EXPLANATORY MEMORANDUM TO

THE CIVIL LEGAL AID (FINANCIAL RESOURCES AND PAYMENT FOR SERVICES) (AMENDMENT) REGULATIONS 2021

2021 No. 1423

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 These Regulations amend the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (referred to throughout this explanatory memorandum as 'the 2013 Regulations') in order to remove the means test for other legal services (referred to throughout as advocacy) granted under the Exceptional Case Funding (ECF) scheme for inquests, and to remove the means test for legal help where advocacy is being provided as a result of a grant of advocacy under the ECF scheme.

2.2 Removing the means test from ECF inquest cases recognises the importance of families getting advocacy for matters concerning Article 2 and Wider Public Interest inquests and aligns with other MoJ work to make processes more accessible for bereaved families.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument is England and Wales.

4.2 This instrument applies to 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 The framework for the provision for civil 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 2013 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 In order to be eligible for means-tested civil legal aid, the applicant must pass both the income and the capital eligibility test. Regulation 5 of the 2013 Regulations sets out the list of matters where a determination in respect of an individual's financial resources is not required. Regulations 7 and 8 set out the gross income, disposable

income and disposable capital thresholds for accessing civil legal aid. Regulation 10 provides the DLAC the discretion to disapply the eligibility limits in Regulations 7 and 8 in certain circumstances.

7. Policy background

What is being done and why?

7.1 In 2018, the MoJ launched a review of the existing provisions for legal aid for inquests, gathering evidence from a wide range of stakeholders and running a call for evidence exercise. The subsequent report, published in February 2019, identified a range of potential changes to the system, all aimed at improving the current legal aid process and developing a more supportive system for bereaved families. The report acknowledged concerns around means-testing for advocacy at inquests and committed to reviewing this area, specifically as part of the Legal Aid Means Test Review.

7.2 It was clear from the evidence gathered that there was a perceived unfairness that bereaved families should be required to have their means assessed, and potentially pay a financial contribution, to receive advocacy at an inquest into the death of their loved one when this death was potentially as a result of state action or inaction.

7.3 On 7 July 2020 the Justice Select Committee (JSC) opened an inquiry concerning the Coroner Service with the aim of examining the effectiveness and capacity of the service. The inquiry also looked at whether sufficient progress had been made in improving bereaved people's experience since changes to the service were introduced in 2009 with the implementation of the Coroners and Justice Act 2009.

7.4 As part of its inquiry, the JSC issued a call for evidence seeking views on a number of issues, including improvements in services for the bereaved. On 27 May 2021 the Committee published its report and one of the recommendations centred around removing the legal aid means test for certain inquest related matters.

7.5 Following a decision from the Lord Chancellor, non-means-tested ECF is to be made available for advocacy at inquests where, as set out, the Director of Legal Aid Casework (DLAC) determines that the relevant criteria for ECF are satisfied. In addition to this, where advocacy has been granted under the ECF scheme, and legal help is not already in place, non-means-tested legal help is to be made available to cover certain other services required. This is important, because legally aided advocacy at inquests covers a narrower range of services than other types of representation.

7.6 To fulfil the purpose of the instrument, amendments have been made to the 2013 Regulations; specifically, to Part 2, Chapter 1, regulation 5 in order to (i) make available non-means-tested advocacy in inquest cases where the DLAC has made an ECF determination and (ii) where legal help is not already in place and the individual is in receipt of advocacy, make available non-means-tested legal help in relation to the inquest.

7.7 Amendments have also been made to regulation 10 to remove the DLAC's discretionary waiver in relation to the means test in inquest cases where an ECF determination has been made. This part of the waiver has been replaced by the amendments made in regulation 5.

7.8 In addition to this, regulations 44(2)(a)(iii) and 44(3)(a)(iii) of the 2013 Regulations have been removed since they will no longer apply because contributions are no longer payable in respect of advocacy for these matters.

7.9 With regard to transitional arrangements, an application received on or after the 12 January 2022 is treated as an application falling under these Regulations. Any application that is made prior to 12 January, where a determination has yet to be made, will also fall under these regulations. Where an application has been determined prior to 12 January 2022 and the matter is ongoing post this date, the legal aid recipient will not be liable to make further contributions payable under section 23 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Explanations

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

7.10 Legal help in advance of a potential inquest hearing is in scope of LASPO and is available for a family member, subject to a means and merits test.

7.11 Legal aid for advocacy at inquests is only available under the ECF scheme where the application relates to obligations under ECHR and/or the WPI test is satisfied where, given the particular circumstances of the case, the provision of advocacy to the individual for the inquest is likely to produce significant benefits to others. With regard to ECHR, ECF may be granted where failure to do so would breach government ECHR obligations. In the case of inquests, this is typically in relation to Article 2 (the right to life).

7.12 Prior to the changes set out in this explanatory memorandum, the DLAC had a discretion in inquests to waive elements of the means test in certain legal help and ECF cases and additionally, in relation to applications for ECF for advocacy, could apply a waiver of contributions, having regard to applicable Article 2 rights.

Why is it being changed?

7.13 In 2018, the MoJ launched a review of the existing provisions for legal aid for inquests, gathering evidence from a wide range of stakeholders and running a call for evidence exercise. The MoJ published a report in February 2019 that identified a range of potential changes to the provisions for legal aid for inquests.

7.14 The evidence gathered suggested a perceived unfairness that bereaved families should be required to have their means assessed, and potentially pay a financial contribution, to receive advocacy at an inquest into the death of their loved one when this death was potentially as a result of state action or inaction.

What will it now do?

7.15 Non-means-tested ECF will now be available for advocacy at inquests where the DLAC has determined that the relevant criteria for ECF are satisfied. In addition to this, where advocacy has been granted under the ECF scheme, and legal help is not already in place, non-means-tested legal help will be available to cover certain other services required.

8. European Union Withdrawal and Future Relationship

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

9. Consolidation

9.1 None required.

10. Consultation outcome

10.1 The Department carried out informal consultations with stakeholders on these changes via working group meetings to inform them of proposals and allow them an opportunity to give feedback.

11. Guidance

11.1 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 significant impact on business, charities or voluntary bodies.

12.2 There is no significant impact on the public sector.

12.3 Given this low level of impact, a full Impact Assessment has not been prepared for this instrument.

13. Regulating small business

13.1 The Regulations do not impose any additional regulatory burdens on small firms. They will in fact reduce the administrative process of assessing a legal aid applicant's eligibility in the circumstances set out in this explanatory memorandum.

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 of and expenditure on the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency.

15. Contact

15.1 Chris Rant at the Ministry of Justice (telephone: 07394 715019 or email: chris.rant1@justice.gov.uk) can be contacted with any queries regarding the instrument.

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

15.3 Tom Pursglove MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.