

## EXPLANATORY MEMORANDUM TO

### THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012 (LEGAL AID: FAMILY AND DOMESTIC ABUSE) (MISCELLANEOUS AMENDMENTS) 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.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

#### 2. Purpose of the instrument

- 2.1 This instrument makes a number of changes to the civil and criminal legal aid schemes.
- 2.2 This instrument expands the civil legal aid scheme, making civil legal aid available in two new areas of family law and in certain domestic abuse proceedings. This instrument also makes changes to the means and merits tests and the evidence requirements for victims of domestic abuse as a result of new areas being brought into scope of the civil legal aid scheme.
- 2.3 This instrument amends the criminal legal aid scheme to ensure criminal legal aid is available in certain proceedings relating to domestic abuse.

#### 3. Matters of special interest to Parliament

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

- 3.1 This draft instrument supersedes the draft of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid: Family and Domestic Abuse) (Miscellaneous Amendments) Order 2022, which was laid and published on 17 October.

#### 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, has made the following statement regarding Human Rights:

“In my view the provisions of The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid: Family and Domestic Abuse) (Miscellaneous Amendments) 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 mean 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 (criminal legal aid).

### Civil legal services

- 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. There are two key eligibility tests for civil legal aid: the means and merits tests.
- 6.4 The means test is set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (“the Means Regulations”).
- 6.5 The Civil Legal Aid (Merits Criteria) Regulations 2013 (“the Merits Regulations”) sets out the merits test. The exact merits test applicable depends on the type of case (e.g. family, public law, immigration) and the level of services required (e.g. advice and assistance or representation in court).
- 6.6 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. Schedules to the Procedure Regulations set out the acceptable forms of supporting evidence that is required from an applicant for legal aid before they can qualify for legal aid.

### *Special Guardianship Orders*

- 6.7 Paragraph 1(1) of Schedule 1 to LASPO brings into the scope of civil legal aid specific issues relating to the care, supervision and protection of children. Matters heard with those listed issues are also covered by legal aid by virtue of paragraph 1(2) of that Schedule. Regulation 5 of the Means Regulations set out the services which are not means tested.
- 6.8 Part 6 of the Merits Regulations explains what merits test should apply in specific cases. Regulations 66 and 68 are relevant for this instrument. Regulation 66 sets out the criteria to be satisfied for full representation in public family law cases, and Regulation 68 sets out the merits test in private family law cases.
- 6.9 This instrument delivers on a Government commitment made in the Legal Support Action Plan 2019.

### *Placement and Adoption Orders*

- 6.10 Placement and adoption orders are made under the Adoption and Children Act 2002. Legal aid is available for adoption and placement orders under paragraph 1(1)(i) of Schedule 1 to LASPO, subject to the relevant means and merits criteria. The exact means and merits criteria which apply are dependent on whether the placement and

adoption order is sought as part of care proceedings under the Children Act 1989, or if an order is sought without any related care proceedings.

- 6.11 This instrument delivers on a Government commitment in the Legal Support Action Plan 2019.

*Domestic abuse protection order – civil legal aid*

- 6.12 The Domestic Abuse Protection Order (DAPO) is a civil order introduced by Part 3 of the Domestic Abuse Act 2021, intended to offer more comprehensive and longer-term protection for victims of domestic abuse.
- 6.13 Schedule 1 to LASPO already makes civil legal aid available for victims of domestic abuse in family proceedings, for example, for obtaining a non-molestation order against a perpetrator, subject to means and merits testing. Legal aid is also available for respondents to potential injunctions under paragraph 11 of Schedule 1.
- 6.14 In addition, for proceedings falling within paragraph 12 of Schedule 1, domestic abuse victims applying for civil legal aid may have to provide supporting documentation evidencing that they are, or are at risk of being, a victim of domestic abuse before legal aid can be granted. The types of acceptable supporting documentation are set out in Schedule 1 to the Procedure Regulations.
- 6.15 The Government committed to introducing legal aid for the DAPO in a policy paper prepared during the passage of the Domestic Abuse Act 2021:  
<https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-protection-notices-orders-factsheet#will-legal-aid-be-available-for-dapos>.

Criminal legal aid

- 6.16 Sections 13-20 of LASPO set out the levels of advice which can be funded as criminal legal aid.
- 6.17 The Criminal Legal Aid (General) Regulations 2013 make provision about the making and withdrawing of determinations (decisions) that an individual qualifies for criminal legal aid. Eligibility tests for criminal legal aid funding depend on the level of services required. Broadly there are two: the means test and the interests of justice test.

*Domestic abuse protection notices and domestic abuse protection orders – criminal legal aid*

- 6.18 Part 1 of LASPO sets out the statutory framework for criminal legal aid. The Criminal Legal Aid (General) Regulations 2013 (“the Criminal Regulations”) set out the rules for determinations (decisions) in relation to whether an individual qualifies for criminal legal aid. Part 3 of the Criminal Regulations lists the proceedings which are criminal proceedings for the purposes of criminal legal aid.
- 6.19 Part 3 of the Domestic Abuse Act 2021 also introduced the Domestic Abuse Protection Notice (DAPN). The DAPN is a police-issued notice designed to give victims of domestic abuse immediate protection for up to 48 hours. The Domestic Abuse Act 2021 also gives the criminal court power to make a DAPO of its own volition on conviction, acquittal or on a successful appeal against conviction.
- 6.20 The Government committed to introducing legal aid for the DAPN and the DAPO during the passage of the Domestic Abuse Act 2021 (see 6.15).

## 7. Policy background

### *What is being done and why?*

- 7.1 LASPO reformed the scope of civil legal aid. Legal aid provision was generally maintained in public family law matters, which is where a local authority has made an application or lodged proceedings on behalf of a child. Private family law matters between individuals generally became out of scope of the legal aid scheme, with the exception of where an individual is a victim of domestic or child abuse.
- 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 resulted in gaps in legal aid provision for certain groups of people. The Government published the Legal Support Action Plan in 2019, which set out its proposed approach to rectifying these gaps in provision.
- 7.3 Since the PIR in 2019, there have been other events and legislation such as changes to the Immigration Rules, the passing of the Domestic Abuse Act 2021 and the Covid-19 pandemic. These events have necessitated further consideration of legal aid provision to ensure that the original policy intention of LASPO in providing legal aid to those most in need is maintained and keeps up with legislative changes.

### Special Guardianship Orders (SGO)

- 7.4 Legal aid is available for special guardianship orders (SGO) where that application is heard within public family law proceedings due to the risk of the removal of a child as a result of those proceedings, subject to means and merits tests.

### *Why is it being changed?*

- 7.5 SGOs in private family proceedings are not in scope of legal aid. However, evidence was submitted during the PIR which suggested that prospective guardians may be deterred from seeking an SGO, and parents may not get the legal advice they require when faced with the loss of rights over their child without legal aid provision. The Government accepted these arguments.

### *What will it do now?*

- 7.6 This instrument will bring SGOs in private family law proceedings within the scope of the legal aid scheme and will replicate the same means and merits testing arrangements for the parental party and prospective special guardian that are currently in place when SGOs are brought in public family law proceedings.

### Placement and Adoption Orders

- 7.7 A placement order authorises a local authority to place a child for adoption and an adoption order gives the child the legal status as a child of their adoptive parents and gives full parental responsibility to the adoptive parents. It is the Government's policy that parents, or those with parental responsibility, who are at risk of having their child permanently removed should be legally represented.
- 7.8 Currently, the vast majority of placement and adoption orders are sought as part of care proceedings under the Children Act 1989. This means that parents, or those with parental responsibility who are contesting the application for a placement or adoption order are only subject to the means and merits test that applies to care proceedings.

The parents or those with parental responsibility do not have to undergo any further means and merits testing for the placement and adoption order.

*Why is it being changed?*

- 7.9 We have identified instances where placement and adoption orders are not part of care proceedings and therefore have different means and merits criteria to cases where placement and adoptions orders are part of care proceedings. This goes against the Government's policy that parents or those with parental responsibility who are at risk of having their child permanently removed should be legally represented, because there is a greater chance that parents or those with parental responsibility will fail the means and/or merits tests.

*What will it do now?*

- 7.10 This instrument will amend this unintentional discrepancy in means and merits criteria and restore the policy intention. The effect of the amendment will be that parents who are contesting a placement and adoption order outside of care proceedings will be subject to the same means and merits testing arrangement as if they were contesting the application within care proceedings. Parents, or those with parental responsibility, who risk the loss of responsibility over their child will be eligible for non-means tested legal representation. A less stringent merits test will also apply, which is that it is appropriate for legal aid to be granted when taking into account the circumstances of the case.

#### Domestic abuse protection orders - civil legal aid

- 7.11 The Domestic Abuse Protection Order (DAPO) is a type of injunction intended to provide domestic abuse victims with more comprehensive and longer-term protection compared to existing protective orders used in domestic abuse cases. Victims and third parties, either specified in regulations or with permission from the court, can apply to the family court for a DAPO. The police can also apply to a magistrates' court for a DAPO. The Domestic Abuse Act 2021 also enables criminal, family and civil (county) courts to make a DAPO of their own volition during existing court proceedings, which do not have to be domestic abuse related.
- 7.12 There are existing provisions within Schedule 1 which provide civil legal aid for matters relating to issues of domestic abuse. The first is paragraph 11 of Schedule 1, which entitles applicants and respondents to civil legal aid for certain types of protective orders, such as non-molestation orders. The second is paragraph 12 of Schedule 1, which provides civil legal aid to victims of domestic abuse in private family law proceedings. Both of these provisions exist because it is the Government's policy to provide domestic abuse victims with legal aid in order to help them get the support they need to remove themselves from the abusive relationship, and to provide legal aid to respondents to protective orders or injunctions due to the impact it could have on the respondent.

*Why is it being changed?*

- 7.13 Neither of the existing provisions in paragraphs 11 and 12 of Schedule 1 will provide adequate legal aid support in DAPO cases without any amendments. Firstly, both paragraphs are only concerned with family proceedings, whereas DAPOs can be made in civil, family or criminal proceedings, and it is the Government's intention to provide legal aid for DAPOs irrespective of the court in which the DAPO is made. Secondly, paragraph 11 as drafted would not encapsulate DAPOs as it is limited to

certain types of protective orders made under the Family Law Act 1996. Thirdly, paragraph 12 will only be available to applicants for DAPOs, not respondents, which would place DAPO respondents on a different footing for legal aid purposes when compared to similar orders such as a non-molestation order, and it is the Government's view that there would be no justifiable reason for this difference in treatment.

*What will it do now?*

- 7.14 This instrument will amend paragraph 11 of Schedule 1 to explicitly provide that civil legal aid is available for DAPOs for both applicants and respondents. This will align DAPOs with the other types of protective injunctions, such as non-molestation orders, and make legal aid available on the same terms to both applicants and respondents to DAPOs.

Domestic abuse protection notices and domestic abuse protection orders – criminal legal aid

- 7.15 A Domestic Abuse Protection Notice (DAPN) is a police-issued notice which provides victims of domestic abuse immediate protection for up to 48 hours. Upon issuing a DAPN, the police must also apply for a DAPO within the same 48 hour period. Whilst a breach of a DAPN is not a criminal offence, if a DAPN is breached, the person issued with the DAPN (the alleged perpetrator of domestic abuse) may be arrested without a warrant, remanded in police custody, and must come before the magistrates' court within 24 hours for a bail hearing or, if earlier, the hearing for the DAPO application.

*Why is it being changed?*

- 7.16 The DAPN, DAPO and the consequences for breaching a DAPN have been created by the Domestic Abuse Act 2021 and so there is no existing provision for legal aid. LASPO also requires that a legal service is either civil or criminal.

*What will it do now?*

- 7.17 This instrument will ensure that the person issued with a DAPN, who is potentially heard before the magistrates' court for bail conditions, is able to access criminal legal aid. This instrument does this by prescribing that a bail hearing for a breach of a DAPN is a criminal proceeding for legal aid purposes in the Criminal Legal Aid (General) Regulations 2013.
- 7.18 In addition, this amendment will provide for criminal legal aid to be available where DAPOs are made alongside other criminal proceedings. This will ensure that if domestic abuse is raised in other criminal proceedings and a judge decided to make a DAPO, the defendant can also receive criminal legal aid in relation to the DAPO.

Supporting evidence requirements for victims of domestic abuse

- 7.19 For some matters where legal aid is available for domestic abuse victims, the victim must also provide supporting documentation evidencing that they are, or are at risk of being, a victim. This instrument makes two changes to the supporting evidence requirements.
- 7.20 One form of evidence currently permitted is a letter or report from a health professional, which in many cases, is provided by a General Practitioner (GP). This letter or report must state that following a face-to-face consultation, their professional

opinion is that the applicant for legal aid has or has had injuries, or a condition, consistent with being a victim of domestic abuse.

*Why is it being changed?*

- 7.21 Prior to the Covid-19 pandemic, requiring a face-to-face consultation aligned with GP practices more broadly, who mostly saw patients face-to-face as a matter of course. During the pandemic, however, GP appointments were being dealt with over the phone or via video conferencing where possible and clinically appropriate following guidance set by NHS England to keep staff and patients safe and reduce the spread of Covid-19. In direct result to this change during the pandemic, the Legal Aid Agency amended its internal guidance to say that video conferencing appointments counted as a face-to-face consultation for the purpose of providing evidence under the Procedure Regulations. It is likely that as we come out of the pandemic, greater use of video conferencing or telephone appointments will remain a permanent part of the way in which GPs deliver care.
- 7.22 Secondly, the Domestic Abuse Act 2021 introduces the DAPN which offers immediate protection to victims of domestic abuse for up to 48 hours. DAPNs will replace Domestic Violence Protection Notices, which is currently an acceptable form of evidence listed in the Procedure Regulations. Without amendment, victims of domestic abuse would not be able to use a DAPN as evidence that they are a victim of domestic abuse in their application for legal aid.

*What will it do now?*

- 7.23 Firstly, this instrument will allow a letter or report following a telephone consultation, either by landline or mobile, to suffice as an acceptable form of evidence for a legal aid application. This amendment will also formalise the existing video conferencing arrangement by explicitly listing a letter or report following a video conferencing consultation as an acceptable form of evidence for a legal aid application. This amendment seeks to ensure that the type of supporting evidence keeps up with changes in medical professional practices and ultimately ensures that all domestic abuse victims provide the supporting evidence required, no matter how they have been engaging with a medical professional.
- 7.24 The Government recognises that medical professional practices may change over time. The Government is therefore committing to conducting a formal review of this change after a year to assess its effectiveness. The review will consider how to ensure legal aid evidence requirements remain aligned to NHS policy as well as monitoring how the evidence requirements have been operating in practice.
- 7.25 Secondly, this instrument will also allow for the DAPN to be included as an acceptable form of evidence of domestic abuse when applying for legal aid.

## **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 There has been no formal policy consultation on this statutory instrument.
- 10.2 The amendments in relation to Special Guardianship Orders were formulated after an extensive evidence-gathering process as part of the PIR in 2019<sup>1</sup> and culminated in the Legal Support Action Plan.<sup>2</sup>
- 10.3 The amendments regarding the Domestic Abuse Protection Notice and Domestic Abuse Protection Order are a key part of the Domestic Abuse Act 2021 and were subject to public consultation on the draft Bill in 2018.<sup>3</sup>
- 10.4 The amendment to permissible forms of supporting evidence for domestic abuse victims does not represent a change in Government policy. Rather it ensures that how medical professionals provide supporting evidence for domestic abuse victims remains up to date with medical practices and how medical professionals engage with their patients.

## **11. Guidance**

- 11.1 The Ministry of Justice will issue amendments to the Lord Chancellor's Guidance regarding the changes before they come into force:  
<https://www.gov.uk/guidance/funding-and-costs-assessment-for-civil-and-crime-matters>. The Lord Chancellor's Guidance is technical guidance which sets out some of the factors that should be considered by the Director of Legal Aid Casework and her caseworkers when making decisions about legal aid funding.
- 11.2 The Legal Aid Agency will issue guidance to providers on how to claim their payments for these new types of cases in advance of the changes coming into force via its website, as is usual practice.

## **12. Impact**

- 12.1 The impact on business, charities or voluntary bodies is limited to the business and charities who hold a family, criminal or immigration 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](http://legislation.gov.uk) website. The expansion of the scope of the legal aid scheme, the removal of the means test, changing of the merits test and widening of the evidence requirements is expected to cost between £7.2m-£17.4m per year, with our best estimate of £12.4m per year.

## **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.

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<sup>1</sup> [pir-laspo-terms-of-reference.pdf \(publishing.service.gov.uk\)](https://www.gov.uk/guidance/consultation-terms-of-reference).

<sup>2</sup> [Legal Support Action Plan - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/424442/legal-support-action-plan-2019-2021.pdf).

<sup>3</sup> [https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting\\_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf](https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf).



#### **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.
- 14.2 A review will be undertaken one year after the implementation of the changes to permissible forms of supporting evidence for domestic abuse victims, as described in paragraph 7.24 above.

#### **15. Contact**

- 15.1 Abi Marx at the Ministry of Justice. Telephone: 07976766336 or email: [civil.legalaid@justice.gov.uk](mailto: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.