EXPLANATORY MEMORANDUM TO

THE CIVIL LEGAL AID (IMMIGRATION INTERVIEWS) (EXCEPTIONS) REGULATIONS 2012

2012 No. 2683

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before the Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument sets out the exceptions to the general rule that legal aid is not available for a legal provider to attend an asylum interview with their client. The instrument allows for legally aided representation at such interviews for certain vulnerable clients where:

- the individual being interviewed is, or is being treated for the purposes of the interview as, a child; or
- the individual is detained at a location where their application for asylum may be subject to the Fast Track processing scheme (and the interview is not a preliminary, or 'screening', interview); or
- the individual lacks mental capacity (and the interview is not a 'screening' interview).

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

3.1 None

4. Legislative Context

4.1 This is one of a number of statutory instruments which implement Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the Act"). These instruments will be laid in time for the Act to come into force on 1 April 2013. This particular instrument is one that provides additional detail on what is within the scope of legal aid, in particular in respect of paragraph 30 of Schedule 1 to the Act (Immigration: rights to enter and remain).

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 The Act gives effect to the Government's policy position on Legal Aid. The Government believes that legal aid has expanded far beyond its original intentions and is available for a wide range of issues, many of which need not be resolved through the courts. Irrespective of the current economic situation, a wide ranging programme of reform is required to ensure that legal aid is targeted to those who needed it most, for the most serious cases in which legal advice and representation is justified.

7.2 The Act sets out what services can and cannot be funded by through civil legal aid in Schedule 1. Paragraph 30 (1) of the schedule provides that civil legal services in relation to an asylum application can be funded. However, the paragraph excludes legal aid for a legal representative to attend an interview conducted on behalf of the Secretary of State with a view to reaching a decision on an individual's claim for asylum (the "immigration interview"), except where regulations provide otherwise. This instrument uses that power to set out circumstances where such attendance may be funded.

7.3 The intention is to largely replicate the current policy in relation to legal aid for attendance at an asylum interview. Since 2004, legal aid has been unavailable for attendance at an asylum interview (on the basis that it is unnecessary), subject to certain exceptions designed to protect particularly vulnerable legal aid clients. All but one of these exceptions are set out in the Secretary of State's Direction of 31 March 2004 on asylum interviews, made under the Access to Justice Act 1999 (the other relates to the 'Early Legal Advice Pilot' (see paragraph 7.5 below)). This instrument replicates three of the current exceptions. Three further current exceptions have not been included in these regulations for the reasons explained below.

7.4 The instrument allows for attendance by a legal provider to be funded through civil legal aid where i) the individual being interviewed is under the age of 18, or is being treated as such for the purposes of the interview, ii) where the individual is detained at a location where their application for asylum may be subject to the Fast Track processing scheme, or iii) where the individual lacks mental capacity, as defined by the Mental Capacity Act 2005. Where the interview is a preliminary or 'screening' interview (which covers certain administrative matters, such as a person's identity, rather than the substantive matter), then attendance will only be funded if the individual being interviewed is under 18, or is being treated as such for the purposes of the interview.

7.5 The exceptions not being carried over from the 2004 Direction are attendance for i) persons being interviewed in accordance with the Police and Criminal Evidence Act 1984 (PACE); and ii) persons alleged to pose a threat to national security. Neither of these has been needed in practice. An interview under PACE would not be an asylum

interview, but a criminal matter. As such, the person being interviewed would be eligible for criminal legal aid. We are unaware of the exception relating to persons alleged to pose a threat to national security ever having been used and we cannot envisage any circumstances in which it would be used in the future. A separate, more limited exception also existed for legal attendance at an interview where this was part of the 'Early Legal Advice Pilot', as set out in the Lord Chancellor's Authorisation of 2010. The pilot is due to end before the new Act comes into force, and so no provision is required as part of this instrument.

8. Consultation outcome

8.1 The consultation 'Proposals for the reform of legal aid in England and Wales' was published on 15 November 2010 and closed on 14 February 2011. Over 5,000 responses were received from representative bodies, practitioner and other organisations, individual members of the judiciary, members of the House of Commons and Lords, individual solicitors and barristers and members of the public.

8.2 The majority of responses did not support the Government's original proposals for reform, although there was some support for particular measures. Some of the original proposals were modified in light of the comments received from consultees. Most changes widened access to legal aid for certain types of case compared to the original proposals, for example an expansion of the criteria to qualify for legal aid in a private family law case involving domestic violence. However, other changes further limited access to legal aid, such as removing funding for certain immigration and asylum judicial reviews where there has been an appeal or judicial review to a tribunal or court on the same issue or a substantially similar issue within a period of one year.

8.3 A detailed Government response to the consultation exercise is available on the MoJ Website at www.justice.gov.uk/consultations/legal-aid-reform

8.4 We have not consulted on the Civil Legal Aid (Immigration Interviews) (Exceptions) Regulations 2012.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument. A programme of training and guidance is being prepared by the Legal Services Commission to support the transition to the new arrangements. This will be made available to legal aid providers ahead of the commencement of the Act on 1 April 2013.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is unchanged from the current position of approximately £1m per year. The removal of the three exceptions discussed above has no impact on public sector costs as they have not been used.

10.3 The impacts of the Government's programme of legal aid reform are set out in an Impact Assessment, which was updated following the Act receiving Royal Assent. This is available at http://www.justice.gov.uk/legislation/bils-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information . An Impact Assessment has not been prepared specifically for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Ministry of Justice will conduct a post-implementation review of the Act between three to five years after implementation. This review will also consider the operation of the secondary legislation.

13. Contact

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