EXPLANATORY MEMORANDUM TO

THE CRIMINAL AND CIVIL LEGAL AID (AMENDMENT) REGULATIONS 2025

2025 No. 750

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.

1.2. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Declaration

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

2.2. Lizzie Checkley / Claire Cooper, Joint Deputy Directors for Eligibility, Civil and Family Legal Aid Policy, and Kate Brittain, Deputy Director for Criminal Legal Aid Policy, at the Ministry of Justice confirm that this Explanatory Memorandum meets the required standard.

3. Contact

3.1. Nikki Daniels at the Ministry of Justice, email civil.legalaidpolicy@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 will temporarily amend legal aid regulations to ensure the Legal Aid Agency (LAA) can continue to deliver its services following the cyber security incident on its online digital services[1]. The primary aim of this Statutory Instrument (SI) is for a temporary period to remove civil income and capital contributions for new and existing cases and to remove prohibitions on delegation of powers to enable the LAA to delegate some additional decisions regarding civil legal aid determinations to legal aid providers (referred to as 'providers'). The SI also makes some minor and consequential amendments relating to crime determinations which supports other measures being taken as business continuity arrangements. This SI is expected to remain in place until these contingency arrangements are no longer needed.

4.2. The SI will, in particular, make technical amendments to four regulations: the Civil Legal Aid (Procedure) Regulations 2012 ("the Procedure Regulations"); the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 ("the Civil Financial Regulations"); the Criminal Legal Aid (Financial Resources)

[1] See, for further context: the statement in Parliament of 19 May 2025 from Minister Sackman - https://hansard.parliament.uk/commons/2025-05-19/debates/C6B0C827-D166-4DF8-90AD-ECBDA4951D37/LegalAidAgencyCyber-SecurityIncident; and published guidance from the Legal Aid Agency on contingency measures and processes: https://www.gov.uk/guidance/legal-aid-agency-cyber-security-incident.

Regulations 2013 ("the Criminal Financial Regulations"); and the Criminal Legal Aid (General) Regulations 2013 ("the General Regulations").

4.3. In relation to the Procedure Regulations, this SI will:

4.3.1. Remove the prohibition on delegation of certain functions to allow the Director of Legal Aid Casework (DLAC), through a separate non-legislative process, to delegate to civil legal aid providers the ability to amend some legal aid determinations for Licensed Work,[2] and to withdraw determinations in certain circumstances; and

4.3.2. Require DLAC to withdraw[3] emergency representation, when the individual is found not to be financially eligible for that form of legal aid on a full assessment of their resources, where currently she is only able to revoke such determinations (revocation has a number of adverse consequences for the individual, including a requirement to repay any outstanding legal aid costs incurred under the certificate recording the determination).

4.4. In relation to the Civil Financial Regulations, this SI will disapply both income and capital contributions for both new and existing civil legal aid cases whilst this SI remains in force.

4.5. In relation to the General Regulations, this SI will exclude criminal legal aid providers from the requirement to determine that an individual is financially eligible for representation in the Crown Court where they have made a determination in the same proceedings that an individual is financially eligible for representation in the magistrates' court. There are also amendments to the General Regulations to confirm that where, as a result of the cyber security incident, providers were unable to submit certain criminal legal aid applications to the LAA in the usual way, representation orders subsequently granted should be backdated to when the individual instructed the provider, to make the legal aid application (the individual can provider instructions in person or remotely).

4.6. The amendments to the Crime Financial Regulations solely relate to preventing a provider who issues a representation order recording a determination from being required to send written notification of this to themselves. Similar amendments are also made in the General Regulations, and in relation to certificates for civil work, in the Procedure Regulations.

Where does the legislation extend to, and apply?

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

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

[2] For Licensed Work, where legal representation in court is needed, the LAA (acting under delegated powers) usually determines eligibility and is also typically responsible for taking decisions in relation to the potential amendment of the determination as well as its possible withdrawal, subject to the circumstances of the case.

[3] The distinction between revocation and withdrawal is broadly as follows: when the LAA revokes the funding certificate, any legal aid funds paid to the provider for work undertaken in the case would be reclaimed from the individual; in contrast, when the LAA withdraws the funding certificate, legal aid funding ceases from that point and the individual faces no liability to the LAA for the legal aid costs incurred in the case.

5. Policy Context

What is being done and why?

5.1. As summarised in section 4 above, following the cyber security incident affecting LAA digital services, this SI makes amendments to existing regulations on the operation of civil and criminal legal aid to ensure the operation of legal for a temporary period.

5.2. This SI will amend the Procedure Regulations to:

5.2.1. Remove the prohibitions on the DLAC's delegating functions to enable delegation of powers to providers to amend limitations on civil Licensed Work determinations and some types of withdrawal decisions (details of which are not specified in the SI but will be set out in tables following the decision by DLAC to delegate such functions to providers).

5.2.2. To require DLAC to withdraw, rather than revoke, any emergency representation determination in cases where the initial determination has been made on the basis of limited information by DLAC, and later it is determined the individual does not pass the means test.

5.3. This SI will also amend the Civil Financial Regulations to remove current provisions requiring both capital and income contributions for civil legal aid funding which would previously have been payable for both new and existing cases. The provisions of the SI, therefore, mean that such civil contributions are not due or are waived whilst the SI remains in force. Any contributions which were required and paid by an individual in relation to the grant of the civil legal aid certificate prior to the SI coming into force will not automatically be refunded by virtue of these provisions. Once the contingency arrangements covered by this SI are revoked, it is expected that the LAA will resume the collection of income and capital contributions which fall due for payment after this date. There will be no attempt to recover income or capital contributions retrospectively which might otherwise have fallen due for payment had it not been for the emergency provisions covered by this SI.

5.4. This SI will further amend the General Regulations and the Crime Financial Regulations to stop providers from having to send representation orders to themselves where the power has been delegated to them by the DLAC. Similar amendments have been made to prevent providers having to notify themselves of a withdrawal where the power to withdraw a determination has been delegated to them. It also specifies the date from which any determination for representation runs where a provider makes the determination. It removes the requirement of providers to determine that an individual is also eligible financially in the Crown Court when they are carrying out a determination in relation to representation in the magistrates' court.

5.5. Finally, amendments introduced by this SI will provide clarity for providers who have been unable to submit criminal legal aid applications to the LAA through the digital portal or other channels since the LAA's digital systems went offline. As these outstanding applications are processed by the LAA or by the provider under delegated powers, representation orders subsequently granted will be backdated to when the individual instructed the provider to make the legal aid application (the individual can provide instructions in person or remotely). If there is a determination that legal aid should not be granted because the interests of justice have not been met, but the individual then successfully has the determination overturned on review by the LAA or following an appeal to the court, the representation order will also be backdated to when the individual instructed the provider to make the legal aid application (the

individual can provide instructions in person or remotely). Following a determination not to grant legal aid because the individual does not pass the interests of justice test, and is also financially ineligible, if the individual successfully appeals the interests of justice decision and they are also found to be financially eligible on reassessment by the LAA due to a change in their financial circumstances, any representation order subsequently issued will be backdated to when the change which rendered them financially eligible occurred.

5.6. What was the previous policy, how is this different?

5.7. Prior to this SI, the Procedure Regulations contained provision which had the effect that DLAC could not delegate some of her functions in relation to determinations made under delegated functions by providers; furthermore, civil legal aid contributions were payable in certain instances by individuals[4] as a condition on the determination, failing which DLAC could withdraw the determination. The calculation of and process for making such contributions is set out in the Civil Financial Regulations. No changes are being made to contributions required in criminal legal aid. The amendments to the General Regulations and the Crime Financial Regulations are being made because the existing wording related to circumstances where applications are received by the DLAC for determination. This wording would not have worked in circumstances where determinations are to be delegated to providers. Additionally, the amendments allow for a position where DLAC will retain responsibility for determinations in Crown Court proceedings but allow for determinations in certain magistrates' court cases to be delegated to providers. As outlined more fully in section 6 below, this SI will also amend existing regulations to make temporary technical and operational changes to ensure business continuity in both the Civil and Criminal regulations. There is no permanent change in policy because the measures in this SI are meant to be temporary to ensure business continuity following the cyber-security incident on the LAA systems.

6. Legislative and Legal Context

How has the law changed?

6.1. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") requires the Lord Chancellor to secure that legal aid is made available in accordance with Part 1. Part 1 specifies that legal aid includes both civil legal aid and criminal legal aid. What is required to be secured is set out in sections 9 and 10 (for civil) and 13, 15 and 16 and paragraph 4 or 5 of Schedule 3 (for criminal).

6.2. Section 5 of LASPO allows for certain functions of the Lord Chancellor and the functions of DLAC to be delegated to anyone authorised by the Lord Chancellor or the DLAC for that purpose.

6.3. Section 21 of LASPO states that a determination that an individual qualifies for legal aid (in both civil and criminal) cannot be made unless their financial resources are such that they are determined to be financially eligible in accordance with regulations. Within the regulations there are some provisions where no financial determination is required. Section 23 gives the Lord Chancellor the power to set out in regulations when an individual who qualifies for legal aid may have to make a contribution

[4] To note, crime contributions were also payable and will continue to be payable because the relevant LAA criminal legal aid systems are operational. This is not the case for the LAA civil legal aid systems which are still offline.

towards the costs of their legal aid. Section 41 allows regulations to enable the exercise of discretion and the making of transitional provisions.

6.4. Where, as a result of the cyber security incident, the LAA is currently prevented from making determinations in relation to certain matters, and is unable to assess or receive contributions for civil legal aid, the regulations have been amended a) to remove impediments to delegating such determinations to legal aid providers; and b) to ensure civil contributions will not be payable for the period that the instrument is in force.

6.5. This instrument amends the Procedure Regulations, the Civil Financial Regulations, the Crime Financial Regulations and the General Regulations, to remove restrictions on the delegation of certain functions and to remove the requirement for individuals to make contributions in both new and existing civil cases during the period this instrument is in force. Where additional functions are being delegated to legal aid providers, the instrument also removes requirements currently in place which, if not removed, would result in providers having to notify themselves of various actions having taken place. It also provides that where a criminal legal aid provider makes a determination, the commencement date of any subsequent representation order is the date the determination was made by the provider. The transitional provisions ensure the changes made by this instrument apply to ongoing cases and to new cases started after this instrument comes into force. They also prevent an individual who has already received civil legal aid services, subject to a contribution, being able to benefit from the waiver of contributions which may have accrued before the commencement date. In relation to criminal legal aid, the transitional provisions ensure that where providers have been unable to submit applications to the Legal Aid Agency since digital systems have been offline, any determinations made after 27 June 2025 will be backdated to when the individual instructed the provider to make the legal aid application (the individual can provide instructions in person or remotely).

Why was this approach taken to change the law?

6.6. As a result of the cyber security incident, the LAA is currently prevented from making determinations in relation to certain civil and criminal legal aid matters and is temporarily unable to assess or receive contributions for civil legal aid or make suitable alternative arrangements. As a result, the regulations are being amended to enable DLAC to delegate some functions to legal aid providers and remove the requirements to assess and take payment of contributions in civil cases. This is the only possible approach to make the necessary changes.

7. Consultation

Summary of consultation outcome and methodology

7.1. There has been no formal policy consultation on this SI. This was due to both the technical nature of the changes as well as the emergency situation which meant that LAA required these changes to be urgently in place. However, both LAA and the Ministry of Justice have engaged (and continue to engage) representative bodies to assist in understanding the impact of these operational changes, and more broadly the business continuity planning following the security incident. The measures in the SI are meant to be temporary.

8. Applicable Guidance

8.1. Following the security incident, the LAA published, and regularly updates, guidance for providers on GOV.UK[5]. Following this SI, we expect to make consequential updates of the relevant published tables of delegated authorities.

[5] See: https://www.gov.uk/guidance/legal-aid-agency-cyber-security-incident ; and https://www.gov.uk/guidance/legal-aid-agency-cyber-security-incident-frequently-asked-questions

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1. A full Impact Assessment has not been prepared for this instrument because of the estimated relatively low impact of these operational changes on the public sector. The measure is not a regulatory provision.

Impact on businesses, charities and voluntary bodies

9.2. There is no significant impact on business, charities or voluntary bodies because the legal aid changes in this SI are expected to only affect legal aid services providers. The legislation impacts small or micro businesses to the extent that they are legal aid services providers. This is because the legislation supports operational changes to delegate some LAA functions to providers to ensure that they continue to be able to process legal aid applications. This is unavoidable given the emergency situation, but we expect these measures to be temporary ones.

9.3. The estimated cost for the full package of measures is estimated to be up to £130k per week. These estimates are uncertain and may vary considerably due to unknown behavioural factors.

9.4. The measures in the SI are not expected to give rise to direct or indirect discrimination or other prohibited conduct under the Equality Act 2010, concerning the processing of civil or criminal legal aid applications by providers. We have considered whether the measures contained in the SI to waive contributions for civil legal aid (and not for criminal legal aid) may have equalities implications in the sense of treating civil legal aid applicants differently from criminal legal aid applicants for the duration of the emergency. These measures are expected to be temporary and are dictated by the objective situation of civil legal aid systems being offline for the time being, therefore, making the payment of civil contributions impossible until the LAA is able to resume digital operations. Therefore, a differing approach is justified. Finally, by mitigating risks on the continuing provision of legal aid services to legal aid applicants, this SI pursues the legitimate aims of: promoting access to justice; advancing equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and fostering good relations between these different groups.

9.5. Welsh Language Impact. The measures in this SI would also affect legal aid services providers based in Wales. However, as set out in paragraph 9.2 above, we expect the impact to be a positive one. This is because the legislation makes operational changes to delegate some LAA functions to providers, including those based in Wales, therefore ensuring that they continue to be able to process legal aid applications, ultimately ensuring that those who need it can access legal advice and representation.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1. Following implementation of this SI, the Ministry of Justice and the LAA, working closely with representative bodies and providers, will continue to monitor the impact of these changes on the operation of the legal aid framework, as part of business continuity planning following the security incident affecting LAA online digital services.

10.2. This SI does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Minister Sackman has made the following statement: “It would not be appropriate in these emergency circumstances to make provision for a statutory review of this instrument because we expect the measures in this SI to be temporary until these contingency arrangements are no longer needed.”

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1. This instrument is intended to come into force on the day after it is made, and we consider that this approach is justified. In reaching this view, consideration has been given as to whether this appears to give those affected by the provisions a reasonable chance to adapt to the changes required, having particular regard to whether the SI: a) imposes duties on people that are significantly more onerous than before; and b) requires them to adopt different patterns of behaviour. It is the Government's view that there is a pressing need for the legislation to come into force as soon as possible.

11.2. As outlined further above, the SI is part of the LAA's response to an emergency situation following the cyber-security incident involving its online digital services. The changes in this SI are necessary to enable the LAA to maintain its services until digital operations can be resumed. Failure to legislate for these changes within this timeframe could therefore significantly risk compromising the LAA's ability to administer the legal aid scheme going forward, until the LAA's digital operations are restored. This in turn would have a significant negative impact not just on legal aid providers but on access to justice for individuals more widely.

11.3. The measures in this SI are not a permanent change in policy; they are expected to be temporary while the relevant LAA systems are offline. Some LAA functions will be delegated to legal aid providers as a result of this SI, and this may have an impact on their workload. However, we expect that impact to be overall a positive one to the extent that it would allow providers to keep processing legal aid applications whilst the emergency situation is ongoing (that is, until the LAA is able to resume its digital operations), and to ensure the proper functioning of both the civil and the criminal justice systems. The LAA has been engaging with legal aid representative bodies on contingency arrangements and notified legal aid representative bodies and providers on 24 June of the changes which will be in place from 27 June.

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").