EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (FINANCIAL RESOURCES) (AMENDMENT) REGULATIONS 2013

2013 No. 2791

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 The Criminal Legal Aid (Financial Resources) (Amendment) Regulations 2013 make provision for the introduction of a financial eligibility threshold for applications for legal aid in the Crown Court; some further minor and consequential amendments to the Criminal Legal Aid (Financial Resources) Regulations 2013 (S.I. 2013/471) ("the Financial Resources Regulations") are also made. These Regulations are made under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO").

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 legal aid reform proposals set out in the document: *Transforming Legal Aid: Next Step*s. This instrument implements, in conjunction with the Criminal Legal Aid (Contribution Orders) (Amendment) Regulations 2013 (S.I. 2013/2792), the Criminal Legal Aid (General) (Amendment) Regulations 2013 (S.I. 2013/2790) and the Costs in Criminal Cases (General) (Amendment) (No.2) Regulations 2013 (S.I. 2013/2830), a financial eligibility threshold for legal aid in the Crown Court. We will also bring forward draft regulations which will amend section 16A of the Prosecution of Offences Act 1985 to make provision for acquitted Crown Court defendants who have been assessed as financially ineligible for criminal legal aid in certain Crown Court proceedings to receive a payment out of central funds in respect of legal costs incurred by them in respect of those proceedings.

4.2 This instrument also amends the means test for prison law cases to remove reference to treatment cases. This is consequential to the Criminal Legal Aid (General) (Amendment) Regulations 2013 (S.I. 2013/2790), which provide that criminal legal aid is no longer available for cases in which a prisoner wishes to challenge their treatment in a prison, young offender institution or secure training centre.

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 Following on from the reforms set out in LASPO, the Government consulted on a package of reform proposals. The primary objective of the reform package is to bear down on the cost of legal aid, ensuring that every aspect of expenditure is justified and that we are getting the best deal for the taxpayer. Unless the legal aid scheme is targeted at the persons and cases where funding is most needed, it will not command public confidence or be credible.

7.2 *Transforming Legal Aid: Next Steps* sets out a number of reforms which the Government intends to make under Part 1 of LASPO. Two of the reforms set out in *Transforming Legal Aid: Next Steps* are a financial eligibility threshold in the Crown Court and changes to the scope of criminal legal aid for prison law.

7.3 This instrument implements elements of the proposal to introduce a financial eligibility threshold in the Crown Court. The introduction of the threshold will mean that defendants with an annual disposable household income of £37,500 or more are no longer automatically provided with legal aid in Crown Court proceedings. There will be a review mechanism to ensure that those individuals whose annual disposable income falls above that threshold but who really cannot pay their defence costs privately are able to be represented in court.

7.4 Regulation 4 inserts into the Financial Resources Regulations a number of definitions, including setting out the 'Crown Court proceedings' to which the threshold applies. Regulation 5 amends regulation 7 of the Financial Resources Regulations, consequential to the change in scope of criminal legal aid for prison law implemented by the Criminal Legal Aid (General) (Amendment) Regulations 2013. Regulations 6 and 10 are minor corrections to the Financial Resources Regulations. Regulation 8 is consequential to the insertion of various definitions in regulation 2 of the Financial Resources Regulations. Regulations 7 and 9 provide that applications for legal aid in magistrates' court proceedings are to be determined in accordance with Part 3 of the Financial Resources Regulations. Regulations 11 and 12 set out how restrained assets and housing benefit payments are to be treated for the purposes of calculating an individual's disposable income under Part 3 of the Financial Resources Regulations.

7.5 Regulation 13 inserts a new Part 4 to the Financial Resources Regulations to give effect to the introduction of a financial eligibility threshold for legal aid in the Crown Court. Part 4 covers the calculation of financial eligibility, evidence requirements, renewals of applications and reviews and withdrawals of determinations.

7.6 Regulation 30 introduces new Part 4 and provides for when a determination is to be made under this Part. Regulation 31 of Part 4 provides that an individual with £37,500 or more annual disposable household income is not eligible for criminal legal

aid in relation to Crown Court proceedings. Regulation 32 sets out that the financial resources, income or other financial circumstances of an applicant's partner must be considered as part of the assessment of the individual's financial eligibility unless the partner has a contrary interest in the proceedings.

7.7 Regulation 33 of Part 4 sets out the financial resources that must be taken into account and disregarded when calculating an applicant's gross annual income. Regulation 34 sets out how annual disposable income must be calculated. Regulation 35 makes provision for the Director to require an individual to provide information and documentary evidence in relation to their application at any time. Regulation 36 makes provision for an individual to renew an application following a determination that he is not eligible, if there has been a change in financial circumstances or where the initial determination is withdrawn following a review.

7.8 Regulation 37 of Part 4 sets out the conditions that allow an individual to apply for a review, on the grounds either that there has been a miscalculation of financial resources or an administrative error, or that the individual cannot afford to pay privately for their defence. This regulation sets out how the application must be made and the information that must be supplied. Such applications must be made within 21 days of the initial determination of financial ineligibility – this is to ensure that private costs and affordability are considered by the applicant and provider promptly following the initial determination. However, this time limit may be extended in exceptional circumstances if agreed between the Director and the individual. There is a 14 day time limit for provision of further information and documents if requested by the Director in relation to the review. Regulation 38 sets out the requirements on the Director where a determination is withdrawn.

7.9 Regulation 39 of Part 4 establishes that in criminal proceedings other than those to which Parts 3 and 4 of the Financial Resources Regulations apply, the authority determining an individual's application for legal aid must deem the individual to be financially eligible (for example in relation to proceedings under the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 in which the court is able to make a determination). Regulation 14 of the Regulations clarifies how gross annual income and the cost of living expenses must be calculated following calculation of the relevant sum in the Schedule (weighting according to household circumstances), and makes one consequential amendment.

7.10 Regulations 15 and 16 set out the transitional arrangements for these Regulations. The transitional arrangements in terms of financial eligibility for Crown Court proceedings are set out in regulation 15. The provision states that applications for representation in criminal proceedings which are made before 27 January 2014 will be considered in accordance with the unamended Financial Resources Regulations, (and will not therefore be subject to the financial eligibility threshold). Applications will be considered made when the application form is signed and dated by the individual. This provides clarity for the individual on which financial eligibility rules will apply to their application. The transitional arrangements in terms of prison law are set out in regulation 16. Regulation 16 specifies that the amendment made by regulation 5 does not apply to an application for advocacy assistance under section 15 of LASPO which is made before 2nd December 2013. Applications for advocacy

assistance in relation to prison law treatment matters may be made either in paper form or over the telephone. Where the application is in paper form, the form must be signed and dated by the provider before 2nd December 2013 and received by the Director by 5:00pm on 2nd January 2014. Where the application is made over the telephone, the telephone call must be made before 2nd December 2013 and the application must be signed and dated and then received by the Director within 30 days of the telephone call. Sufficient time has therefore been provided after the application is made in order to allow for the application forms to reach the necessary parties.

8. Consultation outcome

8.1 The consultation '*Transforming Legal Aid: Delivering a more credible and efficient system*' was published on 9th April 2013 and closed on 4th June 2013. Around 16,000 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. The Ministry of Justice held 14 stakeholder events throughout the consultation period.

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 to ensure their implementation is fully consistent with Government's wider objectives, for example:

- the proposals on prison law have been amended to ensure criminal legal aid remains available for all proceedings before the Parole Board in which it has the power to direct release, as opposed to all cases that engage Article 5.4 of the European Convention on Human Rights (ECHR). Sentence calculation cases where the date of release is disputed will also be retained.

- the residence test was revised to include exceptions for certain cases which broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children.

- changes to expert fees will proceed, subject to retaining the rates payable to experts in those areas where recent increases have been made to address market supply issues. Fees payable to interpreters in London will be retained and the reduction in rates payable to interpreters outside London will be limited to ensure these do not fall below rates paid by CPS.

8.3 A detailed Government response to the consultation exercise is available at https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/user_uploads/annex-b-response-to-consultation.pdf

8.4 We have not consulted on the Criminal Legal Aid (Financial Resources) (Amendment) Regulations 2013.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument. A programme of training and guidance for providers is being prepared by the Legal Aid Agency to support the transition to the new arrangements.

10. Impact

10.1 The impacts of the Government's programme of legal aid reforms are set out in a series of Impact Assessments, which were updated following publication of *Transforming Legal Aid: Next Steps*. These impact assessments are available at https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view An Impact Assessment has not been prepared specifically for this instrument.

10.2 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 arrangements for barristers, which has been assessed as part of the above Impact Assessments.

10.3 There is no impact on the public sector arising from this instrument beyond those accounted for in the Impact Assessments.

11. Regulation of small businesses

11.1 The legislation applies to small business only insofar as it affects the contractual relationship between the Legal Aid Agency and providers of legal aid services or the payment arrangements for barristers.

11.2 The Ministry of Justice has not taken any specific steps to minimise the impact of the requirements on firms employing up to 20 people.

11.3 The instrument does not impose any additional regulatory burdens on small firms.

12. Monitoring and review

12.1 The operation of and expenditure on the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency. The Ministry of Justice will conduct a post-implementation review of LASPO between three to five years after implementation. This review will also consider the operation of the secondary legislation, including this SI.

13. Contact

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