

**EXPLANATORY MEMORANDUM TO
THE CIVIL AND CRIMINAL LEGAL AID (AMENDMENT) REGULATIONS 2015**

2015 No. 1416

- 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 makes amendments to accommodate the new Female Genital Mutilation Protection Orders (FGMPOs) and victims of modern slavery, servitude or forced or compulsory labour within the legal aid framework. The instrument also makes a number of minor changes to the procedural element of the civil legal aid framework under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

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

- 3.1 The Civil Legal Aid (Procedure) (Amendment) Regulations 2014, which made an amendment to regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012 was reported by the Joint Committee on Statutory Instruments (JCSI) in its Second Report of Session 2014-15 (dated 20th June 2014) for defective drafting. An undertaking was provided to the Committee by the Ministry of Justice to rectify the defect and regulation 2(6)(a)(ii) of this instrument corrects the defect.

4. Legislative Context

- 4.1 The Civil and Criminal Legal Aid (Amendment) Regulations 2015 amend:

The Civil Legal Aid (Procedure) Regulations 2013 which make provision about the making of applications for civil legal aid and determinations about whether an individual qualifies for civil legal services under sections 9 and 10 of LASPO;

The Criminal Legal Aid (General) Regulations 2013, which make provision for determinations in relation to whether an individual qualifies for criminal legal aid under Part 1 of LASPO;

The Civil Legal Aid (Remuneration) Regulations 2013, which make provision about the payment by the Lord Chancellor to persons who provide civil legal services under arrangements made for the purposes of Part 1 of LASPO;

The Criminal Legal Aid (Remuneration) Regulations 2013, which make provision for the funding and remuneration of advice, assistance and representation made available under LASPO; and

The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 which set out the rules for making a determination about whether an individual is financially eligible for civil legal aid.

- 4.2 The above regulations are being amended in order to provide the appropriate statutory framework for the provision of civil and criminal legal aid and the remuneration of legal aid providers in relation to FGMPOs, which were introduced by the Serious Crime Act 2015. The amendments also set out the appropriate statutory framework for the provision of civil legal services to victims of modern slavery, and the provision of criminal legal aid in relation to Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders, which were introduced by the Modern Slavery Act 2015. This instrument also makes a number of minor amendments to ensure that the statutory framework is in line with legal aid policy.

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 In July 2014, as part of its wider work to tackle female genital mutilation (FGM) with victims, communities and professionals, the Government consulted on the creation of a new civil law measure to protect victims or potential victims of FGM. Following that consultation, provisions to introduce the FGMPOs, which are based on the existing Forced Marriage Prevention Orders, were included in the Serious Crime Act 2015. The Serious Crime Act 2015 received Royal Assent on 3 March 2015.
- 7.2 The provision of legal aid for FGM replicates the legal aid arrangements for Forced Marriage Protection Orders, as the Government considers that, similar to Forced Marriage, there are serious issues at stake for the person requiring protection, including risk of physical harm.
- 7.3 The Modern Slavery Act 2015 makes provision for the protection of victims of modern slavery, servitude and forced or compulsory labour. As part of this, civil legal aid is being made available on a similar basis to that available to victims of

trafficking in human beings. In parallel, criminal legal aid is to be made available to those alleged to have breached the new civil orders.

7.4 In addition, a number of minor amendments have been made to ensure that the statutory framework correctly reflects legal aid policy;

- A change so that the Legal Aid Agency is not required to re-examine evidence of domestic violence when a legal aid client moves between legal aid service levels, (specifically from family help higher to legal representation) in relation to the same proceedings for which legal aid has already been granted.
- A change to the treatment of evidence of a relevant conviction for a domestic violence or child abuse offence to so that they remain valid as evidence for 24 months or until spent, whichever period is the longer and a clarification to the language used to describe evidence of a stay in a domestic violence refuge, in line with an undertaking given to the Joint Committee on Statutory Instruments¹;
- Correction of an implementation oversight, to ensure that victims of trafficking are required to provide evidence of a National Referral Mechanism determination in order to qualify for legal aid in the Controlled Work category;
- A change that allows providers to make applications for civil legal aid on behalf of children in relation to certain proceedings in the youth court where that child will not be accompanied by an adult; and
- Adding injunctions under Section 3A of the Protection from Harassment Act 1997 to the definition of protective injunctions that can be used as evidence of domestic violence.

8. Consultation outcome

8.1 In July 2014, the Government consulted on the creation of FGMPOs, the aim of which would be to provide an additional tool to prevent and/or help eliminate FGM. This consultation, and the Government's response to it, can be found at: <https://consult.justice.gov.uk/digital-communications/female-genital-mutilation-proposal-to-introduce-a>

8.2 That consultation did not relate specifically to the availability of legal aid for FGMPOs. However, a significant majority of those who responded to the consultation supported the introduction of FGMPOs and agreed that the existing Forced Marriage Prevention Order would be a good model for this purpose.

¹ JCSI - Second Report of Session 2014-15 18 June 2014
(<http://www.publications.parliament.uk/pa/jt201415/jtselect/jtstatin/9/9.pdf>)

8.3 The Government did not consider that it was appropriate to consult on this instrument. The approach taken in relation to legal aid for FGMPOs reflects the approach taken to legal aid for Forced Marriage Prevention Orders and is therefore consistent with general views of respondents to the consultation. A stakeholder engagement meeting with the Law Society took place on 15th June 2015, at which the civil legal aid arrangements were discussed.

8.4 Prior to publishing the draft Modern Slavery Bill, Frank Field MP was commissioned by the Home Secretary to review the evidence base for the Bill. The Review Panel, which included Baroness Butler-Sloss and Sir John Randall MP, spent two months consulting with NGOs, campaigners, frontline professionals, international experts and victims of modern slavery, in order to build a set of evidence-based recommendations to underpin the new clauses in the proposed Bill.

8.5 We have not consulted specifically on this instrument as it replicates the provisions currently in place for victims of human trafficking.

9. Guidance

9.1 Guidance has not been prepared specifically on this instrument.

10. Impact

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

10.2 There is no impact on business, charities or voluntary bodies, other than where it affects a contractual relationship between the Legal Aid Agency and providers of legal aid services or the payment arrangements for barristers.

10.3 There is no impact on the public sector.

11. Regulating small business

11.1 The Regulations do not impose any additional regulatory burdens on small firms.

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

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 Chris Rant at the Ministry of Justice (Tel: 020 3334 6095 or email chris.rant1@justice.gsi.gov.uk) can answer any queries regarding the instrument.