EXPLANATORY MEMORANDUM TO

THE CIVIL AND CRIMINAL LEGAL AID (FINANCIAL RESOURCES AND CONTRIBUTION ORDERS) (AMENDMENT) REGULATIONS 2024

2024 No. 1074

1. Introduction

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

2. Declaration

2.1 Minister Alexander, Minister of State at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

2.2 Claire Cooper and Lizzie Checkley, Joint Deputy Directors for civil legal aid policy at the Ministry of Justice confirm that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Madeleine van Oss at the Ministry of Justice LegalAidMeansTestReview@justice.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument amends the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (the "2013 Civil Means Regulations"), the Criminal Legal Aid (Financial Resources) Regulations 2013 (the "2013 Criminal Means Regulations"), the Criminal Legal Aid (Contribution Orders) Regulations 2013 (the "2013 Criminal Contribution Regulations"), and the Criminal Legal Aid (General) Regulations 2013 ("the 2013 Criminal General Regulations").

4.2 For an individual to qualify for legal aid, they must meet certain financial eligibility criteria - the 'means test'. This instrument introduces and extends a range of disregards to the legal aid means test, including a new discretionary disregard power for the Director of Legal Aid Casework (DLAC), meaning certain payments received by a legal aid applicant may be excluded when assessing financial eligibility for legal aid. It also permits certain individuals to request a reassessment of their financial eligibility arising from changes made by this instrument.

Where does the legislation extend to, and apply?

4.3 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.4 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. Policy Context

What is being done and why?

5.1 Legal aid is crucial to a fair justice system because it opens up legal advice and representation for those who are most in need. The means-testing system uses distinct tests for civil and criminal legal aid to identify whether an individual is eligible for legal aid based on their financial circumstances. The Means Test Review (MTR) was announced in February 2019 under the previous Government and a public consultation launched in 2022. The previous Government's response, setting out the intended changes to the means test, was published on 25 May 2023.

5.2 Certain payments may not be taken into account for the means test where we believe they should not be used to fund legal services – we refer to these as disregarded payments (see 5.3). These will reduce the money people are assessed as having available for legal services and may impact their legal aid eligibility. The disregards in this instrument are primarily focused on vulnerable groups and those compensated after a life-changing event. Overall, the changes are expected to increase the number of people eligible for legal aid, thereby increasing access to justice and supporting people to enforce their legal rights and seek effective resolutions.

Overarching disregards rationale

5.3 Payments should be disregarded where they are made to an individual for 'personal harm' or a 'specified purpose'. These are provided to support individuals in meeting essential needs or to return an individual to the same position as if a certain non-financial loss or harm had not happened. We do not consider it fair that such payments prevent an individual seeking legal aid, nor should individuals be expected to use such payments to fund legal services. Mandatory disregards are therefore suitable where payments compensate solely for personal harm or are for a specified purpose.

5.4 Discretionary disregards are applicable where schemes may include payment for a wider range of purposes and it may be appropriate to disregard only some of the payment. The 2013 Civil Means Regulations include discretionary disregards and this instrument adds several more, whilst introducing new discretionary disregards into the 2013 Criminal Means Regulations and 2013 Criminal Contribution Regulations.

5.5 To ensure discretionary disregards operate consistently, the three principles in 5.6-5.8 have been developed and apply to all (new and existing) discretionary (as opposed to mandatory) disregards in the 2013 Civil Means Regulations, 2013 Criminal Means Regulation, and the 2013 Criminal Contribution Regulations. This instrument also introduces a general power in civil legal aid which gives the DLAC and providers discretion to disregard certain schemes and payments not listed in the regulations, also subject to the three principles below.

Three Discretionary Principles

5.6 As in 5.3, compensation, damages, insurance and ex-gratia payments made for personal harm or a specified purpose may be disregarded as they should not be used to fund legal services.

5.7 Second, payments intended to replace lost income should not be disregarded as these are considered analogous to earnings, which are normally treated as income for the means test. Where a payment is received for a mixture of reasons, the DLAC and providers may not disregard any part of the payment representing loss of income,

except where the purpose of the payment cannot be ascertained in which case the DLAC may disregard the whole payment.

5.8 Third, compensation, damages, insurance and ex-gratia payments should not deny or deter an individual from holding an alleged responsible party to account in a matter directly related to the harm or loss compensated for, even if the payment is not made for personal harm or a specified purpose, such as where the payment is for financial loss. We consider the harm being compensated for could be perpetuated where taking the payment into account would deny legal aid for a directly related matter and may undermine access to justice. Therefore, where such related legal action is sought, the DLAC and providers may disregard the full payment.

Changes made by this instrument

5.9 The majority of changes in this instrument are based on the disregards rationale (5.3) and three principles (5.6-5.8) above. It introduces and amends a number of mandatory (such as infected blood and modern slavery) and discretionary (such as Grenfell Tower) disregards accordingly. In addition, the instrument introduces a new general power to allow the DLAC and providers to disregard payments fitting within criteria based on the three principles, but not listed in the Regulations.

5.10 The instrument also makes changes to existing provisions to ensure the disregards operate as intended. In the 2013 Civil Means Regulations, the DLAC may disregard any interim payments made through court proceedings from the disposable capital assessment. Such payments could also fall under the general power, which treat the payment differently (5.6 – 5.8). To remove the conflict and ensure consistency, any capital discretionary disregards and capital payments which fall within the general power are removed from scope of the interim payment disregard.

5.11 Given the measures in this instrument are designed to increase eligibility, we believe it is fair that individuals in receipt of relevant payments should be able to benefit from this instrument upon coming into force. The transitional provisions in this instrument allow individuals to request a reassessment where their application for legal aid was determined prior to the changes coming into force, they are paying contributions, and the changes may have applied if their application was determined on or after the date they came into force. Finally, the instrument ensures those refused representation for ongoing criminal proceedings under section 16 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 due to failing the means test, but who may be eligible as a result of the disregards in this instrument, can request a reassessment.

What was the previous policy, how is this different?

5.12 There was previously limited guidance on applying discretion to disregards. This instrument subjects all discretionary disregards, new and existing, in regulations or under the general power, to the three principles (5.6-5.8), providing clarity and ensuring consistency. The new general discretionary power also removes the need to lay secondary legislation each time a new scheme or payment is identified, minimising delays in payments being disregarded.

5.13 Payments for modern slavery, compensation for victims of overseas terrorism (VOTCS), and miscarriages of justice compensation payments made under Section 133 of the Criminal Justice Act 1988 (‘Section 133 payments’) were not previously disregarded from the means test. Following this instrument, they are now disregarded in the 2013 Civil Means Regulations, 2013 Criminal Means Regulations, and the 2013 Criminal Contribution Regulations (on a discretionary basis for VOTCS).

5.14 The disregards for Scotland and Northern Ireland historical child abuse redress scheme payments, backdated benefit and child maintenance, domestic violence equity, and infected blood compensation payments are now listed as payment disregards under the relevant parts of the 2013 Civil Means Regulations. In addition, the Grenfell Tower fire discretionary disregard is extended to the 2013 Criminal Means Regulations and the 2013 Criminal Contribution Regulations.

5.15 This instrument also changes the interim payment discretion for capital payments (5.10) to ensure discretionary disregards work as intended. Finally, the regulations do not allow for a reassessment of financial eligibility based on changes to means-testing rules. The transitionals (5.11) allow for reassessment based on the changes in this instrument, ensuring individuals may benefit when this instrument comes into force.

6. Legislative and Legal Context

How has the law changed?

6.1 Section 4 of LASPO designates the DLAC responsible for making determinations on provision of legal aid in individual cases, with power under section 5 to delegate responsibility for determinations to authorised providers of legal aid services. Section 21(1) of Part 1 of LASPO requires that, for an individual to qualify for legal aid, they must pass the means test. 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. Section 23 gives the Lord Chancellor the power to make provision in regulations requiring individuals to make financial contributions towards their legal aid. Section 41 allows for powers to provide for a person to exercise discretion and the making of transitional provisions.

6.2 This instrument amends the 2013 Civil Means Regulations, the 2013 Criminal Means Regulations, the 2013 Criminal Contribution Regulations and the 2013 Criminal General Regulations, under the above powers, to extend existing and introduce new mandatory and discretionary disregards. It also creates a general discretionary disregard power for DLAC to disregard payments from the civil means assessment, and criteria for DLAC to apply to existing discretionary disregards. The transitional provisions also allow certain individuals who may be affected by the changes to request a reassessment of their financial eligibility (5.11).

Why was this approach taken to change the law?

6.3 This is the only possible approach to make the necessary changes.

7. Consultation

Summary of consultation outcome and methodology

7.1 The Department conducted 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 and the previous Government response to the consultation was published on 25 May 2023[1].

7.2 The measures in this instrument that were consulted on all received support from consultees, ranging from 90% for the equity disregard for victims of domestic abuse to 66% for Victims of Overseas Terrorism Compensation Scheme as a disregard from the capital assessment. Full analysis of consultation feedback can be found in

[1] https://www.gov.uk/government/consultations/legal-aid-means-test-review/outcome/government-response-to-legal-aid-means-test-review--3

Chapters 2 (overarching proposals) and 4 (civil capital thresholds, disregards and passporting) of the response, available at the address provided above.

7.3 Most of the measures introduced in this instrument are implemented as consulted upon, with a few exceptions. The response listed Modern Slavery Victim Care Contract payments as disregarded from income only and the Scotland and Northern Ireland redress schemes for Historical Child Abuse from capital only. Further work identified these schemes may pay as a lump sum or in instalments. Typically, where a payment can be made as either a regular or lump sum payment, we disregard from both income and capital assessments (e.g., Grenfell Tower). To align with this general practice, this instrument disregards these payments on a mandatory basis from both the income and capital means tests.

7.4 In the consultation, the general power covered compensation, damages and ex gratia payments. We also consider insurance payments may be made for a specified purpose and that to not disregard insurance payments may disadvantage those who proactively sought insurance. Additionally, policy development on the Section 133 payments highlighted the need for the third principle (5.8) to ensure compensation payments do not impact an individual's financial eligibility for legal aid in seeking accountability and justice from a potentially responsible party in a directly related matter.

7.5 Disregards for Section 133 payments and new infected blood compensation schemes were developed after consultation. Although both these schemes offer income replacement elements and so would not usually fit within our mandatory disregards rationale, we have chosen to make the disregards mandatory due to the exceptional circumstances surrounding these particular schemes. Both schemes are associated solely with actions, omissions or decisions of state or public bodies (although this does not necessarily amount to error, fault, liability or wrongdoing by the state) and so we consider such payments should not be taken into account in the means test. In the case of the infected blood schemes, we are treating the relevant actions, omissions, or decisions as solely associated with the state even though the Infected Blood Inquiry noted that other actors may have been involved. This is because the events that the schemes are designed to address are such that the Government considers it inappropriate to separate out the elements contributing to the wrong (including particular actions and actors associated with them).

7.6 Extension of the Grenfell Tower fire disregard to criminal legal aid was agreed after the MTR consultation, following engagement with stakeholders. Given the disregards rationale and provision in the 2013 Civil Means Regulations, it is consistent and fair to extend this disregard to criminal legal aid.

7.7 The change to the interim payments discretion was also made following policy development during implementation of the general discretionary disregard power. The instrument removes a conflict between the interim payments disregard and the discretionary disregard power, or discretionary disregards listed in the regulations, to ensure that capital payments falling under the discretionary disregard power or discretionary disregards listed in the regulations are treated consistently.

8. Applicable Guidance

8.1 The Ministry of Justice will publish an update to the Lord Chancellor's Guidance for the civil means test and add an addendum under section 4 for crime. This will provide guidance for the relevant areas of the legal aid means test in the week commencing November 18, 2024. This will be available at https://www.gov.uk/guidance/funding-and-costs-assessment-for-civil-and-crime-matters

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 As a procurement provision this measure is out of scope of the Better Regulation Framework. The costs associated with this instrument are estimated in total, and in steady state, to cost – at maximum – an additional £430,000 per year.

9.2 Full Impact Assessments[2][3] and Equalities Assessments[4] were prepared for the launch of the MTR and were updated to accompany the MTR response. Whilst these accounted for the expected steady state costs of the disregard measures consulted on, no equality impacts were included due to limited data on the small number of individuals likely to be affected (see paragraph 132 for civil and 138 for criminal). As there are several disregards, there is no overarching group who stand to benefit or be adversely affected and it was not possible to identify the personal circumstances (e.g. household income, family type) and characteristics (e.g., age, sex) of those who will have some of their income or capital disregarded because of changes to disregards. Furthermore, due to the future-proofing element of the general discretionary disregard power, it was not possible to estimate the scope or size of payments and the impact.

9.3 The majority of the measures were previously consulted on. Measures not consulted on are not included in the Impact and Equality assessments above. These additional measures are expected to have a net benefit, increasing the numbers of those eligible for legal aid, with low financial impact (up to £130,000 per annum total).

Impact on businesses, charities and voluntary bodies

9.4 There is no, or no significant, impact on business, charities or voluntary bodies because this instrument does not impose further regulatory burdens on these bodies.

9.5 The legislation does not significantly impact small and micro businesses. The legislation applies to small and micro businesses only insofar as it affects specific operational arrangements, as set out in operational guidance, of the Legal Aid Agency (LAA) and providers of legal aid services.

9.6 There is no, or no significant, impact on the public sector. Whilst the changes will require the LAA to collect and process information it has not previously identified, the volume of legal aid applications as a direct result of this SI is expected to be minimal.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is ongoing as we continually monitor the operation of and expenditure on the legal aid scheme by the Ministry of Justice and the LAA using published data on volumes of legal aid cases and spending on legal aid. The monitoring and review will help assess whether the objectives of the MTR have been met by modelling the proportion of the population who are eligible for legal

[2] Updated Civil Impact Assessment: https://assets.publishing.service.gov.uk/media/646f17edab40bf0010196a14/government-response-to-legal-aid-means-test-review-impact-assessment-civil.pdf
[3] Updated Criminal Impact Assessment: https://assets.publishing.service.gov.uk/media/6479bcb05f7bb700127fa375/government-response-to-legal-aid-means-test-review-impact-assessment-crime.pdf
[4] Updated Equalities Assessment: https://assets.publishing.service.gov.uk/media/646f11d4ab40bf000c1969fc/government-response-to-legal-aid-means-test-review-equalities-assessment.pdf

aid, including assessing the scheme based on updated means-testing models to see how the new scheme compares in terms of eligibility, equalities, and spend. We will continue regular engagement with stakeholders to gather feedback on the impact of the policies for both applicants and providers.

10.2 Finally, these changes will be formally reviewed as part of the Post Implementation Review due within three to five years of all the new MTR measures coming into force. This aligns with typical government post-implementation review timeframes and is a reasonable time-period which allows changes to bed in.

10.3 The instrument does not include a statutory review clause. The Minister of State at the Ministry of Justice, Minister Alexander, has made the following statement: "It would not be appropriate in the circumstances to make provision for a statutory review of this instrument because of the low impact on business, and because the work will be reviewed as part of the Post Implementation Review."

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

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

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").