

EXPLANATORY MEMORANDUM TO
THE COMMUNITY LEGAL SERVICE (FINANCIAL) (AMENDMENT)
REGULATIONS 2009

2009 No. 502

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 the Community Legal Service (Financial) Regulations 2000 (“the Regulations”) which relate to financial eligibility for, and contributions towards, civil legal aid. It increases the financial eligibility limits for civil legal aid and ensures the ‘means free’ provision of legal representation in ‘deprivation of liberty’ cases.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.

4. **Legislative Context**
 - 4.1 These Regulations are made by the Parliamentary Under Secretary of State, by authority of the Lord Chancellor in exercise of powers conferred upon him by sections 7 and 10 of the Access to Justice Act 1999. They are subject to the negative resolution procedure, by virtue of section 25(10) of that Act.
 - 4.2 Section 7 of the Access to Justice Act 1999 allows the Lord Chancellor to set financial eligibility limits for people to receive services funded by the Community Legal Service fund. It allows him to set different limits or no limit at all, in different circumstances or for different types of service case. Section 10 enables the Lord Chancellor to set financial conditions to apply to people receiving services funded by the Community Legal Service fund.

5. **Territorial Extent and Application**
 - 5.1 This instrument applies to England and Wales.

6. **European Convention on Human Rights**
 - 6.1. As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 In relation to the annual uprating, it is the Department's usual practice to raise all income eligibility limits each April alongside the general uprating of welfare benefits and inflation conducted by the Department for Work and Pensions. As with previous years, the Retail Price Index (RPI) has been used to calculate the uprating.
- 7.2 In relation to the 'means free' provision for cases about deprivation of liberty which fall under a new procedure, this will ensure funding for representation in these type of cases without reference to means, as of April 2009. Deprivation of liberty cases concern reviews in the new Court of Protection against authorisations to detain individuals who lack capacity to take particular decisions, and who cannot be detained under the Mental Health Act, but who need to be detained in an institution (typically a care home or hospital), for their best interests. The Mental Health Act 2007 made changes to the Mental Capacity Act 2005; these incorporate new deprivation of liberty safeguards, which are to be introduced from April 2009.
- 7.3 The amendments in this instrument were subject to a limited consultation with key practitioners' groups, including the Law Society, Bar Council, Family Law Bar Association, Resolution, the Legal Aid Practitioners' Group, Association of Lawyers for Children, Mental Health Lawyers Association, British Medical Association, Association of Contentious Trust And Probate Specialists Solicitors For The Elderly, and NHS Litigation Authority. The consultation began on 27 January 2009; a draft of the amended Regulations was sent to all consultees.

8. Consultation outcome

- 8.1 The Department did not conduct a full public consultation. We ran a limited consultation, which is shorter than the standard 12-week consultation between 27 January and 17 February, with the major stakeholders. The uprating of eligibility limits is an annual exercise, which involved minor technical changes; and the provision of 'means free' legal representation in deprivation of liberty cases, was a consequential change. We received three responses from The Law Society, Legal Aid Practitioners Group, and the Mental Health Lawyers Association. The responses have not been published.
- 8.2 The Law Society was of the opinion that, although the uprating of the eligibility limits has been the usual practice in past years, the Department ought to review the legal aid budget and re-consider the eligibility rules in light of an unprecedented time of recession. The Law Society, Legal Aid Practitioners Group, and the Mental Health Lawyers Association suggested that we raise the current financial eligibility provisions regarding disposable income. This relates to the equity disregard (£100K) and mortgage disregard (£100K) when financial eligibility is being assessed. There was also a consensus that the Legal Services Commission should re-introduce its ability

to disregard income, if it was reasonable to do so in the particular circumstances of the case with reference to disabled clients.

- 8.3 We do not agree that any change to the Legal Services Commission's ability to disregard income is necessary. We remain of the view that the current rules regarding capital are relatively generous. When clients are contesting property, their capital is assessed as follows: any outstanding mortgage, up to a value of £100,000, is subtracted from the value of the property. Then the remaining equity is divided equally between the parties. Where assets are in joint names, they will be treated as equally shared. The first £100,000 of each person's equity is then disregarded under the 'subject matter of the dispute' rule. Each person with an interest in the house then receives a further £100,000 'equity disregard', if the property is their main dwelling.
- 8.4 If the remaining equity exceeds the capital limit for legal aid, which currently stands at £8000, the client will be financially ineligible for legal aid. In practice, only those clients who are contesting large amounts of capital, or homes valued in excess of half a million pounds, are excluded on capital grounds. We do not consider any further change to the disregard is necessary at this time.
- 8.5 The Law Society, Legal Aid Practitioners Group, and the Mental Health Lawyers Association encouraged us to expand the scope of eligibility to include all cases that engaged the client's deprivation of liberty, such as those that involved disputes over whether a client is being deprived of their liberty.
- 8.6 We have restricted provision of 'means free' legal representation to those cases which fall under paragraph 2 of Schedule A1 to the Mental Capacity Act 2005, in proceedings in the Court of Protection under section 21A of that Act. This is a new, self-contained procedure. It is aligned with the new practice direction which supplements Part 10A of the Court of Protection Rules 2007. This comes into force on 1 April 2009. It concerns applications to the court for orders under section 21A of the Mental Capacity Act 2005. In these cases, authorisations would have already been issued to deprive someone of their liberty, and the person would be bringing a case to challenge the lawfulness of the authorisation. If we were to extend 'means free' provision to other deprivation of liberty cases, including for example, disputes about whether something amounts to a deprivation of liberty, we would incur additional costs which cannot be met by the current limited legal aid budget.

9. Guidance

- 9.1 The Legal Services Commission will be issuing guidance as to the implementation of the changes in due course.

10. Impact

10.1 A full regulatory impact assessment has not been made for this instrument, as it has no significant impact on the cost of businesses, charities or voluntary bodies.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 We will keep this under review. It may be that we need to devise a system of discretionary waiver of the means free limit in due course. This would be for other deprivation of liberty cases.

13. Contact

Shirley Benson at the Ministry of Justice, Tel: 020 3334 4207 or email: Shirley.Benson@justice.gsi.gov.uk can answer any queries regarding the instrument.