EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (GENERAL) (AMENDMENT) REGULATIONS 2013

2013 No. 2790

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 (General) (Amendment) Regulations 2013 amend the prescribed conditions that must be met before advice and assistance for criminal proceedings may be made available to an individual under section 15 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), in order to restrict the scope of criminal legal aid for cases falling under the prison law category of work.

2.2 The instrument also makes changes resulting from the introduction of a financial eligibility threshold for criminal legal aid in Crown Court cases.

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 Steps*.[1]

4.2 This instrument implements changes to the scope of criminal legal aid for prison law. This instrument amends regulation 12 of the Criminal Legal Aid (General) Regulations 2013 (S.I. 2013/9) ("the General Regulations"), which prescribes the conditions that must be met before advice and assistance for criminal proceedings may be made available to an individual. Amendments that are consequential to this instrument are made in the Criminal Legal Aid (Financial Resources) (Amendment) Regulations 2013 (S.I. 2013/2791) and the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013 (S.I. 2013/2803).

4.3 This instrument also implements, in conjunction with the Criminal Legal Aid (Financial Resources) (Amendment) Regulations 2013 (S.I. 2013/2791), Criminal Legal Aid (Contribution Orders) (Amendment) Regulations 2013 (S.I. 2013/2792), and Costs in Criminal Cases (General) (Amendment) (No.2) Regulations 2013 (S.I. 2013/2830), the introduction of a financial eligibility threshold 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

[1] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view

certain Crown Court proceedings to receive a payment out of central funds for legal costs incurred by them in those proceedings.

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 changes to the scope of criminal legal aid for prison law and the introduction of a financial eligibility threshold in the Crown Court.

7.4 The changes to the scope of criminal legal aid for prison law are intended to focus public resources on cases that are of sufficient priority to justify the use of public money. Alternative means of redress such as the prisoner complaints system should be the first port of call for issues removed from scope. The amendments aim to target limited public resources at the cases that really justify it, in order to ensure that the public can have confidence in the scheme.

7.5 In order for criminal legal aid advice and assistance to be available, an individual must meet one of the prescribed conditions set out in regulation 12 of the General Regulations. Some of these conditions relate to prison law matters. Regulation 4 amends those conditions to limit the types of case in which an individual may be eligible for criminal legal aid in prison law matters to the following:

- cases regarding an individual's sentence where the calculation of the date on which the individual is entitled to be released by the Secretary of State, or eligible for consideration by the Parole Board for a direction to be released, is disputed (regulation 4(2));
- an individual's disciplinary hearing in a prison or young offender institution where the proceedings involve the determination of a criminal charge for the purposes of Article 6(1) of the European Convention on Human Rights ("ECHR") (regulation 4(3));

- an individual's disciplinary hearing in a prison or young offender institution, where the governor has exercised the governor's discretion (currently set out in paragraphs 2.10 and 2.11 of Annex A to Prison Service Instruction 2011/47)[2] to allow advice and assistance in relation to the hearing (regulation 4(3)); and
- proceedings before the Parole Board where the Parole Board has the power to direct the individual's release (regulation 4(4) and (5)).

7.6 The amendments to the scope of criminal legal aid for prison law therefore, for the reasons set out at paragraph 7.4 above, remove criminal legal aid for the following types of prison law matter:

- all matters related to an individual's treatment (including, but not limited to, prison conditions, treatment by staff, and communications and visits) in a prison, young offender institution or secure training centre.
- the majority of prison law matters related to an individual's sentence (including, but not limited to, categorisation, resettlement, sentence planning, and licence conditions). The only exception is cases regarding an individual's sentence where the calculation of the date on which the individual is entitled to be released by the Secretary of State, or eligible for consideration by the Parole Board for a direction to be released, is disputed;
- disciplinary matters which do not involve the determination of a criminal charge for the purposes of Article 6(1) ECHR, or where the governor has not exercised his or her discretion to allow advice and assistance in relation to the hearing; and
- Parole Board matters where the Board does not have the power to direct release.

7.7 The introduction of the financial eligibility threshold in the Crown Court is intended to ensure that the wealthiest defendants, who are able to pay privately, are no longer automatically provided with legal aid at the taxpayer's expense in specified Crown Court proceedings. Defendants with a disposable household income of £37,500 or more will therefore be ineligible for legal aid in those 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. The specific intention of the provisions in this instrument is to revise the way in which the Director of Legal Aid Casework makes decisions about financial eligibility for criminal legal aid in the light of the introduction of the new financial eligibility threshold.

7.8 Regulation 5 amends regulation 24(1) of the General Regulations to make clear that where an individual is financially eligible for criminal legal aid in the magistrates' court, a determination will also be made that the individual is eligible under Part 4 of the same regulations for criminal legal aid in the Crown Court in the same proceedings.

7.9 Regulation 6 amends regulation 25(1) of the General Regulations so that, where an individual does not qualify for representation in magistrates' court proceedings, the

[2] http://www.justice.gov.uk/downloads/offenders/psipso/psi-2011/psi-47-2011-prison-discipline-procedures.doc

Director of Legal Aid Casework ("the Director") must consider that individual's application for representation in Crown Court proceedings in accordance with the new financial eligibility rules. This is in contrast to the current position, where the Director is obliged in such circumstances to make a determination that an individual qualifies for representation in those Crown Court proceedings.

7.10 Part 2 of the instrument sets out the transitional provisions that apply to the amendments. The transitional arrangements for the prison law amendments are set out in regulation 7, which provides that the amendments will not apply to an application for advice and assistance which is "made" before 2nd December 2013. Provision is also made to determine when an application will have been "made" before 2nd December 2013:

a) Where the application relates to the individual's treatment and the application is in paper form, the form must be signed and dated by the legal aid practitioner 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.

b) Where the application relates to another category of prison law case and the application is made in paper form, the form must be signed and dated before 2nd December 2013. In the case of a telephone application, the telephone call must be made before 2nd December 2013 and the application must be signed and dated and then received by the legal aid practitioner 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.

7.11 The transitional arrangements in terms of Crown Court eligibility are set out in regulation 8. The provision states that applications for representation in criminal proceedings which are made before 27th January 2014 will be considered in accordance with the existing General 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.

8. Consultation outcome

8.1 The consultation '*Transforming Legal Aid: Delivering a more credible and efficient system*'[3] 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.

[3] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid

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 (General) (Amendment) Regulations 2013.

9. Guidance

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

9.2 A set of communications materials explaining the changes to criminal legal aid for prison law were sent out by the Ministry of Justice to governors and directors of prisons and young offender institutions on 20 November 2013. Also included was a note for distribution to prisoners and young offenders. The Youth Justice Board also wrote to all Secure Training Centres to explain the changes on 5 September 2013 and Ministry of Justice officials are liaising with the Department for Education to ensure the same message reaches Secure Children's Homes.

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.

10.2 The changes to criminal legal aid for prison law are estimated to reduce legal aid expenditure by approximately £4m per annum in stead-state with almost 11,000 fewer cases a year being funded.

10.3 The introduction of a financial eligibility threshold in the Crown Court is estimated to result in approximately 200 less eligible defendants and a saving of £2 million per annum in steady state.

10.4 An Impact Assessment has not been prepared specifically for this instrument.

10.5 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, which has been assessed as part of the above Impact Assessments.

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

11. Regulating small business

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 & 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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