

EXPLANATORY MEMORANDUM TO
THE CIVIL LEGAL AID (FINANCIAL RESOURCES AND PAYMENT FOR
SERVICES) (AMENDMENT) (No. 2) REGULATIONS 2014

2014 No. 2701

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 Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (“the 2013 Regulations”). The 2013 Regulations relate to applications for civil legal aid and in particular set out the circumstances in which the financial resources of an applicant for civil legal aid are relevant in determining the application. The amendments ensure that the financial means test does not apply to the second party in respect of the first mediation session which takes place following a Mediation Information and Assessment Meeting (“MIAM”) where the first party is financially eligible for legal aid for such matters. The amendments also ensure that where a person who is undertaking a course of study applies for civil legal aid, child care costs incurred by reason of that study can be deducted from their study-related income for the purposes of determining their financial eligibility.

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

3.1 None.

4. Legislative Context

4.1 The 2013 Regulations set out the rules for making a determination about whether an individual is financially eligible for civil legal services under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10) (LASPO).

4.2 Regulation 5 of the 2013 Regulations provides for exceptions from the requirement to make a determination in respect of an individual’s financial resources for civil legal aid. The amendment in regulation 2(2) adds the first mediation session following a MIAM to the exceptions in Regulation 5, so long as the conditions set out in the amendment are satisfied.

4.3 Regulation 27 of the 2013 Regulations provides that in calculating an individual’s income for the purposes of determining financial eligibility, it is permissible to deduct child care expenses in certain circumstances where the individual applying for civil legal aid is either employed or self-employed. The amendment in regulation 2(3) extends the deduction for child care expenses to students.

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 order to qualify for civil legal aid under LASPO, an applicant must meet the financial eligibility and merits criteria. The 2013 Regulations make provision about the rules the Director of Legal Aid Casework (“the Director”) must apply in order to determine whether an individual’s financial resources are such that the individual is eligible for civil legal services.

Mediation

7.2 In order to encourage uptake of mediation it is already government policy to pay the costs arising from a MIAM for both participants in cases where only one is financially eligible for legal aid.

7.3 Currently, for all subsequent mediations, a means test applies and legal aid is provided only to a party who passes the means test; the other party, if not eligible for legal aid, has to privately fund their share of the fee in order for the mediation to go ahead. In practice, this may have acted as a disincentive for mediation for the non-legally aided person.

7.4 The Family Mediation Taskforce Report was published in June 2014, and recommended that “the LAA should fund the non-legally aided person for the first single session mediation for a period of three years.”

7.5 The Government has agreed that it will fund the first mediation session to take place after the MIAM in all cases where one of the parties is eligible for legal aid. This session will either be a ‘single session’ or the initial session taking place as part of a ‘multi session’ (where there is more than one session, the sessions, as a group, are termed a ‘multi session’).

Childcare expenses

7.6 The policy intention is that the child care deduction currently available under regulation 27 of the 2013 Regulations to those who are employed and self-employed, should also be available to an individual engaged in a course of study outside the home. Since 25 March 2014, the Legal Aid Agency has interpreted the 2013 Regulations to give effect to this intention.

7.7 The amendment made by regulation 2(3) of this instrument ensures that this position is more clearly reflected in the Regulations. Where an individual’s income is assessed for the purpose of civil legal aid, and consists wholly or partly of a student loan, student grant, or other income (from a person who is not a relative or partner),

and that income is for the purpose of supporting the individual's course of study, it is possible to deduct an amount to provide for child care costs during the time the individual is absent from the home by reason of their studies. The amendment made by regulation 2(3) of this instrument does not alter the position in relation to individuals who are employed and self-employed.

7.8 There are currently no plans to consolidate the 2013 Regulations.

8. Consultation outcome

8.1 The Government has not consulted on the amendment made by regulation 2(2) of this instrument. However this amendment puts in place a recommendation made by the Mediation Task Force (convened at the Secretary of State's request by David Norgrove, Chair of the Family Justice Board) in July 2014 on how to increase the take up of mediation.

8.2 The Government has not consulted on the amendments made by regulation 2(3) of this instrument, which will increase the number of individuals eligible for civil legal aid, as there is no requirement to do so.

9. Guidance

9.1 The Lord Chancellor's Guides to determining financial eligibility for certificated work, and Controlled Work and Family Mediation¹ have been amended to reflect the revised policy in respect of deductions for child care expenses.

10. Impact

10.1 An Impact Assessment has not been prepared specifically for this instrument.

10.2 There is no impact on business, charities or voluntary bodies, other than where it affects a contractual relationship between the Legal Aid Agency and providers of legal aid services or the payment arrangements for barristers.

10.3 A cost/benefit analysis on the effect of the amendments made by regulation 2(2) of this instrument is attached to this memorandum and will be published alongside the instrument at www.legislation.gov.uk.

10.4 In relation to the amendments made by regulation 2(3) of this instrument, the impact on the public sector is an expected increase in the cost of civil legal aid, of potentially around £1m per annum in steady state.

¹ The Lord Chancellor's Guide to determining financial eligibility for Controlled Work and Family Mediation is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/313163/LAA-determine-controlled-work-mediation.pdf

The Lord Chancellor's Guide to determining financial eligibility for Licensed Work is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332853/legal-aid-guide-to-determining-eligibility-certificated-work.pdf

11. Regulating small business

11.1 The Regulations do not impose any additional regulatory burdens on small firms.

11.2 The legislation applies to small business only insofar as it affects the contractual relationship between the Legal Aid Agency and providers of legal aid services or the payment arrangements for barristers.

11.3 The Ministry of Justice has not taken any specific steps to minimise the impact of the requirement on firms employing up to 20 people.

12. Monitoring & review

12.1 The Ministry of Justice will conduct regular reviews in respect of the amendments made by regulation 2(2) of this instrument.

12.2 The operation of and expenditure on the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency. The Ministry of Justice will conduct a post-implementation review of LASPO between three to five years after implementation. This review will also consider the operation of the secondary legislation made under LASPO, including this instrument.

13. Contact

David Holmes at the Ministry of Justice (tel: 020 3334 3821 or email: David.Holmes@justice.gsi.gov.uk) can answer any queries regarding the instrument.

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