EXPLANATORY MEMORANDUM TO

THE CIVIL LEGAL AID (PROCEDURE) (AMENDMENT) REGULATIONS 2017

2017 No. 53

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 2012"), which make provision about the making and withdrawal of determinations that an individual qualifies for civil legal aid services under sections 9 and 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). The purpose of this instrument is to better align the position for legal aid for representation at inquests with that for legal aid for litigation. This instrument enables individuals, in certain circumstances, to receive legal aid for representation at an inquest into the death of a family member from a provider of legal services with appropriate knowledge or expertise that does not (in advance) hold a legal aid contract authorising such work (a "relevant case category contract").

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument is laid in breach of the 21-day rule. The issue that this instrument addresses has come to light in the context of a request for public funding for family members of the victims of the Birmingham Pub Bombings, some of whom are represented by a firm, and in some cases have been for some time, which does not hold the necessary legal aid contract to provide legally-aided representation for those families. Applications by those families for legal aid for the inquests were therefore rejected by the Legal Aid Agency. The inquests are scheduled to begin in September 2017 but there are pre-inquest hearings currently scheduled for 23rd February 2017. While it is matter of regret that Parliament is being given limited notice of this instrument, by breaching the 21-day rule, the changes made by this instrument would give the families affected certainty about the funding position as quickly as possible. However the Lord Chancellor has no function in relation to exercise of the discretion introduced by this instrument, which is solely exercisable by the Director of Legal Aid Casework (the "Director") independently of the Lord Chancellor. The breach of the 21-day rule in these circumstances is no indication of how the Lord Chancellor considers that discretion should be exercised in that case.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative resolution 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 Legal aid is available for inquests under section 9 and paragraph 41 of Part 1 of Schedule 1 to LASPO, subject to the exclusion for advocacy in Part 3 of Schedule 1. Legal aid for inquests within the scope of Part 1 of Schedule 1 to LASPO ("in scope") therefore takes the form of legal help (the advice and assistance level of legal aid), provided as Controlled Work under Part 3 of the Procedure Regulations 2012 (regulation 21(2)).

4.2 Regulation 23(1)(d) of the Procedure Regulations 2012 requires applications for Controlled Work to specify a proposed provider with whom the Lord Chancellor has made an arrangement under section 2(1) LASPO – which in practice requires the provider to hold a relevant case category contract. Prior to the changes made by this instrument there were no exceptions to this requirement.

4.3 Legal representation at an inquest is outside the scope of Part 1 of Schedule 1 to LASPO ("out of scope"). Legal aid for representation at an inquest is only available in the form of Exceptional Case Funding ("ECF") in the circumstances set out in section 10 of LASPO, namely:

- where a failure to fund would breach the applicant's rights under the European Convention on Human Rights ("ECHR") or EU Law (in practice, rights of family members of the deceased under Article 2 ECHR), or where funding is appropriate having regard to the risk of a breach; or
- for family members of the deceased where the Director has determined that the provision of advocacy is likely to produce significant benefits for a class of person, other than the individual and the members of the individual's family.

The Director has a discretion to backdate ECF determinations under regulation 68(1) of the Procedure Regulations 2012.

4.4 Regulation 67(1)(b) of the Procedure Regulations 2012 requires applications for ECF for advocacy at an inquest to specify a proposed provider with whom the Lord Chancellor has made an arrangement under section 2(1) LASPO unless the effective administration of justice test is met. Regulation 31(5) explains that the effective administration of justice test is satisfied if the Director decides that it is necessary for a provider to provide the civil legal services applied for under an individual case contract having considered the provider's knowledge of the proceedings and expertise in providing the services, the nature and likely length of the proceedings, the complexity of the issues, and the circumstances of the applicant. Where the effective administration of justice test is met, the application for ECF need not specify a provider who holds a relevant case category contract.

4.5 In accordance with regulation 10 of the Procedure Regulations 2012, the form of civil legal services for ECF for an inquest are "other legal services", which covers instructing an advocate, preparing for advocacy, and advocacy. This would not cover other preparation for an inquest, such as preparing witness statements, for an inquest such work would need to be covered by legal help.

4.6 By contrast, in accordance with regulation 9 of the Procedure Regulations 2012, legal representation in most litigation matters covers the provision of services to an individual or legal person in proceedings where that individual or legal person is party, or potential party, to those proceedings. This would cover all relevant preparation work for the litigation and in practice would displace the need for legal

help in relation to those proceedings. In most cases, for in scope matters, legal representation is provided as Licensed Work under Part 4 of the Procedure Regulations 2012, and for out of scope matters is provided as ECF under Part 8. In either case an individual case contract may be available where the effective administration of justice test is met.

4.7 So, whilst it is possible to avoid the requirement of regulation 23(1)(d) to receive legal aid to prepare for litigation, it was not possible to do so to prepare for inquests prior to the changes made by the this instrument.

5. Extent and Territorial Application

5.1 The extent of this instrument is 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 This instrument introduces an exception to the requirement that an application for Controlled Work must specify a provider who holds a relevant case category contract, thereby enabling such work to be undertaken under an individual case contract. This exception enables the Director to waive that requirement where the application is for legal help for an inquest, where the applicant will also be receiving ECF for that inquest and the effective administration of justice test is met.

7.2 Where the conditions of the exception are met, it enables a provider who does not hold a relevant case category contract to provide civil legal services to individuals in preparation for an inquest funded by legal aid. This therefore better aligns the position for legal aid for representation at inquests with that for legal aid for litigation, where in most cases a provider who does not hold a relevant case category contract may provide civil legal services in preparation for that litigation, funded by legal aid, where the effective administration of justice test is met. The difference in the position between legal aid for inquests and litigation came to light in the case of the inquests relating to the Birmingham Pub Bombings.

7.3 Where the Director exercises his discretion to apply the exception introduced by this instrument for a particular application he has a further discretion to backdate his determination. The reason for this is because the exception cannot apply until ECF has been made available to the applicant for the inquest, and ECF determinations can themselves be backdated. The possibility to backdate a determination further aligns the position for legal aid for representation at inquests with that for legal aid for litigation.

Consolidation

7.4 There have been other changes made to the Procedure Regulations 2012, but there are currently no plans to consolidate these Regulations.

8. Consultation outcome

8.1 The Department has not consulted on this instrument. Doing so would be disproportionate given the limited impact this amendment will have on the legal aid system as a whole.

9. Guidance

9.1 The Legal Aid Agency ("LAA") will make changes to its Provider Pack, forms and website and is liaising with providers about the changes.

10. Impact

10.1 There is a minor impact on business, charities or voluntary bodies, through the impact on providers who currently hold case category contracts for legal help for inquests who may lose out on such work to other providers who do not currently hold such contracts. This instrument does not have any effect on the rates available for civil legal services for inquests.

10.2 The impact on the public sector is confined to the LAA, there is no real financial impact on the LAA, except for some slight additional administrative costs of granting legal aid to a new provider.

10.3 An Impact Assessment has not been prepared for this instrument, this is because only a limited number of businesses will be affected to a limited extent, and there will be no or negligible impact on public finances.

11. Regulating small business

11.1 This instrument applies to small businesses only insofar as they affect applications for legal aid for Legal Help for inquests.

11.2 As this instrument only has a minor impact on business confined to providers holding relevant case category contracts, the Ministry of Justice has not taken any specific steps to minimise the impact of the requirement on firms employing up to 20 people. The instrument does not impose any additional regulatory burdens on small firms.

12. Monitoring & review

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

13. Contact

13.1 Olga Kostiw at the Ministry of Justice Telephone: 0203 334 6400 or email: Olga.Kostiw@justice.gsi.gov.uk can answer any queries regarding the instrument.