order will amend the Remuneration Regulations to set the level of payment that a legal aid provider who is authorised to conduct work on the pilot scheme will be able to claim.
- 6.10 The fees and rates for civil legal services are set out in Schedule 1 of the Remuneration Regulations. Part 1 sets out the standard and graduated fees. This instrument amends Part 1 of Schedule 1 to the Remuneration Regulations by introducing a new standard fee. This new fee is comparable to existing fees but includes an uplift to account for additional reporting providers will be asked to complete for evaluation purposes.
- 6.11 The fees and rates set out in the Remuneration Regulations are subject to the definitions and payment schemes contained in the contracts made between the Lord Chancellor and a provider of civil legal services under Part 1 of LASPO. The relevant contract for present purposes is the 2018 Standard Civil Contract (“the contract”). The detailed remuneration provisions are contained in the contract Specification which consists of general provisions and other sections that are specific to particular categories of law as defined in the contract. Further details of assessment of costs and

what can generally be claimed are also set out within guidance. The work delivered as part of this pilot scheme will be covered within the existing contract framework. It is likely to be included either as a separate schedule to the contract, or under a bespoke contract Specification. This is in line with standard practice, noting there are already a number of different Specifications covering different areas of work.

7. Policy background

What is being done and why?

- 7.1 In April 2013, LASPO reformed the scope of civil legal aid, including the removal of funding for early legal advice and support for most social welfare law. LASPO had the stated aim of ensuring that legal aid was targeted at those who need it most, for the most serious cases in which publicly funded legal advice or representation is justified.
- 7.2 Given the extent of the changes that LASPO introduced, the Government committed to carrying out a Post-Implementation Review (PIR) of the reforms it had introduced to assess the impact of the policies against the original objectives. The PIR found that while the changes to legal aid had succeeded in reducing legal aid spend, the reforms had left gaps where some groups were now struggling to resolve certain legal problems. Respondents to the PIR suggested that clients experiencing housing matters eligible for legal aid might have resolved their issues prior to formal proceedings if they had received legal advice at an earlier stage which addressed the totality of their social welfare law matters, in particular debt, welfare and housing benefits.
- 7.3 While research by organisations such as Citizens Advice, Shelter, the Law Society and the Equality and Human Rights Commission was persuasive in suggesting a link between early legal advice and downstream benefits, officials in the department concluded that their findings did not robustly quantify the financial savings for government, nor did they account for the costs of individuals whose problems would not be resolved with early legal advice, or offer sufficient information to inform future policy development.
- 7.4 The policy intention is to test the hypotheses put forward by respondents by expanding the scope of legal aid to provide eligible participants with early legal advice and assistance for a total of three hours on any matters within the categories of ‘housing’, ‘debt’ or ‘welfare benefits’.
- 7.5 The pilot scheme seeks to gather evidence to inform future policy development relating to civil legal aid, particularly regarding social welfare law matters. The pilot will gather substantial data about the participants, the outcomes they experience, and the possible cost savings to the government. The data will be used to produce an evaluation of the pilot scheme, which the department intends to publish.
- 7.6 The pilot scheme proposed deviates from the current legal aid regime as described in paragraph 6.8. The proposals are, however, within the power of LASPO. These changes are reflected in the order as outlined below:

In scope services

- 7.7 At present, civil legal services for matters proposed under the pilot scheme are not in-scope of legal aid. The amendment to Part 1 of Schedule 1 of LASPO therefore brings these matters into scope for legal aid, subject to exclusions outlined in the Order.

- 7.8 The amendment covers civil legal services relating to advice and assistance in relation to housing, debt and welfare benefits in the form of information and guidance for a total of three hours. Participants can receive advice and assistance irrespective of whether their matters fall into one of these categories, or all of the categories.

Eligibility for the pilot scheme

- 7.9 To be eligible for the pilot scheme, individuals will live, or be habitually resident, in the area of Manchester City Council or the area of Middlesbrough Council. The words “lives or habitually resident” have been used to cover people who might have relocated from a place where they were habitually resident but have not been in the place they live for long enough to establish habitual residence. This is to ensure that vulnerable people, such as those who have fled homes as a result of domestic violence, refugees, or people who have become homeless and are temporarily staying with family or friends, for example, will be eligible for the pilot scheme.
- 7.10 Individuals will also be selected to participate in the pilot scheme by a person who will be appointed by the Lord Chancellor to select participants for the pilot scheme. Guidance will explain who that person is to be, but it may be an individual or individuals employed by the local authority or an independent evaluator.
- 7.11 Subject to a feasibility study to confirm whether a randomised control trial is the most appropriate impact evaluation mechanism to test the impact of the proposed intervention and generate evidence that satisfies requirements set by the Her Majesty’s Treasury, participants will be randomly allocated to either the treatment group or a control group. Therefore, participants will also need to have been allocated to the treatment group in order to be eligible for the services on offer.
- 7.12 The Means Regulations and Merits Regulations will be amended by this Order, with reference to the pilot scheme to allow for pilot participants to receive legal aid on that basis alone (and without any other form of means or merits assessment). This step has been taken to not only ensure that the pilot meets the participant threshold required to make any findings statistically relevant, but also to help us understand the types of individuals who participate in the study, their cases and their means.

Remuneration rates

- 7.13 The Remuneration Regulations set the fees and rates payable to legal aid providers who have a contract with Lord Chancellor. The fees and rates are set at levels so as to remunerate legal aid providers for the work they do as part of their legal aid contract.
- 7.14 There is currently no remuneration rate for the work delivered as part of the pilot scheme, and so the Remuneration Regulations will be amended to introduce a new fee to be paid to providers who undertake work as part of the pilot scheme.

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 There are no current plans to consolidate the secondary legislation instruments which this order amends.

10. Consultation outcome

- 10.1 There has been no formal consultation on this statutory instrument as its purpose is to deliver a commitment already announced by the Ministry of Justice, in the Legal Support Action Plan published here:
<https://www.gov.uk/government/publications/legal-support-action-plan>
- 10.2 The design of the pilot scheme has been informed by engagement with stakeholders during the Post Implementation Review of LASPO in 2017-2019 as well as by ongoing engagement with interested stakeholders through the department's Legal Support Advisory Group and other forums and workshops.

11. Guidance

- 11.1 The Lord Chancellor will publish guidance establishing the criteria which will be used to select participants for the pilot scheme. Additional guidance will be published by the department to be used by the local authorities and legal aid providers involved in the delivery of the pilot scheme.

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 A full Impact Assessment has not been prepared for this instrument because it falls below the threshold for producing one.
- 12.4 The legislation brings into scope matters for the purposes of the pilot scheme which will be implemented using finite funding from HM Treasury's Shared Outcome Fund. The funding will cover all costs associated with the delivery of the pilot scheme, including remuneration of legal aid providers. The anticipated benefits from the pilot scheme will include improved data on the positive impact of early legal advice for individuals and public services, which will be used to inform future policies relating to legal aid and social welfare matters.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken will be to provide operational guidance. The legislation will only apply to specific small business providing legal aid services in Manchester and Middlesbrough, where the pilot scheme will be conducted.
- 13.3 The basis for the final decision on what action to take to assist small businesses was founded on the fact that the small businesses affected are already providing similar services and are used to delivering similar work.

14. Monitoring & review

- 14.1 A review provision within the Order is not required as the purpose of the pilot is to provide data to help officials assess whether an early legal advice scheme would be of benefit in terms of helping to prevent future legal proceedings. However, the department does intend to publish an independent evaluation of the pilot scheme, as set out in paragraph 7.5.

14.2 Additionally, the operation and expenditure of the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency

15. Contact

15.1 Vimbai Dzimwasha at the Ministry of Justice. Telephone: 07971493032 or email: Vimbai.dzimwasha@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Jelena Lentzos, Deputy Director for Legal Aid, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Wolfson of Tredegar QC, Parliamentary Under Secretary of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.