**EXPLANATORY MEMORANDUM TO**

**THE COSTS IN CRIMINAL CASES (LEGAL COSTS) (EXCEPTIONS) REGULATIONS 2013**

**2013 No. [DRAFT]**

**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 Costs in Criminal Cases (Legal Costs) (Exceptions) Regulations 2013 amend section 16A of the Prosecution of Offences Act 1985 ("POA") 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 those proceedings.

## 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 in the document *Transforming Legal Aid: Next Steps*[1]. This instrument is one of a number that implements a financial eligibility threshold for legal aid in the Crown Court.

## 5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

## 6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Justice, Shailesh Vara MP, has made the following statement regarding Human Rights:

In my view the provisions of the Costs in Criminal Cases (Legal Costs) (Exceptions) Regulations 2013 are compatible with the Convention Rights.

## 7. Policy background

7.1 Following on from the reforms set out in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), the Government consulted on a package of reform proposals. The primary objective of the reform package is to bear

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

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. One of the reforms set out in *Transforming Legal Aid: Next Steps* is a financial eligibility threshold in the Crown Court.

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 specified 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 policy intention is that acquitted defendants who were financially ineligible for representation in Crown Court proceedings will be able to recoup legal costs incurred in those proceedings from central funds at legal aid rates.

7.4 Existing legislation sets out a number of exceptions to the general rule that a court may not order the payment out of central funds of an amount in respect of the legal costs of the accused. These Regulations make provision for an additional exception to enable acquitted defendants (who have been determined as a result of the threshold to be financially ineligible for legal aid in respect of certain Crown Court proceedings) to apply for a defendant's costs order to recoup their costs from central funds at legal aid rates.

7.5 The conditions attached to the new exception are that: the defendant must be an individual (i.e. the new provision will not apply to legal persons, because they are not subject to the new Crown Court financial eligibility threshold); the defence costs order is made under section 16(2) of POA (which provides for defendant's costs orders to be made in the Crown Court); the costs were incurred in relevant Crown Court proceedings (those to which the financial eligibility threshold applies); and that the Director of Legal Aid Casework has made a determination of financial ineligibility in relation to the defendant and those proceedings (i.e. the defendant has been deemed ineligible for legal aid as a result of the threshold).

## 8. Consultation outcome

8.1 The consultation '*Transforming Legal Aid: Delivering a more credible and efficient system*'[2] was published on 9 April 2013 and closed on 4 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.

[2] 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 Costs in Criminal Cases (Legal Costs) (Exceptions) 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 and will be disseminated in early January. Guidance is also being prepared for Legal Aid Agency and Majesty's Courts and Tribunals Service staff.

## 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 The provision that acquitted defendants ineligible as a result of the threshold can apply for a defendant's costs order may increase the number of applications for

reimbursement from central funds needing to be processed by Her Majesty's Courts and Tribunals Service National Taxing Team, with a consequent impact on central funds costs. Judges may also see a small increase in the number of applications for defendant's costs orders but the number of applications as a result of the introduction of the threshold is expected to be small. The introduction of the threshold is anticipated to save around £2m per year in steady state.

10.3 There is no impact on business, charities or voluntary bodies other than where it affects a contractual relationship between the Legal Aid Agency and legal aid practitioners or the payment arrangements for barristers, which has been assessed as part of the above Impact Assessments.

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

## 11. Regulating small businesses

11.1 The legislation applies to small business only insofar as it affects the contractual relationship between the Legal Aid Agency and legal aid practitioners 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

Simon Denison at the Ministry of Justice (Tel: 020 3334 5618 or email: simon.denison@justice.gsi.gov.uk) can answer any queries regarding the instrument.