

**EXPLANATORY MEMORANDUM TO
THE LEGAL AID (INFORMATION ABOUT FINANCIAL RESOURCES)
(AMENDMENT) REGULATIONS 2015**

2015 No. 1408

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 This instrument revokes regulation 11 of the Legal Aid, Community Legal Service and Criminal Defence Service (Amendment) Regulations 2015 (S.I. 2015/838) (“the amendment Regulations”) and revokes the words purportedly inserted into the Legal Aid (Information about Financial Resources) Regulations 2013 (S.I. 2013/628) (“the Information Regulations”) by that regulation. Regulation 11 of the amendment Regulations was made using the incorrect Parliamentary procedure. These Regulations seek to remedy that defect.

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

- 3.1 An amendment to the Information Regulations was purportedly made by the amendment Regulations to enable the relevant authority (the Director of Legal Aid Casework at the Legal Aid Agency (“the Director”)) to seek information from the Secretary of State about direct payments made to individuals to secure the provision of services for children with special educational needs (SEN) and other disabilities (“SEN direct payments”) and direct payments made under regulations made under s.17A of the Children Act 1989 for the provision of services to children with disabilities (“Children Act direct payments”).
- 3.2 The Information Regulations are made under section 22 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”). Section 41(6) and (7)(h) of LASPO provides that regulations which contain regulations made under section 22 are subject to the draft affirmative procedure. The amendment Regulations were made by way of the negative procedure. Therefore regulation 11 of the amendment Regulations was made erroneously.
- 3.3 These Regulations seek to remedy that error by revoking the relevant provision of the amendment Regulations and revoking the amendment it purported to make to the Information Regulations.

- 3.4 Whilst no record is made of information requests made under the Information Regulations, inquiries made by the Ministry of Justice indicate that no information request has been made by the Director of Legal Aid Casework under the Information Regulations in reliance on the defective provision. The Legal Aid Agency has been informed of the defect in the amendment Regulations and been advised not to rely on the amendment purportedly made to the Information Regulations.
- 3.5 The Ministry of Justice considers that the error made in relation to the amendment to the Information Regulations does not affect the other provisions of the amendment Regulations which were properly made via the negative procedure.
- 3.6 The other amendments made by the amendment Regulations therefore continue to have effect. In particular the amendments that provide that SEN direct payments and direct payments made under regulations made under s.17A of the Children Act 1989 are disregarded for the purposes of assessing the financial resources of an applicant for legal aid are unaffected. Therefore the error has not affected the outcome of applications for legal aid.
- 3.7 These Regulations come into force less than 21 days after the day on which they were laid before Parliament. The Ministry of Justice considers that this is appropriate in light of the need quickly to provide legal certainty as to the content of the Information Regulations and the merits of minimising the risk of inadvertent reliance on the defective provision.
- 3.8 The Ministry of Justice very much regrets the procedural error made in the amendment Regulations. The error was made because the amendment Regulations were prepared in some haste, so as to be made and laid before Parliament was dissolved. The Ministry of Justice will continue to be alert to the very significant implications of inappropriately rushing the preparation of secondary legislation. It has also taken steps to ensure that similar errors are not made in the future.

4. Legislative Context

- 4.1 The Information Regulations give the relevant authority (the Director) the power to request information from the relevant Secretary of State about a prescribed benefit an individual is receiving for the purposes of assessing the financial resources of the individual in the course of assessing the individual's eligibility for legal aid.

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 SEN direct payments are cash payments made directly to the child's parent or guardian, the young person or their nominee, allowing them to arrange provision of necessary services (e.g. transport) as identified in the individual's Education Health Care (EHC) plan. An EHC plan brings a child's education, health and social care needs into a single, legally-binding document. The child must have special educational needs to be eligible for an EHC plan. They are currently made under the SEN (Personal Budgets) Regulations 2014, made under section 49(3) of the Children and Families Act 2014. Direct payments may also be made under section 17A of the Children Act 1989 to parents of disabled children, a disabled person with parental responsibility for a child, or disabled children aged 16 or 17 to meet their assessed needs. These direct payments are disregarded for the purposes of a legal aid financial eligibility assessments following the amendments made in the amendment Regulations, which came into force on 13 April 2015. As outlined above, these amendments are not affected by the error made in relation to the amendment to the Information Regulations.

- 7.2 It is the intention of Government that the Director should be able to make an information request to the Secretary of State to find out whether or not a legal aid applicant is in receipt of direct payments that are disregarded for the purposes of the legal aid financial eligibility assessment. This instrument corrects the error made by the amendment Regulations and removes SEN and Children Act direct payments from the direct payments for which this information can be sought. The Government will bring forward an instrument using draft affirmative procedure in due course to achieve this policy intention.

8. Consultation outcome

- 8.1 The Ministry of Justice has not consulted on Legal Aid (Information about Financial Resources) (Amendment) Regulations 2015. Given that the Regulations are correcting an error made in a previous instrument, no consultation is considered appropriate.

9. Guidance

- 9.1 Guidance is not being prepared specifically on this instrument. Given that the Regulations are correcting an error made in a previous instrument, no guidance is considered appropriate. The officials who support the Director in the exercise of the Director's functions under section 22 of LASPO have been informed of the

defect in the amending Regulations and been advised not to rely on the amendment purportedly made to the Information Regulations.

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 There is no impact on the public sector.

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 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

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