

EXPLANATORY MEMORANDUM TO
THE CIVIL LEGAL AID (FAMILY RELATIONSHIP) REGULATIONS 2012

2012 No. 2684

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 Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“the Act”) legal aid will be available to victims of domestic abuse for private family law matters (e.g. child contact and financial issues arising on separation). This instrument brings orders made under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (“TLATA”) in relation to the family home following the breakdown of a relationship between an unmarried couple within the scope of private family law legal aid in such circumstances. The intention is to make equivalent legal aid provision for married and unmarried couples, reflecting the position under the current legal aid scheme.

2.3 The instrument makes similar provision to allow legally aided family mediation under the Act to be available to help resolve section 14 TLATA issues. The intention again is to make equivalent provision for unmarried and married couples and to reflect the current provision of services to help resolve section 14 TLATA issues

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

3.1 None

4. Legislative Context

4.1 This is one of a number of statutory instruments which implement Part 1 of the Act. These instruments will be laid in time for the Act to come into force on 1 April 2013. This particular instrument is one that provides additional detail on what is within the scope of legal aid, in particular in respect of paragraph 12 of Schedule 1 to the Act (Victims of domestic violence and family matters) and paragraph 14 of Schedule 1 to the Act (Mediation in family disputes).

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

7.1 The Act gives effect to the Government's policy position on legal aid. The Government believes that legal aid has expanded far beyond its original intentions and is available for a wide range of issues, many of which need not be resolved through the courts. Irrespective of the current economic situation, a wide ranging programme of reform is required to ensure that legal aid is targeted to those who need it most, for the most serious cases in which legal advice and representation is justified.

7.2 The Act sets out what can and cannot be funded through civil legal aid in Schedule 1. Under Schedule 1, legal aid will generally only be available for private family law proceedings for i) victims, or those at risk, of domestic violence or ii) a party making an application to protect a child at risk of abuse (provided that the stipulated evidence of abuse is provided) or iii) in relation to family mediation (i.e. for families to resolve their disputes out of court). The Act defines private family law proceedings (or 'matters arising out of a family relationship') in the same way that they are currently defined for legal aid purposes, except that it does not include orders made under section 14 of TLATA (which governs disputes about family homes arising from the breakdown of a relationship between unmarried couples). It was intended that such cases would be better defined in regulations rather than in the Act itself. These regulations therefore bring such cases within the meaning of 'matters arising out of a family relationship' for the purposes of legal aid and allow them to be funded for victims of domestic violence (including court proceedings) or for people to seeking to resolve their dispute through mediation.

7.3 The regulations also bring applications by married couples for a section 14 order under TLATA in relation to a family home held under a trust within the scope of paragraphs 12 and 14 of Schedule 1 (although the majority of applications under section 14 will be by unmarried couples).

8. Consultation outcome

8.1 The consultation 'Proposals for the reform of legal aid in England and Wales' was published on 15 November 2010 and closed on 14 February 2011. Over 5,000 responses were received from representative bodies, practitioner and other organisations, individual members of the judiciary, members of the House of Commons and Lords, individual solicitors and barristers and members of the public.

8.2 The majority of responses did not support the Government's original proposals for reform, although there was some support for particular measures. Some of the original proposals were modified in light of the comments received from consultees. Most changes widened access to legal aid for certain types of case compared to the original

proposals, for example an expansion of the criteria to qualify for legal aid in a private family law case involving domestic violence. However, other changes further limited access to legal aid, such as removing funding for certain immigration and asylum judicial reviews where there has been an appeal or judicial review to a tribunal or court on the same issue or a substantially similar issue within a period of one year.

8.3 A detailed Government response to the consultation exercise is available on the MoJ Website at www.justice.gov.uk/consultations/legal-aid-reform

8.4 We have not consulted on the Civil Legal Aid (Family Relationship) Regulations 2012.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument. A programme of training and guidance is being prepared by the Legal Services Commission to support the transition to the new arrangements. This will be made available to legal aid providers ahead of the commencement of the Act on 1 April 2013.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impacts of the Government's programme of legal aid reform are set out in an Impact Assessment, which was updated following the Act receiving Royal Assent. This is available at www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information. An Impact Assessment has not been prepared specifically for this instrument.

10.3 The impact on the public sector of this statutory instrument will be to maintain the funding of TLATA cases where there has been domestic violence (or a risk of domestic violence) and TLATA cases which are being mediated. In 2009/10 the Government spent an estimated £4m on TLATA cases. In the published Royal Assent Impact Assessment accompanying the Act it was estimated that approximately 40% of private family law cases would receive legal aid by virtue of presenting evidence of domestic violence. Applying this assumption to TLATA cases, expenditure on TLATA cases would be approximately £2m following the implementation of the Act.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Ministry of Justice will conduct a post-implementation review of the Act between three to five years after implementation. This review will also consider the operation of the secondary legislation.

13. Contact

Olga Kostiw at the Ministry of Justice (Tel: 020 3334 6400 or email: olga.kostiw@justice.gsi.gov.uk) can answer any queries regarding the instrument.