

EXPLANATORY MEMORANDUM TO
THE CIVIL LEGAL AID (PROCEDURE, REMUNERATION AND STATUTORY
CHARGE) (AMENDMENT) REGULATIONS 2018

2018 No. 803

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 makes amendments to regulations made under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”), which are needed because of the introduction of two new contracts to govern relations between the Lord Chancellor and providers of legal aid, known as the 2018 Standard Civil Contract and the 2018 CLA Contract (the 2018 Civil Legal Advice Contract, which governs the provision of remote legal services in certain categories).
- 2.2 The amendments will ensure that existing procedures for applications for legal aid, and remuneration to legal aid providers, apply in relation to work carried out under the 2018 Standard Civil Contract and 2018 CLA Contract; and will reclassify immigration and asylum cases in the Upper Tribunal as Licensed rather than Controlled work.

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 provision of legal aid is governed by LASPO; regulations made under it; and contracts between the Lord Chancellor and providers. The regulations refer to the contracts, so when the Lord Chancellor enters into new contractual arrangements, the references need to be updated.
- 4.2 These Regulations amend the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098) (“the Procedure Regulations”), the Civil Legal Aid (Remuneration) Regulations 2013 (SI 2013/422) (“the Remuneration Regulations”), and the Civil Legal Aid (Statutory Charge) Regulations 2013 (SI 2013/503) (“the Statutory Charge Regulations”). The amendments ensure that each of these instruments refer to the new 2018 Standard Civil Contract and 2018 CLA Contract.

- 4.3 The Procedure Regulations make provision about the making and withdrawal of determinations that an individual qualifies for civil legal services under section 9 and 10 of LASPO.
- 4.4 The Remuneration Regulations make provision about the payment by the Lord Chancellor to persons who provide civil legal services under arrangements made for the purpose of Part 1 of LASPO.
- 4.5 The Statutory Charge Regulations make provision about the statutory charge which arises over money and other property preserved or recovered by a legally aided party in civil proceedings and over costs payable to the legally aided party by another party to the proceedings.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is 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 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 In order to deliver legal aid services, legal aid providers must hold a contract with the Lord Chancellor. Prior to 1 September 2018, legally aided face-to-face work was carried out by providers under the 2010, 2013, 2014, 2015, and 2016 Standard Civil Contracts. These contracts will end on 31 August 2018. On 1 September 2018 a new Standard Civil Contract will come into force, which will govern the provision of face-to-face work by legal aid providers.
- 7.2 Similarly, prior to 1 September 2018, telephone legal aid work was carried out by providers under the 2013 CLA Contract. This contract will end on 31 August 2018 for Family, Housing and Debt and some Discrimination providers. On 1 September 2018 a new CLA Contract will come into force, which will govern the provision of telephone advice by legal aid providers in these categories of law.
- 7.3 The 2018 Standard Civil Contract will govern the underlying commercial relationship between the Legal Aid Agency (LAA) and legal aid providers. It will set out the rules which all civil legal aid providers must abide by when delivering civil legal services in England and Wales.
- 7.4 These Regulations also make a further amendment which changes the way that immigration and asylum work in the Upper Tribunal is categorised.
- 7.5 The 2018 Standard Civil Contract has been tendered on the basis that immigration and asylum work in the Upper Tribunal will be categorised as Licensed Work. The current Procedure Regulations categorise immigration and asylum work in the Upper Tribunal as Controlled Work so the Regulations need to be amended to reflect the 2018 Standard Civil Contract.
- 7.6 Controlled and Licensed Work are two categorisations of legal aid work. The way that the work is categorised in the Procedure Regulations (as either Controlled or

Licensed) dictates the administrative process that must be followed in determining whether an applicant is eligible for legal aid.

- 7.7 Controlled Work includes early legal advice and assistance and some legal representation (e.g. at the First-Tier (Mental Health) Tribunal).
- 7.8 In Controlled Work, the decision on eligibility is delegated to providers of legal aid. This means that no application to the LAA is necessary, instead providers perform the necessary assessment of the applicant's means and of the merits of the case, record the details of the case in a file and submit a record to the LAA afterwards. A selection of files is audited by the LAA to ensure that this work is being properly carried out and recorded.
- 7.9 Licensed work covers all work not defined as Controlled including most legal representation. In Licensed Work, the provider must generally submit the application for legal aid to the LAA upfront for approval of funding. The LAA carry out the means and merits assessments and decide whether to fund the work at the start of the case. Following this change, because the provider will be required to make an application in relation to the now Licensed Work, the LAA will therefore have sight of the potential costs of every case as soon as an application for permission to appeal to the Upper Tribunal is made.
- 7.10 This instrument will change how immigration work in the Upper Tribunal is categorised which will bring it in line with the way legal aid provision is generally governed in Upper Tribunal proceedings (i.e. most work in the Upper Tribunal is currently categorised as Licensed).
- 7.11 The changes made by this instrument will mean that the LAA will be paying slightly higher fees to immigration and asylum providers for work in the Upper Tribunal as fees for Licensed work are slightly higher compared to fees for Controlled work.
- 7.12 The difference between the current fees and the future fees can be found in Schedule 1 to the Remuneration Regulations in Table 8(c) in Part 2 (current, as amended) and Table 10(a) in Part 3 (future).
- 7.13 Transitional provisions have been included in the regulations to ensure that the change does not apply to cases started before 1 September 2018. This includes cases that begin before 1 September as early legal advice but which go on to require legal representation in the Upper Tribunal.

8. Consultation outcome

- 8.1 The Government has not consulted on the Civil Legal Aid (Procedure, Remuneration and Statutory Charge) (Amendment) Regulations 2018. The Regulations make amendments which are consequential on the adoption of the 2018 Standard Civil Contract and 2018 CLA Contract.
- 8.2 These are contracts that the LAA hold with providers of civil legal aid and it is a requirement that they consult with legal aid providers or their representative bodies in advance of changes to the contracts. The LAA has consulted with bodies that represent legal aid providers on these changes (the Law Society, the Legal Aid Practitioners Group, the Advice Services Alliance and the Bar Council).
- 8.3 During consultation with the consultative group, some representatives raised concerns about the effect of the move from Controlled to Licensed work. Their key concerns

were around the extra administrative burden on providers and the need to use the LAA computer system (Client and Cost Management Service).

- 8.4 Following consideration of these concerns, the LAA felt that the benefit of proceeding with the change was proportionate to the potential difficulty caused to providers, and the Ministry of Justice decided to proceed with the changes.

9. Guidance

- 9.1 Guidance is being prepared for LAA caseworkers and for providers on the contract changes including the ones related to this instrument.

10. Impact

- 10.1 The impacts of the Government's programme of legal aid reform implemented through the Act 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 since it is foreseen to have no notable impact.

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 operation of and expenditure on the legal aid scheme is continually monitored by the Ministry of Justice and the LAA.

13. Contact

- 13.1 Jasmine Spencer at the Ministry of Justice, telephone: 07542944606 or email: jasmine.spencer@justice.gov.uk can answer any queries regarding the instrument.