

EXPLANATORY MEMORANDUM TO
THE CIVIL LEGAL AID (PRELIMINARY PROCEEDINGS) REGULATIONS 2013

2013 No. 265

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 The Civil Legal Aid (Preliminary Proceedings) Regulations 2013 prescribe those proceedings which are not to be regarded as preliminary to proceedings described in Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“the Act”), which sets out the scope of civil legal aid. The effect is that the proceedings prescribed in this instrument will not be within the general scope of civil legal aid.
 - 2.2 Regulation 3 provides that applications for permission to appeal made to the First-tier Tribunal about welfare benefits are not preliminary to the proceedings described in paragraph 8 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 is one of a number of statutory instruments which implement 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 These particular regulations are made under paragraph 5(3) of Part 4 of Schedule 1 to the Act and this is the first use of that power.
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 negative resolution procedure and does not amend primary legislation, no statement is required.

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 by through civil legal aid in Schedule 1. During the passage of the Act we further modified our proposals for legal aid. The relevant change for the purposes of this instrument was our decision to make legal aid available for advice and assistance for welfare benefit appeals on a point of law to the Upper Tribunal as well as representation for the higher courts.

Preliminary / Incidental Proceedings

- 7.4 The scope of civil legal aid is set out in Schedule 1 to the Act. Each paragraph of Part 1 of Schedule 1 describes a type of civil legal services that may be made available under the Act. Part 2 of Schedule 1 lists civil legal services that are not to be available, even where they might otherwise fall within the descriptions of services in Part 1. Part 3 of Schedule 1 makes provision about when advocacy may be made available. Part 4 of Schedule 1 makes provision about the interpretation of Schedule 1.
- 7.5 Paragraph 5(1)(b) of Part 4 of Schedule 1 to the Act states that where a paragraph of Part 1 or Part 2 of that Schedule describes civil legal services in relation to proceedings, then that description is to be treated as including preliminary or incidental proceedings.
- 7.7 Paragraph 5(3) of Part 4 of Schedule 1 to the Act allows the Lord Chancellor to prescribe when proceedings are, or are not, to be regarded as preliminary or incidental for the purposes of paragraph 5 of Part 4 of Schedule 1 to the Act. These regulations are made under this power.
- 7.8 Paragraph 8 of Part 1 of Schedule 1 to the Act describes civil legal services in relation to welfare benefit onward appeals to the Upper Tribunal, Court of Appeal and Supreme Court.
- 7.9 These regulations prescribe that an application, made to the First-tier Tribunal, for permission to appeal to the Upper Tribunal on a welfare benefits matter is not to be regarded as preliminary to the proceedings described in paragraph 8 of Part 1 of Schedule 1 to the Act. The effect of these regulations is to ensure that legal aid will not be available for applications made to the First-tier Tribunal for permission

to appeal to the Upper Tribunal relying on paragraph 5(1)(b) of Part 4 of Schedule 1 to the Act.

- 7.10 However, legal aid is available under paragraph 8 of Part 1 of Schedule 1 to the Act for applications for permission to appeal to the Upper Tribunal on a welfare benefits matter when the application is made to the Upper Tribunal.

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 Civil Legal Aid (Preliminary Proceedings) Regulations 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 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 <http://www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-reform>.

[aid-and-sentencing-act/laspo-background-information](#). An Impact Assessment has not been prepared specifically for this instrument.

10.2 There is no impact on business, charities or voluntary bodies.

10.3 There is no impact on the public sector arising from this instrument beyond those accounted for in the Royal Assent Impact Assessment.

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

David Stokes at the Ministry of Justice (tel: 020 3334 4281 email: david.stokes@justice.gsi.gov.uk) can answer any queries regarding the instrument.