

EXPLANATORY MEMORANDUM TO

THE CRIMINAL AND CIVIL LEGAL AID (AMENDMENT) REGULATIONS 2023

2023 No. 745

1. Introduction

1.1 This explanatory memorandum has been prepared by Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The primary purpose of this Instrument is to implement Phase 1 of the changes set out in the Government Response to Legal Aid Means Test Review.

2.2 This Instrument amends the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (the Civil Means Regulations), the Criminal Legal Aid (Financial Resources) Regulations 2013 (the Criminal Means Regulations); the Civil Legal Aid (Procedure) Regulations 2012 (the Civil Procedure Regulation’); and the Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2023 (the Civil Means (Amendment) Regulations 2023).

2.3 This Instrument amends the civil and criminal legal aid means tests to remove the means test for:

- Individuals under the age of 18 applying for criminal advice and assistance;
- Individuals under the age of 18 applying for all civil representation (including Exceptional Case Funding representation) and family help (higher);
- Legal representation for parents of, or those with parental responsibility for, a child (aged under 18) facing withdrawal or withholding of life-sustaining treatment; and
- Legal help relating to inquests where, if the individual were to make an application for Exceptional Case Funding (ECF) representation, due to a breach of Human Rights, or, where the Director of Legal Aid Casework thinks there is a significant wider public interest in legal aid being provided, would be reasonably likely to succeed.

2.4 This Instrument will also make amendments to legal help for inquests determinations to be dated at an earlier date than when the determination was made, so that legal aid providers can continue to claim for legal help carried out from the date of application.

2.5 This Instrument also amends provisions relating to the means testing of applications for legal services in relation to appeals (or proposed appeals) to the First-tier Tribunal (Special Educational Needs and Disability (SEND)). Provisions in relation to these matters were introduced by the Civil Means (Amendment) Regulations 2023. The policy detail in relation to those changes can be found in the corresponding Explanatory Memorandum. This Instrument clarifies the scope of the matters covered by these provisions and expands the provisions to encompass applications to the Education Tribunal for Wales. This Instrument also removes unused definitions from the Civil Means (Amendment) Regulations 2023.

2.6 Minor amendments are also made to paragraph numbering within the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 to ensure that the

existing regulation 5(1)(m) is not overwritten once s25(4) of the Nationality and Borders Act 2022 (NABA) comes into force.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Amendments are made to address the points raised by the Joint Committee on Statutory Instruments in the twenty-eighth report of Session 2022-2023¹ in relation to the Civil Means (Amendment) Regulations 2023, S.I. 2023/45. We have amended that Instrument to clarify where a former foster child living with their foster parent in a staying put arrangement would be considered to lack capacity and removed unused definitions in that Instrument.
- 3.2 Minor amendments are also made to paragraph numbering within the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 to ensure that the existing regulation 5(1)(m) is not overwritten once s25(4) of the Nationality and Borders Act 2022 (NABA) comes into force.

4. Extent and Territorial Application

- 4.1 The extent of this Instrument (that is, the jurisdiction(s) which the Instrument forms part of the law of) is England and Wales.
- 4.2 The territorial application of this Instrument (that is, where the Instrument produces a practical effect) 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

- 6.1 Section 21(1) of Part 1 of LASPO requires that, for an individual to qualify for legal aid, they must meet certain financial eligibility criteria. These criteria are also referred to as ‘means testing’.
- 6.2 Section 21(2) of Part 1 of LASPO gives the Lord Chancellor the power to make provision in regulations to prescribe when an individual’s financial resources are such that the individual is eligible for legal aid, and also to provide for exceptions to the general rule in section 21(1).
- 6.3 The power contained in section 21(2) was used to make the Criminal Means Regulations and the Civil Means Regulations, which set out exceptions to the means test and the situations in which the test can be waived.
- 6.4 The Criminal Means Regulations set out the means criteria for criminal legal aid services, including advice and assistance. Regulation 5 of the Criminal Means Regulations sets out a list of situations where the means test does not apply.
- 6.5 The Civil Means Regulations define the means assessment for civil legal aid services. Regulation 5 sets out the situations where the means test does not apply.

¹ <https://committees.parliament.uk/publications/34216/documents/188220/default/>

7. Policy background

What is being done and why?

- 7.1 The Legal Aid Means Test Review (MTR) was announced in February 2019, as part of the Legal Support Action Plan. The subsequent MTR public consultation was launched in 2022 and assessed the effectiveness with which the means test protects access to justice, particularly for those who are vulnerable. Responses were then analysed and considered, and the Government’s MTR consultation response, setting out the resulting changes to the means test for legal aid, was published on 25 May 2023. Further detail on the consultation responses for the changes included in this Instrument is provided at section 10 of this explanatory memorandum.
- 7.2 The changes set out in the MTR consultation response will be implemented over four phases, the details of which can be found in chapter eight of the response. This Instrument will bring into force the changes described in the consultation as ‘Phase 1’, alongside the minor amendments to appeals to the First-tier Tribunal (Special Educational Needs and Disability (SEND)) described at paragraph 3.1, and amends paragraph numbering to accommodate upcoming changes from s25(4) of the Nationality and Borders Act 2022 (NABA) comes into force as described in paragraph 3.2.

Explanations

Removal of the means test for under 18s in relation to criminal advice and assistance (A&A), and all civil representation

What did any law do before the changes to be made by this instrument?

- 7.3 Legal aid in relation to criminal advice and assistance is available for a range of criminal matters spanning pre-charge to post-conviction proceedings and covers legally aided services other than criminal representation. For most types of criminal A&A, the provision of legal aid is not subject to a means test, for example advice at a police station upon arrest. However, for areas of criminal A&A where a financial determination is required (primarily Prison Law, and advice on appealing a sentence or conviction), applicants aged under 18 were subject to the means test, with their means aggregated (pooled) with the resources of their maintaining adult, unless inequitable to do so. It was presumed that, if the child failed the means test and sought legal assistance, their private legal costs would be covered by their maintaining adult. This approach differed to the approach to legal aid for criminal representation, whereby criminal defendants under the age of 18 were exempt from the means test.
- 7.4 Civil proceedings can be categorised into family and non-family cases. Prior to this Instrument, when someone aged under 18 applied for non-family representation, their eligibility was assessed solely on their individual resources, irrespective of their maintaining adult’s resources. A different approach was taken for family representation, where the means of the applicant were aggregated with their maintaining adult’s (unless a conflict of interest exists between them, in which case the child or young person’s finances were assessed independently). For Exceptional Case Funding representation, the means test applied was whichever was relevant to the case type – either family or non-family.

Why is it being changed?

- 7.5 The changes to the means test for criminal A&A matters will bring the policy in line with the approach to representation at the youth court and Crown Court, and, more generally, the wider approach to under-18s in the Criminal Justice System. We recognise that a child or young person's experience of the criminal justice system will play a critical role in determining how they will be reintegrated into their families, education and wider society. An inability to access criminal A&A may result in their feelings or needs not being heard or met. Therefore, it is important that those aged under 18 in custody have proper access to A&A.
- 7.6 The changes for civil representation reflect the fact that very few applicants aged under 18 fail the means test. Following a review of Legal Aid Agency data, we concluded that there were very few family representation cases initiated by a person under 18 where aggregation actually occurred, owing to the nature of proceedings in these cases, which usually involve a conflict of interest between a maintaining adult and the child or young person. Furthermore, applicants under 18 nearly always passed the means test where the assessment was based on their resources alone, and this would have been even more likely under the new civil means test thresholds (which are being introduced as part of the Phase 2 MTR changes). For detail on the MTR implementation plans please see chapter 8 of the Government response².
- 7.7 Moreover, given that the law now requires all young people in England to continue in education or training until at least their 18th birthday (16 in Wales), they were unlikely to be working full time, and therefore were unlikely to have sufficient income or capital to fail the new civil means test.
- 7.8 Therefore, removing the means test for applicants aged under 18 for all types of civil representation will improve consistency in our approach to family and non-family civil matters, and will ensure access to justice for under 18s, who are highly unlikely to be able to effectively represent themselves in court. It will also reduce the administrative burden for providers, the Legal Aid Agency and applicants, as they will no longer have to undertake the means test for these matters.

What will it now do?

- 7.9 This Instrument removes the means test for criminal A&A, as well as all types of civil representation including Exceptional Case Funding and family help (higher), for applicants aged under 18.

Removal of means test for legal representation sought by parents of, or those with parental responsibility for, a child (aged under 18) facing withdrawal or withholding of life-sustaining treatment

What did any law do before the changes to be made by this instrument?

- 7.10 Civil legal services for proceedings involving children facing withdrawal and withholding of life-sustaining treatment are in scope of legal aid. However, prior to this Instrument, parents, or those with parental responsibility for those children needed to pass a means test to be eligible for legally aided representation in these cases.

² <https://www.gov.uk/government/consultations/legal-aid-means-test-review/legal-aid-means-test-review>

Why is it being changed?

- 7.11 Proceedings relating to the withdrawal and withholding of life-sustaining treatment for children require an understanding of complex medical and legal arguments, and private representation can therefore be expensive. Where parents and those with parental responsibility failed the legal aid means test, they were often faced with trying to represent themselves, a very difficult task considering both the complexity and the highly emotive context of these matters.
- 7.12 Removal of the means test allows parents facing a decision on whether their child will live or die to have legal assistance, ensuring they are properly informed and represented throughout the proceedings, whatever their means.

What will it now do?

- 7.13 This Instrument removes the means test for parents and those with parental responsibility whose children (defined as being under 18 at the time proceedings commence), are facing proceedings in relation to the withdrawal and withholding of life-sustaining treatment.

Removal of means test for legal help in relation to inquests where, if the individual were to make an application for ECF representation under s. 10(2) or (4) of LASPO, the application would be reasonably likely to succeed

What did any law do before the changes to be made by this instrument?

- 7.14 Legal aid for representation at an inquest is only available via Exceptional Case Funding (ECF). ECF funding is available where the applicant can show that either: i) failure to provide such representation would breach Human Rights Act Convention Rights or retained enforceable EU rights, or that it is appropriate to do so to avoid the risk of such a breach, or; ii) Director for Legal Aid Casework determines that there is a wider public interest in the individual being represented at inquest (i.e. provision of representation is likely to produce significant benefits for a class of person, other than the individual and the members of the individual's family). Since January 2022, ECF funding for representation in inquests of this nature has not been means tested. Moreover, applicants who are granted ECF in relation to an inquest are also automatically entitled to non-means tested legal help throughout the remainder of the inquest process.
- 7.15 Legal help in relation to an inquest is in scope of legal aid and is available to a family member before and throughout any inquest hearing. This is generally subject to means and merits tests. Prior to this Instrument, where an individual failed the means test for legal help, the Director for Legal Aid Casework had the power to waive the income and capital eligibility limits of the means test where it was 'equitable to do so', having particular regard to any applicable rights under Article 2 of the ECHR.

Why is it being changed?

- 7.16 Removing the means test for legal help for these types of inquests will remove the burden on families of having to provide financial information in difficult circumstances and minimise the delay of failing a means test then applying for a waiver. This change will also help ensure that legal support is available for bereaved families at the earlier, investigative stage of an inquest. Removing the means test for legal help applications relating to these matters will also support greater consistency with the approach for representation via the ECF scheme.

- 7.17 The changes also recognise the importance of families receiving legal advice in these matters and align with other Ministry of Justice work to improve the experiences of bereaved families at inquests. We hope that professional advice on the likelihood of ECF funding being awarded, and the reasons for this, will support bereaved families through the process of deciding whether to apply for ECF funding and preparation for an inquest.

What will it now do?

- 7.18 This Instrument removes the means test for legal help in relation to inquests where, if the individual were to make an application for ECF under s10(2) or (4) of LASPO for representation at the inquest, the application would be reasonably likely to succeed. This encompasses circumstances where there may have been breach of Human Rights or where the Director of Legal Aid Casework (DLAC) considers there is a significant wider public interest in legal aid representation being provided.
- 7.19 Further detail on the operation of the new assessment will be set out in the Lord Chancellor's guidance, which will be updated to reflect the changes in this Instrument. For more detail, please see section 11 of this explanatory memorandum.
- 7.20 The existing waiver available to the DLAC for legal help applications relating to inquests of this nature is removed by this Instrument.
- 7.21 This Instrument will also amend the Civil Procedure Regulations to introduce backdating measures for inquests of this nature such that, where a legal aid application for standalone legal help is successful, providers can continue to apply to have funding backdated to encompass all legal help work undertaken prior to the determination being made. This brings the approach into line with that taken for successful ECF applications.

8. European Union Withdrawal and Future Relationship

- 8.1 This Instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 No consolidation is planned for this Instrument.

10. Consultation outcome

- 10.1 The Department carried out a full public consultation exercise, the Legal Aid Means Test Review which opened on 15 March 2022 and closed on 7 June 2022. In total, 126 consultation responses were received from a range of stakeholders. These were primarily from legal aid practitioners and representative groups from across the legal profession, as well as third-sector organisations. A response was received on behalf of the devolved administration for Wales, although this did not specifically focus on the Phase 1 changes covered by this SI. The Government response to the consultation was published 25 May 2023³.
- 10.2 Chapter 5 of the consultation and response contain the questions relating to the changes implemented by the Instrument. All of these received strong or very strong support from consultees and have therefore been implemented without further revision. The support for proposals to remove the means test for certain groups was, in

³ <https://www.gov.uk/government/consultations/legal-aid-means-test-review/legal-aid-means-test-review>

summary, as follows: under 18s applying for criminal advice and assistance, 84% support; under 18s applying for civil representation, 88% support; legal representation for parents or those with parental responsibility whose children face proceedings in relation to the withdrawal or withholding of life-saving treatment, 86% support; and, legal help at inquests where the case may involve a breach of ECHR obligations or raise significant wider public interest, 67% support. For a full analysis of consultation feedback on these proposals, please see Chapter 5 of the government response, available at the address provided above.

11. Guidance

- 11.1 The Ministry of Justice will publish an update to the Lord Chancellor's Guidance for the relevant areas of the legal aid means test in the week commencing Monday 18 July 2023.

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 A full Impact Assessment has not been prepared for this Instrument because the cost of the changes is estimated at up to £600,000 per year and, therefore, below the £5 million threshold at which an Impact Assessment would be required. The costs associated with this Instrument are estimated to be: around £20,000 for the removal of the means test for individuals under 18 in criminal advice and assistance, around £100,000 for the removal of the means test for individuals under 18 in civil representation, between £100,000 and £400,000 for legal representation for parents of, or those with parental responsibility for, a child facing the withdrawal or withholding of life-sustaining treatment, and, around £100,000 for Legal Help relating to inquests where, if the individual were to make an application for Exceptional Case Funding (ECF) representation, due to a breach of Human Rights, or, where the Director of Legal Aid Casework thinks there is a significant wider public interest in legal aid being provided, would be reasonably likely to succeed. A full Impact Assessment and Equalities Assessment were prepared for the launch of the Means Test Review, and these were both updated to accompany publication of the consultation response. Analysis from the Equalities Assessment indicated that some of the civil legal aid non-means testing measures covered by this Statutory Instrument would likely impact a relatively small number of people. For example, the policy to remove the means test for the withdrawal or withholding of lifesaving treatment for children is estimated to affect about five cases per year (see paragraph 18(I) of the Equalities Assessment published in May 2023).
- 12.4 As many of the changes in this Instrument relate to individuals under 18 years, the measures will particularly benefit that group. Please see paragraphs 18(h), 40-41 and 58-59 of the Equalities Assessment published in May 2023 for our rationale for benefitting this group, and analysis of the impact according to age. Please note that the analysis relates to the impact of all the measures consulted on. A description of the baselines used to assess the impact is found at paragraphs 19-26 of the May 2023 Equalities Assessment⁴.

⁴ <https://www.gov.uk/government/consultations/legal-aid-means-test-review/legal-aid-means-test-review>

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that it will form constant review of the operation of and expenditure on the legal aid scheme by the Ministry of Justice and the Legal Aid Agency.

14.2 The Instrument does not include a statutory review clause. These changes will be formally reviewed as part of the Post Implementation Review which the Ministry of Justice has committed to undertake within three to five years of all the new means test measures consulted on coming into force. This overarching review will be published no earlier than three years and no later than five years after all measures have come into effect.

14.3 The Post Implementation Review will analyse the effectiveness of the new means testing arrangements in delivering its policy aims. These include protecting access to justice and targeting financial support for legal aid at those most in need. For further details on these strategic aims please see the introduction to the consultation paper, available at: <https://www.gov.uk/government/consultations/legal-aid-means-test-review/legal-aid-means-test-review>

14.4 Conducting a review three to five years post implementation is consistent with typical government implementation review timeframes. This is a reasonable time period which allows changes to bed in; a Post Implementation Review undertaken earlier than this may not accurately reflect impacts of the revised process, or how the new measures are working together to form a fair system of means assessments.

15. Contact

15.1 Madeleine van Oss at the Ministry of Justice, email: LegalAidMeansTestReview@justice.gov.uk can be contacted with any queries regarding the Instrument.

15.2 Claire Cooper, Deputy Director for Legal Aid Policy at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Bellamy KC at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.