EXPLANATORY MEMORANDUM TO

THE CIVIL LEGAL AID (PROCEDURE) (AMENDMENT) REGULATIONS 2019

2019 No. 130

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 This instrument amends the Civil Legal Aid (Procedure) Regulations 2012 (the "Procedure Regulations"). The amendments would permit the backdating of a grant of legal aid funding to a date earlier than the date a decision for funding is made. These amendments will be applicable to certain civil legal aid services which are in scope of the legal aid scheme and in circumstances where it is appropriate to do so in the interests of justice.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument 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 The Procedure Regulations make provision about the making and withdrawal of determinations by the Director of Legal Aid Casework (the "Director") as to whether an individual qualifies for civil legal services under sections 9 and 10 of Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO").

6.2 Section 9 of LASPO permits the Director to make a determination on whether an individual qualifies for civil legal services, provided they are described in Part 1, Schedule 1 of LASPO. Services listed in that Part are known as the "in-scope services".

6.3 Section 10 of LASPO provides for the Director to make a determination that an individual qualifies for civil legal services on an exceptional basis, where the services are not in-scope services but where a failure to grant legal aid funding would breach (or risk breaching) the individual's rights under the European Convention on Human Rights, or any enforceable EU rights. This is known as the Exceptional Case Funding scheme.

6.4 Civil legal services funded under LASPO are categorised as either Controlled or Licensed Work. The way that the work is categorised in the Procedure Regulations (as either Controlled or Licensed) dictates the administrative process that must be followed in determining whether an applicant is eligible for legal aid.

6.5 Controlled Work includes early legal advice and assistance and some legal representation. In Controlled Work, the decision on eligibility is delegated to providers of legal aid. This means that no application to the Legal Aid Agency (LAA) is necessary, instead providers perform the necessary assessment of the applicant's means and of the merits of the case, record the details of the case in a file and submit a record to the LAA afterwards. A selection of files is audited by the LAA to ensure that this work is being properly carried out and recorded.

6.6 Licensed work covers all work not defined as Controlled including most legal representation. In Licensed Work, the provider must generally submit the application for legal aid to the LAA upfront for approval of funding. The LAA carry out the means and merits assessments and decide whether to fund the work at the start of the case.

6.7 As above, at para 6.3, LASPO provides for an Exceptional Case Funding scheme, for people to apply for legal aid in 'cases that do not fall within the scope of civil and family legal aid but where the failure to do so would be a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law, or where there is a significant wider public interest in funding legal representation for inquest cases.

6.8 Regulation 68 of the Procedure Regulations provides for the Director to specify that a determination made under the Exceptional Case Funding scheme may be treated as having effect from an earlier date.

6.9 This instrument amends the Procedure Regulations and provides for the Director to specify that a determination in relation to in-scope Licensed Work has effect from an earlier date, in certain circumstances where it would be in the interests of justice.

7. Policy background

What is being done and why?

7.1 Currently, the Director has the right to specify that a determination made under the Exceptional Case Funding scheme, that an individual qualifies for civil legal services may be treated as having effect from an earlier date. This means that providers are able to be paid for work done from that earlier date.

7.2 However, at present, the Director has no such power in relation to in-scope services (services that are listed in Part 1, Schedule 1 of LASPO). In practice, this means that a legal aid provider might undertake work for urgent cases – such as emergency judicial reviews – before a determination can be made by the LAA, and not be paid for that emergency work undertaken before the determination.

7.3 A judicial review was brought against the Lord Chancellor and the Director challenging the absence of power in legislation to backdate determinations in applications for such in-scope civil legal services. The case raised concerns that in the absence of the backdating of payment for work done ahead of a determination, legal aid providers might not take up the work and a client might not be legally represented.

7.4 Following this legal challenge, the Ministry of Justice has considered the policy further and after reviewing the provisions in relation to the Exceptional Case Funding scheme, has decided to provide for this discretion in relation to in-scope services that are Licensed Work.

7.5 This instrument provides the Director with a discretion to specify that a determination has effect from a date earlier than the date of the determination when the following conditions are met:

- The application for legal aid is made as soon as reasonably practicable;
- It is in the interests of justice for work to be carried out before the relevant determination or amendment is made, and such work cannot be carried out as Controlled Work (i.e. work which, unlike Licensed Work, providers can make determinations themselves); and
- In relation to a determination on review of following an appeal, having regard to all the circumstances, including the information that was available to the provider when the application for the services or the application for the review was made, the Director of Legal Aid Casework is satisfied that it is appropriate for the determination to be treated as having effect from the earlier date.

7.6 The discretion may only be applied by the Director to applications made after the date on which the Regulations come into force.

7.7 This amendment to the Procedure Regulations will mean that when the Director exercises this new discretion, providers may be paid for the work they have undertaken before the date of the determination.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

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

9. Consolidation

9.1 This is not relevant to this Statutory Instrument.

10. Consultation outcome

10.1 Due to the limited nature of the changes being introduced, no public consultation was carried out. The Department considers it would be disproportionate given the limited impact this amendment will have on the legal aid system as a whole.

11. Guidance

11.1 The LAA will update providers through its usual communication channels on the amendment to the regulations and on how to apply for an application to be backdated in the appropriate circumstances.

12. Impact

12.1 There is no significant impact on business, charities or voluntary bodies. It is anticipated that this change may lead to a behaviour change of previously suppressed demand.

12.2 The impact on the public finances is confined to the LAA, where minor (less than £1million) additional case costs, and potential administrative costs, will be incurred to implement and operate the new backdating process.

12.3 An Impact Assessment has not been prepared for this instrument, because only a limited number of businesses will be affected to a limited extent, and there will be the minor impact on public finances outlined in para. 12.2.

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 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 Lucy Atkinson at the Ministry of Justice. Telephone: 07542944795 or email: Lucy.Atkinson1@justice.gov.uk can be contacted with any queries regarding the instrument.

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

15.3 Lucy Frazer QC MP, Parliamentary Under Secretary of State at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.