

**EXPLANATORY MEMORANDUM TO**  
**THE CIVIL LEGAL AID (PROCEDURE) (AMENDMENT) (No. 2) REGULATIONS**  
**2017**

**2017 No. 1237**

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

**2. Purpose of the instrument**

- 2.1 To qualify for legal aid in private family disputes, applicants must provide objective evidence of the domestic abuse (or child abuse) and pass statutory tests of their financial means and an assessment of the merits of their case. The forms of acceptable evidence are listed in the Civil Legal Aid (Procedure) Regulations 2012 (“the Procedure Regulations”).
- 2.2 This instrument amends the Procedure Regulations to make changes to the requirements for the provision of evidence of domestic violence in Regulation 33 and child abuse in Regulation 34.
- 2.3 In particular, this instrument removes the time limit upon the evidence that can be accepted.
- 2.4 This instrument provides that the evidence requirements will be met if an applicant provides one or more new forms of evidence. It also changes the content of some of the existing forms of evidence. In addition, this instrument extends the circumstances in which the Director of Legal Aid Casework can withdraw civil legal aid, where a public authority has confirmed in writing that it is satisfied the applicant is not a victim of domestic violence.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 On 9 March 2016, the Court of Appeal in *R (on the application of Rights of Women) v The Lord Chancellor* [2016] EWCA Civ 91 ordered that the references in Regulation 33 of the Procedure Regulations to the requirement that evidence of domestic violence be no more than 24 months old be struck through. On 25 April 2016, the Procedure Regulations were amended and the time limit on the validity of evidence was raised to 60 months.
- 3.2 In April 2016, the then Lord Chancellor also gave Parliament an undertaking to gather further evidence in relation to the issues raised and consider whether or not further changes to Regulation 33 were needed. This instrument is the outcome of the undertaking given following the Court of Appeal’s judgment.

### *Other matters of interest to the House of Commons*

- 3.3 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

## **4. Legislative Context**

- 4.1 The Procedure Regulations make provision about the making and withdrawal of determinations that an individual qualifies for civil legal aid services under Sections 9 and 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10) (LASPO).
- 4.2 Regulation 33 of the Procedure Regulations sets out that, for the purposes of applying for civil legal services described in paragraph 12 of Part 1 of Schedule 1 to LASPO, specified evidence of domestic violence must be provided.
- 4.3 Regulation 34 of the Procedure Regulations sets out that, for the purposes of applying for civil legal services described in paragraph 13 of Part 1 of Schedule 1 to LASPO, specified evidence of child abuse must be provided.
- 4.4 Regulation 42 of the Procedure Regulations describes the circumstances in which a determination that an applicant qualifies for legal aid may be withdrawn or revoked. Regulation 42(1)(k) applies to determinations for civil legal services described in paragraphs 12 and 13 of Part 1 of Schedule 1 to LASPO.

## **5. Extent and Territorial Application**

- 5.1 This instrument extends to England and Wales.
- 5.2 The territorial application of this instrument is 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**

### *What is being done and why*

- 7.1 The Procedure Regulations set out the requirements that are used to determine whether an individual qualifies for legal aid funding under Sections 9 (general cases that are within scope for legal aid funding) and 10 (cases that are eligible under exceptional case funding) of LASPO.
- 7.2 Part 1 of LASPO was brought into force in April 2013. It provides that legal aid should be available for private family matters, such as child contact arrangements following divorce, if the applicant is, or is at risk of being, a victim of domestic violence. It also provides that legal aid should be available in certain private family law proceedings if the child who is the subject of the proceedings is at risk of suffering abuse.
- 7.3 A victim of domestic violence may receive legal aid for private family matters so long as they provide objective evidence of the domestic violence, as set out at Regulation 33 of the Procedure Regulations. Applicants must also satisfy the merits criteria set out in the Civil Legal Aid (Merits Criteria) Regulations 2013 and financial eligibility

criteria in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013. Legal aid is generally not available for private family disputes if the evidence requirements cannot be satisfied.

- 7.4 The evidence requirements have been amended on several occasions since they were first brought into force in April 2013, most recently in April 2016. Since April 2016, all forms of evidence in Regulation 33 have been subject to a time limit of 60 months prior to the application for legal aid. If the evidence is older, it is not accepted. Regulation 34 requires the objective evidence of child abuse to be no more than 24 months old. This requirement has applied since the Procedure Regulations first came into force in April 2013.
- 7.5 When the Procedure Regulations were amended in April 2016, the Lord Chancellor announced that work had begun with domestic violence support organisations, legal representative bodies, and colleagues across government to gather data in order to improve the government's understanding of the issues victims face when obtaining and providing evidence of domestic violence.
- 7.6 The intention of this instrument is to expand and improve the evidence requirements, in order to make it easier for victims, or those at risk of being a victim, to access legal aid. The new evidence requirements contain an objective element in the form of verification of domestic violence by a suitably qualified and independent party other than the applicant.
- 7.7 This instrument achieves the policy intention by addressing different aspects of the requirements. First, it introduces new forms of evidence into Regulation 33. Secondly, certain existing categories of evidence are broadened. Thirdly, the time limit of 60 months is removed altogether (including for the evidence requirements in Regulation 34). Finally, to better encompass risk of domestic violence, evidence will be accepted if it relates to abuse of previous partners or other family members.
- 7.8 The new forms of evidence introduced include: evidence provided by a domestic violence support organisation that has provided support related to the applicant's needs as a victim of domestic violence; evidence that the applicant has been granted indefinite leave to remain under the domestic violence provisions in the Immigration Rules; evidence from a person acting on behalf of a local housing authority; evidence from an independent domestic violence advisor; and a letter from a public authority where domestic violence has been identified.
- 7.9 Certain categories of evidence in Regulation 33 are amended to make it easier for applicants to comply with them; to make it clearer what the evidence must contain; and to reduce the likelihood that future amendments to the Procedure Regulations will need to be made.
- 7.10 This instrument broadens the categories of health professional that can provide evidence to include a registered medical practitioner or health professional registered with a relevant regulator body. The intention is to reduce the reliance on General Practitioners (GPs) to supply evidence and to allay the misconception that it is only GPs who are eligible to provide it.
- 7.11 In recognition of the fact that Multi-Agency Risk Assessment Conferences are not the only type of group convened to assess risk, this instrument inserts a broader definition that includes other suitable local safeguarding forums. The list of protective injunctions is replaced by a definition that refers to their purpose or effect. This

decreases the likelihood that amendments will need to be made in the future should new forms of protective injunction be introduced.

- 7.12 This instrument also removes the 60-month time limit on all forms of evidence of domestic violence. The time limit on evidence of child abuse under Regulation 34 is also removed, so that both requirements are consistent.
- 7.13 In addition, to ensure the evidence requirements make better provision for risk of domestic violence, the current requirement that evidence must relate specifically to the applicant and the alleged abuser is amended to encompass abuse by the alleged abuser against previous partners or other family members.
- 7.14 Finally, this instrument amends Regulation 42 of the Procedure Regulations to allow legal aid to be withdrawn where the applicant relied on a protective injunction obtained without notice to the alleged abuser, that is later set aside by the court. This will prevent applicants from qualifying for legal aid on the basis of protective injunctions that are successfully challenged or that are discharged due to lack of evidence. This reflects the existing power to withdraw legal aid granted on the basis of other forms of evidence that are liable to change, such as evidence of police bail that does not result in any charge, or ongoing criminal proceedings that result in an acquittal.
- 7.15 Paragraph 42 is also amended to allow legal aid to be withdrawn if the applicant relied on specified forms of evidence and a public authority has written to confirm that the applicant was neither at risk, nor a victim, of domestic violence.

## **8. Consultation outcome**

- 8.1 Since April 2016, the Ministry of Justice has consulted widely with domestic violence support groups, legal representative bodies and other government departments to improve the government's understanding of the issues victims face when obtaining and providing evidence.. The changes to the evidence requirements under Regulation 33 of the Procedure Regulations are based on these findings.
- 8.2 In order to allow victims, or those at risk of domestic violence, to provide evidence in the most straightforward way, survey respondents and focus group participants suggested the addition of new types of evidence. Some of these have been incorporated into this instrument, such as evidence from a domestic violence support organisation and evidence of abuse against a previous partner.

## **9. Guidance**

- 9.1 The Lord Chancellor's Guidance, issued under Section 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to the Director of Legal Aid Casework will be updated to reflect the changes.
- 9.2 The Director of Legal Aid Casework will amend separate operational guidance to caseworkers and legal aid providers to reflect the changes.
- 9.3 New guidance for applicants for legal aid will also be produced, which will explain the new evidence requirements under Regulations 33 and 34 following the laying of this instrument.

## **10. Impact**

- 10.1 There are no additional impacts on business, charities or voluntary bodies arising from this legislation other than those outlined in the Impact Assessment.
- 10.2 There is no impact on the public sector arising from this instrument.
- 10.3 An Impact Assessment has been published alongside the Explanatory Memorandum on the [legislation.gov.uk](http://legislation.gov.uk) website. The changes are expected to increase the number of individuals qualifying for legal aid in private family law proceedings. This is estimated to cost the Legal Aid Agency up to £24m a year in steady state beyond current expenditure. Legal aid providers, who undertake the work funded through legal aid, are expected to gain in the aggregate up to £24m a year in funds as a result of the changes.

## **11. Regulating small business**

- 11.1 Legal aid is out of scope of the regulatory agenda. It is excluded by Section 22(4)(c) of the Small Business Enterprise and Employment Act 2015 on the grounds that it relates to ‘the giving of grants or other financial assistance by or on behalf of a public authority’. The measure does not require Reducing Regulation Committee or Regulatory Policy Committee clearance.

## **12. Monitoring & review**

- 12.1 The impact of these proposals will be monitored closely by the Ministry of Justice and Legal Aid Agency. In order to assist with the monitoring and evaluation of these changes, the Legal Aid Agency have begun to publish details in their quarterly statistics bulletin of the forms of evidence used by legal aid applicants. The Ministry of Justice also intends to continue working with its external advisory group to monitor the impact of the changes.

## **13. Contact**

- 13.1 Tom Bainbridge at the Ministry of Justice (Telephone: 0203 334 6504 or email: [tom.bainbridge1@justice.gov.uk](mailto:tom.bainbridge1@justice.gov.uk)) can answer any queries regarding the instrument.