

## EXPLANATORY MEMORANDUM TO

### THE CIVIL LEGAL AID (PROCEDURE) (AMENDMENT) REGULATIONS 2016

2016 No. 516

#### 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 (Procedure) Regulations 2012 (“the Procedure Regulations”) to make changes to the requirements for the provision of evidence of domestic violence in regulation 33.
- 2.2 In particular, this instrument provides for a time limit upon the evidence that can be accepted of 60 months immediately preceding the date of the application.
- 2.3 This instrument also provides that the evidence requirements will be met if an applicant provides evidence which the Director of Legal Aid Casework is satisfied demonstrates that they have been, or are at risk of being, a victim of domestic violence in the form of financial abuse.
- 2.4 In addition, this instrument extends the list of evidence that can be accepted to include Violent Offender Orders and Female Genital Mutilation Protection Orders.

#### 3. Matters of special interest to Parliament

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

- 3.1 The provisions amending the time limit and making specific provision for evidence of financial abuse are being brought into force on 25 April 2016 and therefore will depart from the 21 day convention. The reason for bringing these amendments into force without delay is to ensure that appropriate action is taken to address the judgment of the Court of Appeal in *R (on the application of Rights of Women) v The Lord Chancellor* [2016] EWCA Civ 91, in which findings were made on the lawfulness of the evidence requirements (see further below).
- 3.2 On 9 March 2016, the Court ordered that the references in regulation 33 of the Procedure Regulations to the requirement that evidence be no more than 24 months old be struck through. In order that the amendments made by this instrument can be understood without the reader having to refer to the Court order, regulation 2(2) substitutes a new regulation 33(2) in full. The lettering in the new regulation 33(2) has remained the same as the previous version, so as not to impact on extensive cross referencing elsewhere in the Procedure Regulations (there are 7 cross references affected) and in the LAA’s operational guidance.

*Other matters of interest to the House of Commons*

- 3.3 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

**4. Legislative Context**

- 4.1 The Procedure Regulations make provision about the making and withdrawal of determinations that an individual qualifies for civil legal services under sections 9 and 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10) (LASPO).
- 4.2 Regulation 33 of the Procedure Regulations sets out that, for the purposes of applying for civil legal services as described in paragraph 12 of Part 1 of Schedule 1 to LASPO, specified evidence of domestic violence must be provided.

**5. Extent and Territorial Application**

- 5.1 This instrument extends to England and Wales.
- 5.2 The territorial application of this instrument is 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**

*What is being done and why*

- 7.1 The Procedure Regulations set out requirements that are used to determine whether an individual qualifies for legal aid funding under Sections 9 (general cases that are within scope for legal aid funding) and 10 (cases that are within scope for legal aid funding under exceptional case funding) of LASPO.
- 7.2 Part 1 of LASPO was brought into force in April 2013. The Act introduced significant changes to the scope and eligibility for legal aid funding. Legal aid is no longer available for most private family law proceedings, such as divorce disputes over financial and child contact arrangements. There are certain exceptions (set out at paragraphs 12, 13 and 15 of Part 1 of Schedule 1 to the Act) including cases where the applicant is, or is at risk of being, a victim of domestic violence.
- 7.3 A victim of domestic violence may receive legal aid for private family proceedings as long as they provide objective evidence of the domestic violence, as set out at regulation 33 of the Procedure Regulations. In addition, applicants must satisfy the merits criteria set out in the Civil Legal Aid (Merits Criteria) Regulations 2013 and financial eligibility criteria in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.
- 7.4 A judicial review challenge was brought to the evidence requirements set out at regulation 33 on the grounds that they: i) exceeded the statutory powers conferred upon the Lord Chancellor by section 12 of LASPO; and ii) thwarted or frustrated LASPO's statutory purpose. The Lord Chancellor successfully defended this challenge in the Divisional Court. However, on 18 February 2016, the Court of Appeal held that regulation 33 is invalid insofar as it: a) requires verification of

domestic violence to be given within a 24 month period before any application for legal aid; and b) does not cater for victims of domestic violence who have suffered from financial abuse.

- 7.5 As a consequence, on 9 March 2016, the Court ordered that references to the requirement that documentary evidence be no more than 24 months old be struck through and ordered that the Lord Chancellor lay before Parliament an amendment to regulation 33 to make provision for evidence of financial abuse.
- 7.6 These amendments to the Procedure Regulations are an immediate, interim, measure seeking to address the concerns of the Court and make sure that arrangements are in place that allow victims of domestic violence to access legal aid in private family disputes. Given the need to provide operational decision-makers with certainty as they consider applications for legal aid, the implementation of these changes has been expedited so that they come into effect two days after the regulations are laid before Parliament.
- 7.7 The time limit on evidence is being extended from the original 24 months in recognition of the Court's concerns that 24 months was a "comparatively short period of time"<sup>1</sup>. The Ministry of Justice has begun work with domestic violence support groups, legal representative bodies and colleagues across government to gather data and develop understanding of the issues in order to inform an evidence-based solution. In the meantime the time limit is being increased from 24 months to 60 months, which will widen access to legal aid for those in genuine need of such assistance whilst maintaining the necessary control of the legal aid regime.
- 7.8 Financial abuse is difficult to objectively verify according to a single item of documentary evidence. Neither the Ministry of Justice nor others that the department has consulted have been able to identify a single, prescribed, form of objective evidence that would allow an applicant to demonstrate financial abuse in an application for legal aid. The interim regulations therefore introduce a provision, which will provide that the Director of Legal Aid Casework will determine that the evidence criteria are met if satisfied that the evidence supplied with the application demonstrates such abuse.
- 7.9 Decision-makers will have to consider whether they are satisfied, on the basis of the evidence presented, that the applicant is a victim of financial abuse. Further research and stakeholder engagement is being undertaken, commencing immediately, to inform a long-term, evidence-based solution.
- 7.10 The amended regulations will be in force for an interim period. The Ministry of Justice has begun work with domestic violence support groups, legal representative bodies and colleagues across government to gather data and develop understanding of the issues in order to inform an evidence-based solution.
- 7.11 The Ministry of Justice aim to draw up replacement regulations, to be informed by the findings of the activities currently under way.

## **8. Consultation outcome**

- 8.1 These amendments have not been consulted upon. This is because the instrument enacts an interim amendment in light of the necessity for urgent response to the Court

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<sup>1</sup> Paragraph 45 of the judgment.

judgment, whilst further consultation is carried out in order to inform a long-term solution.

## **9. Guidance**

- 9.1 The Director of Legal Aid Casework will amend operational guidance to caseworkers and legal aid providers to reflect the changes.

## **10. Impact**

- 10.1 The impact on business, charities or voluntary bodies is primarily on legal service providers who hold a legal aid contract with the Legal Aid Agency allowing them to undertake family work. These providers are likely to receive additional income from a greater number of legal aid grants, though it is not possible to estimate the extent of this at this stage.
- 10.2 The impact on the public sector is that the Legal Aid Agency will face ongoing additional administrative costs from making more determinations of eligibility, including from applying the financial abuse discretion where appropriate, and will incur a one-off cost of less than £100,000 from making changes to its IT systems.
- 10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the [legislation.gov.uk](http://legislation.gov.uk) website.

## **11. Regulating small business**

- 11.1 The legislation applies to small businesses only in so far as it affects specific operational arrangements, as set out in operational guidance, of the Legal Aid Agency and providers of legal aid services.
- 11.2 The Ministry of Justice has not taken any specific steps to minimise the impact of the requirement on businesses employing up to 50 people.

## **12. Monitoring & review**

- 12.1 The impacts of these changes will be monitored and the findings used to inform a wider review of the domestic violence evidence requirements for legal aid.

## **13. Contact**

- 13.1 Samantha Dine at the Ministry of Justice (Telephone: 07467 012913 or email: [Samantha.Dine@justice.gsi.gov.uk](mailto:Samantha.Dine@justice.gsi.gov.uk)) can answer any queries regarding the instrument.