

EXPLANATORY MEMORANDUM TO
THE LEGAL AID (FINANCIAL RESOURCES AND CONTRIBUTION ORDERS)
(AMENDMENT) REGULATIONS 2019

2019 No. 894

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument amends the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (the “CLA(FRPS) Regulations”), the Criminal Legal Aid (Financial Resources) Regulations 2013 (the “CLA(FR) Regulations”) and the Criminal Legal Aid (Contribution Orders) Regulations 2013 (the “CLA(CO) Regulations”), to provide that payments made under or in connection with the Windrush Compensation Scheme will be disregarded for the purpose of calculating entitlement to civil and criminal legal aid and any liability for contributions to legal aid.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument comes into force less than 21 days after it is laid to mitigate the risk of circumstances where payments made under or in connection with the Windrush Compensation Scheme would be taken into account by the Director of Legal Aid Casework (“the Director”) when determining eligibility for civil and criminal legal services. It has been necessary for the instrument to come into force less than 21 days after it is laid because the commencement of the scheme was announced by the Home Office on the 3rd April and as such applicants could be receiving payments after this date. It is important to ensure such payments shall be disregarded should recipients of the scheme submit applications for legal aid.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As this instrument is subject to the negative resolution procedure there are no matters relevant to Standing Order Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial 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 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

Civil Legal Aid

- 6.1 Civil legal aid is made available under section 9 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (“LASPO”) if it is a civil legal service as described in Part of Schedule 1 (or if the Director has made an exceptional case determination under section 10(2)) and the Director has determined that the individual meets the qualification criteria for legal aid. The qualification criteria include an assessment of the individual’s financial resources in accordance with section 21 of LASPO and the CLA(FRPS) Regulations.
- 6.2 Regulations 6 to 8 of the CLA(FRPS) Regulations specify the financial eligibility limits in respect of an individual’s gross or disposable income; and in respect of disposable capital.
- 6.3 Regulations 24 and 40 specify certain payments that the Director must (or may, in certain cases) disregard when calculating an individual’s gross or disposable income and disposable capital for the purpose of determining whether they satisfy the limits set out in Regulations 6 to 8 and are eligible for legal aid.
- 6.4 This instrument amends Regulations 24 and 40 to provide that payments made to individuals under or in connection with the Windrush Compensation Scheme are disregarded for the purposes of calculating disposable income or disposable capital.

Criminal Legal Aid

- 6.5 Under section 15 of LASPO, legal advice and assistance for criminal proceedings may be made available if (a) certain prescribed conditions are met and (b) the Director has determined that the individual qualifies for such advice and assistance in accordance with regulations. Regulation 12 of the Criminal Legal Aid (General) Regulations 2013 sets the prescribed conditions and Regulation 15 requires the Director to apply section 21 (financial resources) and regulations made under it when determining whether an individual qualifies for advice and assistance for criminal proceedings.
- 6.6 The CLA(FR) Regulations have been made under section 21 of LASPO. They contain financial eligibility requirements for legal advice and assistance and for representation in criminal proceedings.
- 6.7 Criminal legal aid for advocacy assistance for individuals in prison is means tested pursuant to Regulation 7 of the CLA(FR) Regulations. Criminal legal aid for advice and assistance other than for prisoners is means tested pursuant to Regulation 8. An individual is eligible if their disposable income and disposable capital, as assessed in accordance with Regulations 11 and 13, do not exceed certain amounts. This instrument amends Regulations 11 and 13 to ensure that compensation paid under or in connection with the Windrush Compensation Scheme is not counted as disposable income or disposable capital.
- 6.8 Under section 16 of LASPO, representation for the purposes of criminal proceedings is available if (a) an individual is a specified individual under that section and (b) the Director has determined that the individual qualifies for representation for criminal

proceedings. Section 17 of LASPO requires the Director to apply section 21 (financial resources) and regulations made under it when determining whether an individual qualifies for such representation.

- 6.9 Defendants appearing before the magistrates' and Crown Courts may be eligible for representation, subject to a means test. Representation for criminal proceedings before any other court is not means tested. Regulations 18 and 31 of the CLA(FR) Regulations provide that individuals are eligible for representation if their gross annual income (or gross annual income and annual disposable income) as assessed in accordance with Regulations 20 and 33 does not exceed certain amounts. This instrument amends Regulations 20 and 33 to ensure that compensation paid under or in connection with the Windrush Compensation Scheme is not counted as gross annual income (and therefore not counted as annual disposable income).
- 6.10 Under section 23(2) of LASPO, regulations may provide that in certain specified circumstances an individual eligible for criminal legal aid may be required to make a contribution towards the cost of legal services received. The CLA(CO) Regulations 2013 make provision in relation to the liability of individuals who are in receipt of representation for criminal proceedings under section 16 of LASPO to make a payment in connection with the provision of such representation, based on an assessment of the financial resources of the individual. Regulations 12, 29 and 30 provide that an individual may be required to make a contribution from their disposable annual income and/ or capital. This instrument amends Regulations 10 and 28 to ensure that compensation paid under or in connection with the Windrush Compensation Scheme is not counted as gross annual income (and therefore not counted as disposable annual income) or disposable specified capital.

7. Policy background

What is being done and why?

- 7.1 In April 2018, the Home Secretary announced a scheme would be established to compensate those of the "Windrush generation" who have faced difficulties in demonstrating their lawful status in the UK. The scheme opened for applications on 3 April 2019 and will run for two years until 2 April 2021.
- 7.2 Commonwealth citizens settled in the UK before 1973, those of any nationality with indefinite leave to remain in the UK before 1988, and children of Commonwealth citizens who were settled in the UK before 1973, will be able to apply if they meet the criteria set out by the scheme. Claims will also be accepted from additional groups that have been impacted, including grandchildren of Windrush individuals, the estates of deceased individuals who would have been eligible, and close family members of an eligible person.
- 7.3 The intention is to compensate claimants for the following categories: unsuccessful immigration fees; detention, deportation, removal and return; loss of access to employment; loss of access to child benefit, child tax credit or working tax credit; denial of access to services (housing, health, education and banking); homelessness; and impact on daily life.
- 7.4 In exceptional cases, the Government will consider discretionary payments for losses which are not covered in other categories. Claimants will be required to submit evidence of the loss, of action they took to resolve their immigration status and to

mitigate their loss, and that the loss was directly related to difficulties demonstrating their lawful status.

- 7.5 The rules of entitlement for legal aid mean that some individuals applying for legal aid might fail the financial eligibility criteria as a result of receiving a compensation payment under or in connection with the Windrush compensation scheme as the compensation received would automatically be considered as income or capital when their financial resources were being assessed in order to determine eligibility for legal aid.
- 7.6 The relevant regulations (for civil and criminal legal aid) already contain exceptions that would allow some sources of income and capital to be disregarded.
- 7.7 The policy is that the compensation paid under the Windrush Compensation Scheme and payments made in connection with the compensation scheme such as reinstatement or backdated payment of benefits payable by the Department for Work and Pensions or Her Majesty's Revenue and Customs or, the repayment of a charge levied by an NHS body, should be disregarded for the purposes of calculating entitlement to civil and criminal legal aid any liability for contributions for contributions to legal aid.
- 7.8 The Department does not hold information in relation to the financial resources of those individuals who may be able to claim under the Windrush Compensation Scheme. We cannot therefore identify precisely how many individuals will be affected by the proposed changes although the Home Office information suggests that it will be fewer than 15,000 individuals. It is likely that the numbers affected by these regulations will be very small, as it will be limited to those who qualify for the Windrush Compensation Scheme and apply for legal aid.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 There have been other changes made to the CLA(FRPS) Regulations, the CLA(FR) Regulations and the CLA(CO) Regulations, but there are currently no plans to consolidate these regulations.

10. Consultation outcome

- 10.1 No public consultation was carried out. The Department considered a public consultation would be disproportionate as the Home Office consulted extensively on the Windrush Compensation Scheme, and given the limited impact this instrument will have on the legal aid system as a whole.

11. Guidance

- 11.1 The Legal Aid Agency ("LAA") will communicate to internal caseworkers and legal aid providers about the changes.

12. Impact

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

- 12.2 The impact on the public sector is confined to the LAA. There is no real financial impact on the LAA, except for some slight additional administrative costs of exercising the disregard when considering new applications for legal aid.
- 12.3 An Impact Assessment has not been prepared for this instrument. This is because the intention is to preserve the current level of access to legal aid not reduce or increase access and there will be no or negligible impact on public finances.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.
- 13.2 Legal aid is out of scope of the regulatory agenda. It is excluded by section 22(4)(c) of the Small Business Enterprise and Employment Act 2015 on the grounds that it relates to ‘the giving of grants or other financial assistance by or on behalf of a public authority’. The measure does not require Reducing Regulation Committee or Regulatory Policy Committee clearance.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that the operation of and expenditure on the legal aid scheme is continually monitored by the Ministry of Justice and the LAA.
- 14.2 This instrument will be subject to a review by the Ministry of Justice five years after it is laid to ensure that the policy intent has been met.

15. Contact

- 15.1 Heather Edmonds at the Ministry of Justice Telephone: 07980742986 or email: Heather.Edmonds@justice.gov.uk can answer any queries regarding the instrument.
- 15.2 Fiona Rutherford, Deputy Director for Legal Aid, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister Lucy Frazer QC MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.