

**EXPLANATORY MEMORANDUM TO**  
**THE CIVIL LEGAL AID (PROCEDURE) (AMENDMENT) (No. 2) REGULATIONS**  
**2016**

**2016 No. 561**

**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.

**2. Purpose of the instrument**

- 2.1 This instrument amends the Civil Legal Aid (Procedure) Regulations 2012 (“the Procedure Regulations”) so that where one party is financially eligible for funding of civil legal services, in the form of a Mediation, Information and Assessment Meeting (MIAM), a determination that the other party also qualifies for legal aid funding for that meeting may be backdated if certain criteria apply.

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

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

- 3.1 None.

*Other matters of interest to the House of Commons*

- 3.2 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 services under section 9 or 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10) (LASPO).

**5. Extent and Territorial Application**

- 5.1 This instrument extends to England and Wales.  
5.2 This instrument applies to England and Wales.

**6. European Convention on Human Rights**

- 6.1 As the instrument is subject to the 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 make provision for determinations that an individual qualifies for funding of civil legal services under section 9 or 10 of LASPO.

- 7.2 The Children and Families Act 2014 introduced a requirement that, prior to applying to the Family Court for certain applications involving children or finances, the applicant must demonstrate that they have considered mediation, unless mediation is deemed unsuitable (e.g. if the case involves domestic violence). To comply with this legal requirement the applicant must attend a Mediation, Information and Assessment Meeting (MIAM), where they receive information about how the mediation process works and the mediator completes an assessment of whether it is suitable for the particular case.
- 7.3 The Ministry of Justice wishes to encourage more people to use mediation in family disputes instead of pursuing an application in the court. Legal aid funding is available to assist in delivery of this aim.
- 7.4 The Ministry of Justice considers that legal aid funding for a MIAM should be available to both parties to a family dispute where one party meets the financial eligibility criteria set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (“the Financial Resources Regulations”). Regulation 5(1)(ga) of the Financial Resources Regulations provides for this by providing that a party to a MIAM is not subject to the requirement to meet financial eligibility criteria where a determination has been made that the other party to the MIAM meets the financial eligibility criteria. However, a procedural difficulty has been identified with the operation of this provision.
- 7.5 MIAMs can take place jointly, with both parties to a dispute, or there can be a separate MIAM held for each party. Where one party (A) does not meet the financial eligibility criteria and the other party (B) does, and separate MIAMs are held for each party, there is no guarantee that B will be the first party attending the MIAM. Where A attends first, there may not have been a determination that B meets the financial eligibility criteria. A will therefore not be able to rely on regulation 5(1)(ga) of the Financial Resources Regulations and will be subject to an assessment of A’s financial resources. A will therefore, at that point in time, not be eligible for legal aid and will be required to make a payment to the mediator. The policy intention is that, in such circumstances, both A and B should be eligible for funding; however, at present there is no provision to backdate a determination that legal aid be granted in these circumstances, and for the Legal Aid Agency to reimburse the payment made by A.
- 7.6 In order to address this, an amendment to regulation 61 of the Procedure Regulations is being made. This will give the Director of Legal Aid Casework (and Mediators acting under delegated powers) the power to backdate a determination that a person qualifies for legal aid in this specific situation. This will allow the Agency to reimburse claims where a MIAM has taken place and the party subsequently becomes eligible for legal aid by virtue of the other party meeting the relevant financial criteria (see regulation 5(1)(ga) of the Financial Resources Regulations).

## **8. Consultation outcome**

- 8.1 The Government has not consulted on the amendment of regulation 61(A) of the Procedure Regulations. The amendment ensures that existing policy is given effect to in practice by providing a power to backdate where certain conditions are met.

## **9. Guidance**

- 9.1 Existing operational guidance provided by the Legal Aid Agency will be amended to reflect these amendments.

## **10. Impact**

- 10.1 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 arrangement for barristers.
- 10.2 There is no impact on the public sector, other than where it affects the procedural arrangements between the Legal Aid Agency and providers of mediation services.
- 10.3 An Impact Assessment has not been prepared specifically for this instrument.

## **11. Regulating small business**

- 11.1 The legislation does not impose any additional regulatory burdens on small businesses.
- 11.2 The legislation applies to small businesses only in so far as it affects the contractual relationship between the Legal Aid Agency and providers of legal aid services.
- 11.3 The Ministry of Justice has not taken any specific steps to minimise the impact of the requirement on businesses employing up to 50 people.

## **12. Monitoring & review**

- 12.1 The provision of legal aid for the purposes of mediation is subject to six monthly review.

## **13. Contact**

- 13.1 Samantha Dine at the Ministry of Justice Telephone: 07467 012913 or email: [Samantha.Dine@justice.gsi.gov.uk](mailto:Samantha.Dine@justice.gsi.gov.uk) can answer any queries regarding the instrument.