

EXPLANATORY MEMORANDUM TO
THE CIVIL LEGAL AID (FINANCIAL RESOURCES AND PAYMENTS FOR
SERVICES) (AMENDMENT) REGULATIONS 2020

2020 No. 1584

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.

2. Purpose of the instrument

2.1 This instrument amends the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (the Civil Means Regulations). It disregards specific payments for the purposes of assessing an individual's financial eligibility for civil legal aid. Specifically, payments from the England Infected Blood Support Scheme (EIBSS), the Welsh Infected Blood Support Scheme (WIBSS), the Scottish Infected Blood Support Scheme (SIBSS) and the Infected Blood Payment Scheme for Northern Ireland (NIBSS) as well as earlier infected blood support schemes, namely the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No.2) Trust, the Eileen Trust, MFET Limited, the Skipton Fund, the Caxton Foundation.

2.2 This instrument will also disregard payments from specific UK compensatory schemes set up to address injury caused by state error and serious incidents in the UK external to state actions, namely payments made under the Vaccine Damage Payment Act; government funded compensation for individuals diagnosed with variant Creutzfeldt-Jakob disease (vCJD); criminal injuries compensation schemes in Great Britain and Northern Ireland; and payments from the National Emergencies Trust, We Love Manchester Fund and the London Emergencies Trust Fund.

2.3 The purpose of these disregards is to restore the applicant for civil legal aid to their position before they received this payment in a context where their ability to earn income, their capital and/or their necessary outgoings have been negatively affected by state error or serious incidents external to state action such as a violent crime, terrorist action or a national emergency. These disregards are scheduled to come into force on 8 January 2021.

2.4 In addition, this instrument amends the same regulations by removing the £100,000 limit on the amount of debt secured by a mortgage or charge which can be deducted from the value of an individual's interest in land. This will mean that all debt secured on the property will be deducted from the total value of the land when assessing a person's capital, so that only the equity in the land (main dwelling and other properties) will be assessed as capital in the means test. The purpose of this amendment is to provide a more accurate assessment of a person's means when assessing eligibility for civil legal aid. This element of the SI is scheduled to come into force on 28 January 2021. This provision will come into force later to allow reasonable time for amendments to be made to the Legal Aid Agency's (LAA) digital systems.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

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 This entire instrument applies to England and Wales only.

3.3 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

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 set out in Section 3 under “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)”.

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

6.1 The framework for the provision for civil and criminal legal aid is contained in Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The rules for financial eligibility are set out in section 21 of LASPO and regulations made under that section. The Civil Means Regulations set out the rules by which the Director of Legal Aid Casework (DLAC) must determine financial eligibility for all forms of civil legal services.

6.2 Where civil legal aid is means tested, the means test assesses both the applicant’s income and capital. In order to be eligible for means-tested civil legal aid, the applicant must pass both the income and the capital eligibility test. As part of the means test assessment DLAC will usually be required to consider all income and capital available to the individual. In that process it may disregard certain income or capital set out in the Civil Means Regulations. Under the regulations listed below, there are certain payments that are disregarded from the calculation of disposable income, gross income and capital.

Disregard for compensation/compensation-like payments

6.3 Regulations 24 and 40 of the Civil Means Regulations provide mandatory and discretionary disregards of certain payments from the calculation of disposable income, gross income or capital.

6.4 Regulation 24 sets out the payments to be disregarded from calculations of disposable income or gross income.

- 6.5 Regulation 40 sets out certain payments to be disregarded from calculations of disposable capital.

Mortgage Allowance

- 6.6 Regulation 37 provides for how to calculate the value of an individual's interest in land, including the treatment of any debt secured by mortgage or charge on a person's interest in land.

7. Policy background

What is being done and why?

Disregard for compensation/ex-gratia payments

- 7.1 The current capital disregards include certain social security payments, e.g. from the social fund payments (made in prescribed circumstances, e.g. Child Funeral Fund payments) and direct payments under specific legislation made to adults and children with disabilities. Certain payments are also disregarded from income assessments, e.g. Disability Living Allowance and payments made out of the social fund under the Social Security Contributions and Benefits Act 1992.
- 7.2 In 2017 and 2019, Ministers made the decision to add further income and capital disregards, one for ex-gratia payments provided to an individual because the individual was a victim of the fire at Grenfell Tower (2017) and the other for payments received by an individual from the Windrush Compensation Scheme and Windrush connected payments (2019) which compensate individuals who have suffered loss in connection with being unable to demonstrate their settled status or right to abode in the United Kingdom.
- 7.3 This instrument is creating a disregard for payments from the EIBSS, the WIBSS, the SIBSS and the NIBSS as well as other compensation and ex-gratia payments funded by the UK government and certain UK-based charitable organisations. These are UK government schemes and UK charitable schemes that support victims of state error and serious incidents in the UK external to state action, specifically a violent crime, terrorist action or a national emergency. Before the laying of this SI, compensation or ex-gratia payments received by an individual from one of these schemes could affect their eligibility for civil legal aid.
- 7.4 The UK-based schemes that we are including in the SI are national infected blood support schemes; payments under the Vaccine Damage Payment Act; government funded compensation for individuals diagnosed with variant Creutzfeldt-Jakob disease (vCJD); criminal injuries compensation schemes in Great Britain and Northern Ireland; and payments from the National Emergencies Trust, We Love Manchester Fund and the London Emergencies Trust Fund.
- 7.5 Legislation is necessary to achieve this change as the disregards provisions are set out in the Civil Means Regulations. DLAC's means test guidance sets out that one-off payments are treated as capital for the purposes of calculating civil legal aid eligibility. In most cases, an individual with disposable capital of between £3,000 and £8,000 in receipt of civil legal aid is required to pay a contribution to their civil legal aid costs, and an individual with disposable capital of over £8,000 is not eligible for civil legal aid. Therefore, a compensation or ex-gratia payment has the potential to

make an applicant ineligible for civil legal aid or eligible subject to the payment of a capital contribution.

- 7.6 Regulations 24 and 40 will be amended to allow for a mandatory disregard for one-off lump sum payments (including interim and top-up payments) from UK government funded schemes where there has been a state error, and a discretionary disregard for UK schemes designed to provide financial support to direct or indirect victims of a serious incident external to state action, such as a violent crime, terrorist action or a national emergency.
- 7.7 These changes will ensure that victims applying for civil legal aid are not disadvantaged by payments they have received as direct or indirect victims of special incidences of state error or serious incidents external to state action, such as a violent crime, terrorist action or a national emergency, to support their short-, medium and long-term living costs. For example, individuals who have received payments from schemes such as an infected blood support scheme are currently being disadvantaged, as this payment may be pushing them over the capital threshold when the civil legal aid means assessment is being completed.

Mortgage Allowance

- 7.8 Regulation 37 currently provides that, when assessing a legal aid applicant's interest in land, the value of any debt secured by a mortgage or charge on the property is deducted from the total value of the property, but the amount deducted may not exceed £100k. This cap on the mortgage allowance can lead to a higher amount of equity being calculated than is actually available in the property. This is because, in cases where total secured debts exceed £100k, only £100k is deducted from the property's total value. The remaining interest in the property is currently classed as equity for the purposes of assessing financial eligibility for civil legal aid, even though it may have a significant secured debt over it.
- 7.9 We are amending regulation 37 to remove this cap on the mortgage allowance. This will mean that the full amount of any mortgage debt will be deducted from the value of a property when an applicant's eligibility for civil legal aid is being assessed. The proposed policy will result in a means assessment which more accurately reflects the capital a person has, thus better determining who is most in need of 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 / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

- 9.1 None.

10. Consultation outcome

- 10.1 The Department carried out informal consultations with stakeholders on these changes via working group meetings to inform them of the proposed SI and allow them an opportunity to give feedback on the schemes to be included.

11. Guidance

- 11.1 DLAC will issue guidance to providers in advance of the changes coming into force.
- 11.2 The Ministry of Justice will issue amendments to the Lord Chancellor's Guidance regarding the changes before they come into force.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the legislation will produce a low-level impact on business and the public sector. The estimated cost of disregarding these types of compensation payments is likely to be small due to the number of recipients of the payments in question being relatively small. This is because there is a low likelihood that an individual requires civil legal aid in any given year and, for the cost to the civil legal aid fund to be increased, any newly disregarded payment would need to be significant enough to change their eligibility determination of the individual. Internal modelling suggests that there is only a small proportion of the population who would see a change in their eligibility determination. This is because such applicants would need to pass both the existing income test and have their capital assessed at, below £3,000 (for full eligibility without a capital contribution) or above £3,000 but below £8,000 (for eligibility on payment of a capital contribution) once the disregard is applied. It is estimated that the Criminal Injuries Compensation Scheme would be the most impactful of the compensation schemes. A total of 31,000 applications were made for both permanent and temporary injury compensation during 2018/19, and the compensation received was variable depending on the nature of the claims (ranging between £1,000 and £500,000).
- 12.4 The estimated cost impact of removing the mortgage disregard is less than £1m per year, increasing civil representation volumes by up to 250 and legal help by 500-750 per year.
- 12.5 DLAC currently applies disregards to some applications when completing means test assessments. Therefore, the only additional work that will be required due to these amendments would be for caseworkers to consider these amendments as part of their determination process.
- 12.6 A full Equalities Statement is submitted with this memorandum and is available on request.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.
- 13.2 The legislation applies to small business only insofar as it affects specific operational arrangements, as set out in operational guidance, of the LAA and providers of legal aid services.

14. Monitoring & review

- 14.1 The operation and expenditure of the legal aid scheme is continually monitored by the Ministry of Justice and the LAA.

15. Contact

- 15.1 Deborah Adedeji at the Ministry of Justice. Telephone: 07967792137 or email: Deborah.adedeji@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Jelena Lentzos, Deputy Director, Legal Aid Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Alex Chalk MP, Parliamentary Under Secretary of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.