EXPLANATORY MEMORANDUM TO

THE LEGAL AID, COMMUNITY LEGAL SERVICE AND CRIMINAL DEFENCE SERVICE (AMENDMENT) REGULATIONS 2015

2015 No. 838

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

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

2. Purpose of the instrument

2.1 This instrument ensures that Special Educational Needs ("SEN") direct payments made under the Children and Families Act 2014 are disregarded for the purposes of the financial eligibility and contributions assessments for civil and criminal legal aid.

2.2 This instrument brings proceedings against an under 14 relating to the breach of an injunction under Part 1 of the Anti-Social Behaviour, Crime and Policing Act 2014 ("Part 1 injunctions") in scope of the criminal legal aid scheme.

2.3 This instrument also makes consequential amendments to civil and criminal legal aid regulations made under the Access to Justice Act 1999 ("AJA") and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") to ensure that certain direct payments under the Care Act 2014 are excluded from calculations of gross annual income and also to ensure that those regulations reflect current legislation relating to direct payments.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument brings regulation 7 into force on the 24th of March, less than 21 days after the instrument will have been laid. Regulation 7 amends the Criminal Legal Aid (General) Regulations 2013 (S.I. 2013/9) ("General Regulations") to bring within scope of criminal legal aid proceedings against an individual under the age of 14 for breach of an injunction made under Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014 (c. 12). Part 1 of that Act comes into force on 23rd March 2015 (S.I. 2015/373, art 4(a)).

3.2 Amendments to the legal aid regime were made by the Criminal Legal Aid (General) (Amendment) Regulations (S.I. 2015/326) (coming into force 23 March 2015) to ensure that legal aid was available in an appropriate manner for proceedings created by ASBCPA. It was originally considered that it was not necessary to make any provision for the proceedings referred to in paragraph 2.1 as they would, without further provision, fall within the scope of the civil legal aid regime. However, it has since become apparent that this approach would be

inappropriate as this would result in applicants for legal aid for these proceedings being subject to an assessment of financial resources and merits under the civil legal aid regime, which is more stringent than the assessment of financial resources and merits under the criminal legal aid regime. It is also considered inappropriate for the approach to those who are under the age of 14 and who breach an injunction made under Part 1 of ASBCPA to differ to the approach taken to those who are over that age as outlined in the Government response to consultation (see paragraph 8 below).

3.3 Fewer individuals under the age of 14 would be eligible for legal aid under the civil eligibility criteria than the criminal criteria. Commencing regulation 7 as soon as possible after laying (to align as closely as possible with the commencement of Part 1 ASBCPA) minimises any potential disadvantage to applicants who would be eligible for criminal but not civil legal aid. The Ministry of Justice regrets that an oversight in the preparation of earlier legislation has resulted in the need to depart from the normal approach to the commencement of secondary legislation of this kind.

4. Legislative Context

Amendment to the Criminal Legal Aid (General) Regulations 2013 (as amended) ("the General Regulations"

4.1 Part 1 of LASPO governs the provision of legal aid. Section 14 of LASPO and regulation 9 of the General Regulations govern the criminal proceedings for which advice, assistance and representation are to be available. This instrument brings proceedings for breach of an injunction under Part 1 of the Anti-Social Behaviour, Crime and Policing Act 2014 ("Part 1 injunctions") against an under 14 in scope of the criminal legal aid scheme through an amendment to regulation 9.

Amendments to civil and criminal legal aid regulations in respect of direct payments

4.2 Section 21 of LASPO governs the assessment of an individual's financial eligibility and section 23 governs the assessment of an individual's liability to make a contribution towards legal costs for the criminal and civil legal aid schemes. Section 22 provides for information requests about the financial resources of applicants. A number of regulations have been made under powers contained in these provisions.

4.3 Part 1 of the AJA created the Community Legal Service and the Criminal Defence Service. This governs the provision of legal aid for cases predating LASPO. Section 7 of the AJA makes provision for the assessment of an individual's financial resources to determine eligibility for the Community Legal Service and section 10 for the assessment of an individual's liability for contribution towards the legal costs. Paragraph 3B of Schedule 3 to the AJA makes provision for the assessment of an individual's financial resources to determine eligibility for the Criminal Defence Service and section 17A for the assessment of an individual's liability for contribution towards the legal costs.

Section 26 of and paragraph 8(2) of Schedule 3 to the AJA provides for requests about the financial resources of applicants for purposes of the Criminal Defence Service. A number of regulations have been made under powers in these provisions (see below).

4.4 Regulations made under both of these legislative regimes make provision as to how direct payments are treated for the purposes of assessing financial eligibility and the individual's liability to make a contribution. Section 49(3) of the Children and Families Act 2014 and sections 31 to 33 of the Care Act 2014 have recently made changes to the provision of certain direct payments.

5. Territorial Extent and Application

5.1 This instrument applies to 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

Amendment to the Criminal Legal Aid (General) Regulations 2013 (as amended)

7.1 Breach of a Part 1 injunction by an adult is contempt of court and is brought within scope of the criminal scheme as a result of the potential custodial penalty and regulation 9(v) of the General Regulations (which prescribes as criminal proceedings which constitute a criminal charge under Article 6 ECHR) as a result of the potential custodial penalty. Breach of a Part 1 injunction by a youth aged 15-17 may be addressed by a detention and training order or a supervision order, i.e. there is the potential for a custodial penalty, and as a result by default falls into the criminal scheme due to regulation 9(v). Breach of a Part 1 injunction by an under 14 may only be addressed by a supervision order, which has no potential custodial element, and so by default would fall into the civil legal aid scheme. This would mean the civil means and merits tests would apply, as opposed to the criminal means and merits (interests of justice) tests applying.

7.2 Under the criminal scheme under 18s are deemed to be financially eligible (i.e. passported through the means tests) and are highly likely to pass the merits test due to the likelihood of their not being able to understand proceedings or be able to state their own case. It is therefore very highly likely that u14s would be granted criminal legal aid in these proceedings. The application of the civil means and merits tests would decrease the likelihood of legal aid being granted to under 14s in these proceedings. We consider it is appropriate that these proceedings are brought within the scope of the criminal legal aid scheme to ensure that all breach proceedings are covered by this scheme in line with the policy intention as outlined in the response to consultation. Regulation 7 achieves this.

Amendments to civil and criminal legal aid regulations in respect of Special Education Needs payments made under regulations made under section 49(3) of the Children and Families Act 2014

7.3 SEN direct payments are cash payments made directly to the child's parent or guardian, the young person or their nominee, allowing them to arrange provision of necessary services (e.g. transport) as identified in the individual's Education Health Care plan. An EHC plan brings a child's education, health and social care needs into a single, legally-binding document. The child must have special educational needs to be eligible for an EHC plan. They are currently made under the SEN (Personal Budgets) Regulations 2014, made under section 49(3) of the Children and Families Act 2014.

7.4 A number of direct payments are already disregarded under both the civil and criminal legal aid schemes when assessing financial eligibility, or where appropriate, level of contribution. These include payments made under Section 57(1) of the Health and Social Care Act 2001 (direct payments), Section 17A of the Children Act 1989 (direct payments) and Section 8(1) of the Carers and Direct Payments Act (Northern Ireland) 2002. SEN direct payments made under s49(3) of the Children and Families Act 2014 are equivalent to these direct payments, i.e. are payments made to specified individuals to promote independence, choice and inclusion by enabling services to be purchased that would otherwise be provided by local public services.

7.5 Prior to the introduction of the SEN (Personal Budgets) Regulations 2014, payments were made by the local authority directly to the relevant service/programme and no money was transferred from the local authority to the individual in receipt of these services. Therefore any payment made was not considered when assessing an individual's financial eligibility, or level of contribution, for legal aid. By disregarding this payment for the purposes of a legal aid financial eligibility assessment and a contribution to costs liability, the amendments in this instrument allows the status quo to be maintained so as to ensure consistency with other direct payments and ensure that those in receipt of SEN direct payments are not disadvantaged.

Updating references to legislation governing direct payments

7.6 Sections 31 to 33 of the Care Act 2014 will implement direct payments for care and support for provision in the community of individuals assessed as eligible. These direct payments are similar in nature to those outlined in paragraph 7.5. Disregarding these direct payments is in line with the current policy regarding other, similar direct payments. Part 1 of the Care Act 2014 will come into force on 1 April 2015. The Care Act 2014 (Consequential Amendments) (Secondary Amendments) Order 2015 will make consequential changes to most of the above legal aid legislation. However, consequential amendments will also be needed for the Criminal Defence Service (Information Requests) (Prescribed

Benefits) Regulations 2009 and the Criminal Defence Service (Contribution Orders) Regulations 2009.

7.7 Amendments are also required to remove out of date references to direct payments made under legislation which has been revoked, namely, the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, and the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004. Where appropriate, the references to these regulations are replaced by a reference to section 57(1) the Health and Social Care Act 2001 (the primary legislation providing vires for the making of such regulations). The reference to the revoked regulations is replaced by a reference to section 57(1) the Health and Social Care Act 2001 (the primary legislation providing vires for the making of such regulations).

Direct payments under the Children Act 1989 - amendments to regulations made under LASPO and the AJA

7.8 The existing policy intention has been to disregard direct payments made under regulations made under section 17A of the Children Act 1989 in assessments of financial eligibility and liability to make a contribution. However, not all of the legal aid legislation reflects this policy intention and some refer to now out of date regulations containing provisions made under this power (see paragraph 7.8). The references to the revoked regulations are replaced by a reference to section 17A of the Children Act 1989 (the primary legislation providing vires for the making of such regulations). We have also ensured that other missing references to these direct payments are now included.

8. Consultation outcome

8.1 We have consulted on the changes to remuneration for legal aid services as a result of the implementation of Part 1 ASBCPA (see: https://consult.justice.gov.uk/digital-communications/changes-to-remuneration-for-legal-aid-services). The provision of criminal legal aid for quasi-criminal proceedings was the subject of the consultation resulting in LASPO, but did not address the position of under 14s specifically. We have not consulted on the remaining amendments as they are consequential or update references to relevant legislation.

9. Guidance

9.1 In respect of the amendment to the General Regulations guidance is not being prepared specifically on this instrument. A programme of training for legal aid practitioners has been prepared by the Legal Aid Agency to support the transition to the new arrangements for Part 1 Injunctions.

9.2 In respect of SEN payments changes, updated guidance will be available from April 2015.

9.3 In respect of the other updating amendments in this instrument guidance is not being prepared.

10. Impact

10.1 The impact on business, charities or voluntary bodies is not significant.

10.2 The impact on the public sector is minimal.

10.3 An Impact Assessment has not been prepared specifically for this instrument.

11. Regulation of small businesses

11.1 The Ministry of Justice has not taken any specific steps to minimise the impact of the requirements on firms employing up to 20 people.

11.2 The instrument does not impose any additional regulatory burdens on small firms.

12. Monitoring and 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. Contacts

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