

EXPLANATORY MEMORANDUM TO
THE CIVIL LEGAL AID (HOUSING AND ASYLUM ACCOMMODATION) ORDER
2023

2023 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 His Majesty.

2. Purpose of the instrument

2.1 This instrument has two purposes.

2.2 This instrument expands scope of civil legal aid to allow early legal advice before court, on a wider range of issues, for those at risk of losing their home. It also introduces a new fee to be paid to legal aid providers delivering this early legal advice.

2.3 The second purpose is to maintain the Government’s policy that those at risk of homelessness can access legal aid. This applies to failed asylum-seekers, who otherwise would be destitute, to receive legal aid to obtain accommodation support.

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 extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 Lord Bellamy KC, Parliamentary Under Secretary of State at the Ministry of Justice, has made the following statement regarding Human Rights:

“In my view the provisions of the Civil Legal Aid (Housing and Asylum Accommodation) Order 2023 are compatible with the Convention rights.”

6. Legislative Context

6.1 Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) sets out that the Lord Chancellor must secure that legal aid is made available in accordance with that Part. Legal aid is divided up into civil legal aid (sections 8-12) and criminal legal aid (sections 13-20).

6.2 “Civil legal services” are defined in section 8(1), and for the purposes of Part 1 of LASPO, civil legal services means any legal services other than the types of advice, assistance and representation that are required to be made available under sections 13, 15 and 16 (i.e. criminal legal aid).

- 6.3 Section 9 of LASPO sets out that the matters which are able to be funded by civil legal aid are described in Part 1 of Schedule 1 to LASPO. Section 11 sets out that an individual can only qualify for civil legal aid in accordance with criteria set out in regulations.

Early legal advice for those facing the loss of their home

- 6.4 Paragraph 33 of Schedule 1 to LASPO sets out that civil legal services can be provided to an individual in relation to court orders for the sale or possession of the individual's home.
- 6.5 Section 21 of LASPO sets out that an individual must pass a means test to be eligible for legal aid. The means test is set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 ("the Means Regulations"). Regulation 5 of the Means Regulations sets out the services that are non-means tested.
- 6.6 Section 2 of LASPO makes provision for the payment of remuneration to practitioners who provide civil legal services. The Civil Legal Aid (Remuneration) Regulations 2022 ("the Remuneration Regulations") sets out that remuneration.
- 6.7 The Civil Legal Aid (Procedure) Regulations 2012 ("the Procedure Regulations") set out the rules for the making and withdrawing of determinations (decisions) that an individual qualifies for civil legal aid services within Part 1 of LASPO.

Legal aid for asylum accommodation support

- 6.8 Section 95 of the Immigration and Asylum Act 1999 ("the 1999 Act") sets out that asylum-seekers, and their dependants, who would otherwise be destitute can obtain support from the Home Office. Section 96 of the 1999 Act defines the ways in which support can be provided under section 95. The type of support relevant to this policy area is the provision of accommodation for asylum-seekers (and their dependants).
- 6.9 Failed asylum-seekers, and their dependants, who would otherwise be destitute can be provided with accommodation under section 4 of the 1999 Act, if the individual is taking all reasonable steps to leave the UK or is unable to leave due to a legal or practical obstacle.
- 6.10 Schedule 11 of the Immigration Act 2016 ("the 2016 Act") is to repeal section 4 of the 1999 Act. It will also introduce a new section 95A to the 1999 Act that is similar in substance to section 4, which is to be repealed.
- 6.11 Currently, paragraph 31 of Schedule 1 to LASPO sets out that civil legal services are available in relation to the provision of asylum support, in the form of accommodation, under section 4 or section 95 of the 1999 Act.

7. Policy background

What is being done and why?

- 7.1 The scope of civil legal aid is set out in LASPO, which came into force on 1 April 2013. The amendments under LASPO refocused the scope of civil and family legal aid to discourage unnecessary litigation at public expense, promote alternatives to litigation and to target legal aid at those who need it most. Most housing cases which did not involve homelessness, significant disrepair or possession were removed from scope.

- 7.2 The Government carried out a Post-Implementation Review (PIR) of LASPO in 2019, which assessed the impact of the policies against the original objectives. Broadly, the PIR found that whilst the objective in relation to reducing legal aid spend had been met, the reforms that removed areas of early civil legal advice from scope of legal aid resulted in a lack of early intervention in social welfare. It also suggested that whilst this saved money on legal aid, ultimately these costs have been shifted elsewhere, as relatively minor legal problems can escalate and cluster into more serious problems.

Early legal advice for those facing the loss of their home

- 7.3 The reforms under LASPO removed early legal advice in housing, welfare benefits and debt advice unless there is a risk of homelessness, possession or eviction. This means that, in many instances, the first time someone with a housing legal problem comes into contact with a lawyer is on the day of their possession hearing.
- 7.4 Advice is provided at court through the Housing Possession Court Duty Scheme (HPCDS). The HPCDS provides ‘on the day’ emergency face-to-face advice and advocacy to anyone facing possession proceedings in court. Anyone in danger of their property being repossessed or being evicted from their home can get free legal advice and representation from a duty solicitor on the day of their court hearing, regardless of their financial situation. This work falls outside of the normal legal aid financial eligibility rules and is a non-means tested service.

Why is it being changed?

- 7.5 The Government accepts that possession proceedings, particularly those relating to rent arrears, can be caused by underlying welfare benefits issues (e.g. housing benefit or Universal Credit). The Government therefore intends to help those facing proceedings by providing early advice, supporting individuals to resolve the issues at the core of their legal problem at the earliest point in the process. This could, in some cases, avoid the need for court proceedings altogether.

What will it do now?

- 7.6 This instrument will replace the HPCDS with the Housing Loss Prevention Advice Service (HLPAS). It will encompass two stages: Stage One will provide early legal advice on certain social welfare issues (welfare benefits and debt) and Stage Two will provide an ‘on the day’ in-court duty service, similar to the present HPCDS.
- 7.7 This instrument expands scope of civil legal aid to allow early legal advice before court on housing, debt and welfare benefits issues for those at risk of losing their home. The early legal advice will be non-means tested, meaning individuals will not need to pass any financial eligibility tests to receive this advice.
- 7.8 This instrument will introduce new fees to the Remuneration Regulations to ensure legal aid providers can be paid for services provided under the HLPAS. It also amends the Procedure Regulations so that certain procedural requirements will not apply to HLPAS to allow for its efficient operation.
- 7.9 The introduction of HLPAS aims to address and reduce relatively minor legal problems escalating and clustering into more serious problems. This has the intended outcome of supporting legal issues early and creating savings across government by reducing the escalation of legal issues.

- 7.10 If approved by Parliament, the parts of this Order in relation to housing, debt and welfare benefits will come into force on 1 August 2023.

Legal aid for asylum accommodation support

- 7.11 It is the Government's policy that asylum-seekers should have access to legal aid to assist with obtaining accommodation, in line with the wider policy that legal aid should be available where someone may be at risk of homelessness.
- 7.12 Legal aid for asylum accommodation is currently tied to sections 4 and 95 in the 1999 Act.

Why is it being changed?

- 7.13 Parts of the 2016 Act, when commenced, will repeal section 4 of the 1999 Act and introduce a new section 95A. Unless LASPO is changed, the result of the change will be that legal aid for accommodation support for failed asylum-seekers will no longer be available, contrary to the Government's policy intention.

What will it do now?

- 7.14 This instrument seeks to ensure the original policy intention of helping failed asylum-seekers obtain accommodation support is met by amending LASPO to reflect these prospective legislative changes. The parts of this Order in relation to legal aid for asylum-seekers will come into force when section 95A of the Immigration and Asylum Act 1999 comes into force.

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 plans for consolidation at this time.

10. Consultation outcome

- 10.1 The amendment to expand legal aid for those facing possession proceedings was subject to public consultation in 2021, and the Government's response to the consultation was published in 2022.¹
- 10.2 The amendment to legal aid for accommodation support for asylum-seekers does not represent a change in Government policy, rather it ensures that legal aid eligibility keeps up to date with changes to immigration legislation. No formal consultation was conducted in respect of this change.

11. Guidance

- 11.1 The Legal Aid Agency will issue guidance to providers in advance of the changes coming into force via its website, as is usual practice.

¹ <https://www.gov.uk/government/consultations/housing-legal-aid-the-way-forward>

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is limited to the business and charities who hold a housing legal aid contract and will be affected by the changes in this statutory instrument.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website. The expansion of housing possession legal aid services will provide an additional revenue stream worth approximately £8.1m per year for housing legal aid providers.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses insofar as it affects the specific operational arrangements between the Legal Aid Agency and providers of legal aid services.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is undertaken by the Ministry of Justice and the Legal Aid Agency, who together monitor the operation and expenditure of legal aid scheme.

15. Contact

- 15.1 Christopher Bone at the Ministry of Justice. Email: civil.legalaid@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Lizzie Checkley, Deputy Director for Legal Aid Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Lord Bellamy KC, Parliamentary Under Secretary at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.