



## **Meeting of the All-Party Group on Legal Aid.**

*7 November 2012 at 4pm – 5.30pm, in Committee Room 16, House of Commons*

### **Topic: new Regulations under the Legal Aid, Sentencing and Punishment of Offenders Act 2012**

#### ***A Parliamentary Briefing from the Legal Aid Practitioners' Group (LAPG) and Young Legal Aid Lawyers (YLAL)***

This Briefing introduces the main issues which we aim to discuss at the meeting: the telephone gateway, evidence about domestic violence and judicial review cases.

You are warmly invited to attend. Contact details for further information can be found at the end of this Briefing.

### **Introduction: LASPO Act**

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made radical changes to the provision of civil legal aid. Around 600,000 people per year will no longer have access to legal aid once the Act comes into force on 1 April 2013.

Several draft Regulations are currently being made which will refine the scope of some elements of the 2012 Act. We are concerned about a number of aspects of these Regulations. The Regulations and links to them are included at the end of this briefing.

### **Civil Legal Services (Procedure) Regulations 2012**

#### ***Regulations 17 to 20 – Telephone Gateway Work***

We are extremely concerned by the effect of Regulations 17 to 20 of the Procedure Regulations. These Regulations set out

- the process for Telephone Gateway Work,
- which members of the public will have to obtain advice via the telephone Gateway and
- which people will be 'exempt' from having to use the Gateway route. Persons who are 'exempt' may access legal advice from a face to face provider without first going through the Gateway.

Whilst currently three areas (Special Educational Needs, debt and discrimination) are Gateway work the Government has said it intends to bring the Gateway in for all other areas of civil work save for asylum and detention. For this reason the application of the Regulations to other areas of work is also of crucial importance.

In this section of the briefing we cover:

- (a) what happens when a person is able to call the gateway operator service and what the operator decides
- (b) who is exempt from using the gateway
- (c) who may not be able to access advice through the gateway as currently devised

The Gateway operator, who is not legally qualified, will decide first whether the person's problem falls within the scope of the reformed legal aid scheme. It is unclear how this will work in practice and risks decisions being made that a person is not entitled to any legal advice when this may be legally incorrect. The new legal aid system is extremely complex, with detailed Schedules to the Act setting out what is and what is not within scope. We are concerned that the first process undertaken by the operator may result in people being turned away at the first point of contact. Moreover many people do not explain their legal problem coherently and often it takes time and the development of a rapport with a client to discover the real problem upon which they are seeking advice.

If the Gateway operator decides that the person's problem falls within the scope of legal aid, the operator will then decide whether the person will access legal advice via the telephone or from a face to face provider (Regulation 19(1)). The circumstances in which the choice is made by the telephone operator are not in the Regulations and there are no published criteria as to when a person will be suitable for phone only advice or be able to see a legal advisor face to face.

During the passage of the Bill through Parliament there was an indication that the test as to whether a person would receive advice only by telephone or would receive advice face to face would be whether the person is able to give instructions and act on the advice given. If this is the case (and this is not explained in the Regulations or in any published guidance) there are very real concerns about the ability of a telephone operator, in one telephone call, to make what is a complex assessment of a person's mental state, communication abilities and their ability to give instructions through telephone advice only. This risks people being referred to a second telephone adviser when in fact they may be unsuited for telephone advice at all.

On the current wording of the interpretation provision in Regulation 20, an exempted person who does not have to use the gateway first is someone who is:

- (a) a child or
- (b) a person who has been deprived of their liberty or
- (c) a previously assessed person with a linked problem.

The definition of an 'exempt' person does not currently include members of the public who are vulnerable and for a variety of reasons may be deterred from or find it difficult to use the telephone or email to explain their legal problem. Urgent cases are also not exempted from the Gateway despite this having been raised during the consultation.

**During the consultation we have been given assurances that arrangements would be made to enable vulnerable people to access legal advice, and to ensure that provision would be made for emergency cases.** However this has not materialised and the very narrow definition of 'exempt' will lead to many people being denied access to legal advice.

People with mental health needs, or learning disabilities, or communication difficulties, some older people, or people who find it difficult to use the telephone or who do not have free access to the phone or email will be disadvantaged or prevented from accessing legal advice.

We think that the absence of any reference to disabled and vulnerable people from the definition of 'exempt' discriminates against such persons and will result in very vulnerable people being excluded from the civil justice system altogether.

Despite the indications that third parties may telephone the Gateway on another person's behalf, this is not contained in the Regulations. It is therefore unclear what if any provision is to be made to enable persons who cannot access the Gateway to access advice via a third party.

We are also concerned about the manner in which a vulnerable individual will be determined to be an "exempted person" under Regulation 20 (c). The issue is that to become "previously assessed" as being unsuitable for the Gateway the individual must, at least on the first previous occasion, have been so assessed by the Gateway telephone operator. The person cannot apply to a face-to-face provider unless and until they are an "exempted person" (see Regulation 17). To be an exempted person they must have been "previously assessed" by the Gateway. This is circular – it is a chicken and egg situation for someone who may not be able to access the Gateway in the first place.

This means that individuals who are unsuitable for telephone advice (likely because of vulnerability, communication difficulties; disability; complexity of their case or urgency) will first have to access the telephone Gateway service in order to be told that they are unsuitable for that service. This is manifestly irrational.

Although we have not seen any decision making guidance, we assume that guidance will be made available to the Gateway providers such that they can determine when a client is unsuitable for Remote services and should be referred to a face-to-face provider. Why therefore can the same guidance and discretion not be available to a face-to-face provider to make the same determination? If a person attends at a provider's office and it is clear that the

person is vulnerable and not suitable for the telephone Gateway then it should be open to the provider to assess the person and provide face to face advice without the client having to go back through the Gateway first.

**We suggest** that the Regulations be revised to make clear that the determination can be made by a face-to-face provider without the need for the client to be forced to have that determination made through the telephone Gateway.

**We also suggest** that to avoid discrimination and to ensure that people are not denied access to legal services the definition of an 'exempt' person should include the following categories:

- (d) any person by reason of disability or other vulnerability who has or may have difficulty in using the telephone or email to explain and communicate their legal problem
- (e) any urgent case.

## **The Civil Legal Services (Procedure) Regulations 2012**

### ***Regulation 33 Domestic Violence Cases***

We are also concerned about the effect of Regulation 33 which relates to evidence in domestic violence cases. Although legal aid in family cases will still be available to victims of domestic violence, clients will need to prove that they are victims of domestic violence using one of the prescribed forms of evidence under regulation 33. This evidence may, however, be expensive to acquire and this will create a barrier for clients who cannot afford to do so: for example, a medical report from a GP can cost £50 - £70. This issue was discussed in a recent article by Wendy Hewstone, a family solicitor. She writes that substantial very sensible amendments were made while the Bill was going through Parliament.

'The issue is as always that the devil is in the detail. Clients will be still be able to access private family legal aid, both legal help and certificated work, if they qualify through what has become known as the 'Domestic Violence Gateway'. Section 12 sets out who will qualify and at section 12 (9) it confirms what the definition of domestic violence would be:

*'... "domestic violence" means any incident of threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other.'*

However, there is nothing in the Act which says how this will be proved and this is to be set out in Regulations.

*The Lord Chancellor's present intention is to make regulations (under the powers provided at section 12 of LASPO) stipulating the evidence that may be provided to demonstrate relevant abuse or risk of abuse. It will be for the individual to provide the evidence before the provider can assess whether the client qualifies for the civil*

*legal services which are the subject of the application.'*

Draft policy statement MOJ

The LSC will not pay for the medical report or other proof required so the client can qualify through the Domestic Violence Gateway.

As David Emmerson of Resolution stated (at LAPG's recent conference) this leaves the whole policy in tatters. The client (who could be either gender as clients could qualify if there is some form of abuse as long as verified by a GP) may not be able to afford to pay for the medical report or other proof and therefore will not be able to obtain access to legal aid funding.

Legal aid lawyers will not be able to fund the medical reports – which usually cost £50 to £70.' For full article see: <http://legalvoice.org.uk/family/laspo-and-the-domestic-violence-gateway/>.

Victims of domestic violence will not be familiar with the Regulations and the issue of whether evidence is or is not sufficient is a complex matter upon which they will need advice. If this advice and access to the evidence (e.g. by a GP report) is not funded as part of the legal aid scheme then victims will not be protected as was intended. The detailed provisions drafted while the Bill progressed through the Parliamentary process which were intended to protect such very vulnerable people and their children will be wholly undermined.

## **Civil Legal Services (Merits Criteria) Regulations 2012**

### ***Regulation 53 – criteria for public law claims (judicial review)***

We are particularly concerned by the wording of Regulation 53(b) which applies a significantly different and more stringent test for access to legal aid for all judicial review claims. These cases concern the legality of decision making by public bodies and it is particularly important that the test for access to the Court (via publicly funded legal representation) is fair, does not create an artificial barrier to a challenge by an individual and is lawful.

The new Regulation requires that, for determinations for legal representation in relation to public law claims, funding will be refused unless:

*“The individual has exhausted all administrative appeals and other alternative procedures before bringing a public law claim.”*

What are our concerns?

- The requirement to exhaust 'all administrative appeals... and procedures' is not qualified in any way by the term 'reasonable' or 'appropriate' so as to take account of the particular circumstances of the case.
- The proposed new test is materially different from the current provision in the Funding Code and also from the test applied by the Courts as to whether judicial review is appropriate. Judicial review is a means of

challenge of last resort; however there are cases where it would clearly not be appropriate for all conceivable review or appeal mechanisms to be exhausted first.

- The test is also different from the Standard Criteria for legal representation in the new Regulations which, at Regulation 39, states that an individual may qualify for legal representation if the Director is satisfied that the

*“the individual has exhausted all **reasonable** alternatives to bringing proceedings including any complaints system, ombudsman scheme or other form of alternative dispute resolution”.* **[Emphasis applied].**

- The wording of Regulation 53 is also markedly different to the test for access to legal aid for public law in the case of ‘legal persons’ under Regulation 74(1)(b) which includes the term ‘reasonable’ in the same way as Regulation 39.

We see no logical explanation why in most areas the applicant need only have exhausted all “reasonable alternatives” to proceedings but in public law the applicant needs to have “exhausted all administrative appeals and other alternative procedures” without any qualification as to whether it is reasonable to expect this in all cases. Further, what does “exhausted” mean and how will it be interpreted and applied?

We note that none of the relevant guidance on decision-making has yet been published.

In the context of public law claims (judicial review) it may be that there are good reasons (around delay and prejudice to the client) which might mean that it is not only unreasonable but actually prejudicial to a client’s case to be forced to exhaust all administrative appeals and other alternative procedures first. Such appeals (for example the Ombudsman schemes) can take months and in some cases years to complete.

- An example might be where a decision has been taken by a public body and where that body refuses to delay implementation of the decision pending any review or appeal process being undertaken. An injunction may be required in these circumstances to protect the client on an interim basis yet on the current drafting this would not be possible.
- Another example is that protective proceedings may need to be issued in cases where the time limit for bringing a judicial review is nearing the maximum deadline of 3 months; otherwise the client will be prevented from bringing a claim for judicial review at all on the basis of delay.

**We propose** that the wording in Regulation 53 be amended to include the word “reasonable” such that it is similar to the wording in Regulations 39 and 74.

## **The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012**

We are deeply concerned by this Order. It was not previously raised with the Representative Bodies or disclosed to them but instead, and for the first time, published on the CLA page of the LSC website amongst a plethora of other draft Regulations and Policy Statements in August 2012 without any explanation.

This Order appears to seek to make fundamental changes to the definition of “Judicial Review” in the 2012 Act and, in doing so, significantly to limit the types of cases for which legal aid is available. This proposed amendment comes before the Act even comes fully into force and does not reflect any of the discussions with or statements made by Government during the consultation on the Act or during the Act’s passage through Parliament.

It appears to reflect a significant policy shift – and a shift for which there has been neither impact assessment, consultation nor any kind of justification.

Worse still the manner in which this Order emerged seems expressly designed to avoid opening them up to the appropriate level of scrutiny which such a fundamental change would appear to require.

We ask for an explanation as to why this change is being sought, the purpose for which the order has been presented, and why the more restrictive definition was not pursued as the Act was drafted or indeed during its passage through Parliament. We have written to the Ministry of Justice to ask for clarification.

### **Contact details**

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## **List of Regulations and links**

Please note that the LSC links below are to draft versions of the Regulations. Some changes have been made – for example, titles have changed from “legal services” to “legal aid”. The TSO versions are up-to-date but there is a charge to view them.

### ***Regulations currently before Parliament***

1. The Civil Legal Aid (Merits Criteria) Regulations 2012:  
<http://www.tsoshop.co.uk/bookstore.asp?FO=1160890&Action=Book&ProductID=9780111530016&From=Subject> and  
[http://www.legalservices.gov.uk/docs/civil\\_contracting/01 The draft Civil Legal Services %28Merits Criteria%29 Regulations - Aug 2012 %28204kb%29.pdf](http://www.legalservices.gov.uk/docs/civil_contracting/01_The_draft_Civil_Legal_Services_%28Merits_Criteria%29_Regulations_-_Aug_2012_%28204kb%29.pdf)
2. The Civil Legal Aid (Family Relationship) Regulations 2012:  
<http://www.tsoshop.co.uk/bookstore.asp?FO=1160890&Action=Book&ProductID=9780111530108&From=Subject> and  
[http://www.legalservices.gov.uk/docs/cls\\_main/08 The draft Civil Legal Services %28Family Relationship%29 Regulations 2012.pdf](http://www.legalservices.gov.uk/docs/cls_main/08_The_draft_Civil_Legal_Services_%28Family_Relationship%29_Regulations_2012.pdf)
3. The Civil Legal Aid (Immigration Interviews) (Exceptions) Regulations 2012:  
<http://www.tsoshop.co.uk/bookstore.asp?FO=1160890&Action=Book&ProductID=9780111530122&From=Subject> and  
[http://www.legalservices.gov.uk/docs/cls\\_main/13 The draft Civil Legal Services Legal Services %28Immigration Interviews%29 %28Exceptions%29 Regulations 2012 .pdf](http://www.legalservices.gov.uk/docs/cls_main/13_The_draft_Civil_Legal_Services_Legal_Services_%28Immigration_Interviews%29_%28Exceptions%29_Regulations_2012_.pdf)
4. The Civil Legal Aid (Prescribed Types of Pollution of the Environment) Regulations 2012:  
<http://www.tsoshop.co.uk/bookstore.asp?FO=1160890&Action=Book&ProductID=9780111530139&From=Subject> and  
[http://www.legalservices.gov.uk/docs/cls\\_main/14 The draft Civil Legal Services %28Prescribed Types of Pollution of the Environment%29 Regulations 2012.pdf](http://www.legalservices.gov.uk/docs/cls_main/14_The_draft_Civil_Legal_Services_%28Prescribed_Types_of_Pollution_of_the_Environment%29_Regulations_2012.pdf)

### ***Regulations not yet before Parliament at time of this Briefing***

1. The Civil Legal Services (Procedure) Regulations 2012:  
[http://www.legalservices.gov.uk/docs/cls\\_main/03 The draft Civil Legal Services %28Procedure%29 Regulations 2012 - Aug 2012 %28351kb%29.pdf](http://www.legalservices.gov.uk/docs/cls_main/03_The_draft_Civil_Legal_Services_%28Procedure%29_Regulations_2012_-_Aug_2012_%28351kb%29.pdf)
2. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012:  
[http://www.legalservices.gov.uk/docs/cls\\_main/07 The draft Legal Aid Sentencing and Punishment of Offenders Act 2012 %28Amendment of Schedule 1%29 Order 2012.pdf](http://www.legalservices.gov.uk/docs/cls_main/07_The_draft_Legal_Aid_Sentencing_and_Punishment_of_Offenders_Act_2012_%28Amendment_of_Schedule_1%29_Order_2012.pdf)