Draft Regulations laid before Parliament under section 41(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2013 No.

LEGAL AID AND ADVICE, ENGLAND AND WALES

The Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013

Made - - - -	*xxxx*
Coming into force - -	*1st April 2013*

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The Lord Chancellor makes the following Regulations in exercise of the powers conferred by sections 5(2) and (4), 19(1) and (2), 27(6) and (10), 30(2) and (3), 41(1), (2) and (3) of, and paragraph 9 of Schedule 3 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012(**a**).

In accordance with section 41(6) of that Act, a draft of this instrument has been laid before and approved by a resolution of each House of Parliament.

PART 1

Interpretation and General

Citation and commencement

1. These Regulations may be cited as the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 and come into force on 1st April 2013.

Interpretation

2. In these Regulations—

"the Act" means the Legal Aid, Sentencing and Punishment of Offenders Act 2012;

"advocate" means a person who is an authorised person for the purposes of section 18 of the Legal Services Act 2007(**b**) in relation to the exercise of a right of audience;

"criminal legal aid" means advice, assistance and representation made available under sections 13, 15 and 16 of the Act;

"the General Regulations" means the Criminal Legal Aid (General) Regulations 2012(**c**);

"junior advocate" means any advocate who is not a Queen's Counsel;

"provider" means a person who has entered into an arrangement with the Lord Chancellor under section 2(1) of the Act (arrangements) to provide criminal legal aid under Part 1 of the Act;

"relevant court" means the court before which the criminal proceedings are taking place or are to take place; and

"representation order" means a document which records a determination made under section 16 of the Act (representation for criminal proceedings).

(**a**) 2012 c. 10. Section 42(1) provides that in Part 1 of the Act "regulations" means regulations made by the Lord Chancellor.
(**b**) 2007 c. 29.
(**c**) S.I. 2012/xxxx

Delegation

3. A function of the Lord Chancellor or Director under these Regulations may be exercised by, or by an employee of, a person authorised for that purpose by the Lord Chancellor or Director respectively(**a**).

PART 2

Determinations by a Court under section 16 of the Act

Applications

4.—(1) An application for a determination under section 16 of the Act (representation for criminal proceedings) made to the Crown Court must be made orally to the court.

(2) An application for a determination under section 16 of the Act made to the High Court or the Court of Appeal must be made—

(a) orally to the court; or

(b) in writing to an officer of the court.

(3) An application for a determination made in accordance with paragraph (2)(b) must be made in a form specified by the Lord Chancellor.

General

5.—(1) When the court makes a determination under section 16 of the Act in accordance with any of regulations 6 to 8, the court must—

(a) issue a representation order recording that determination; and

(b) send a copy of the representation order to the individual and any provider named in the representation order.

(2) Where these Regulations provide that a court is authorised to make a determination under section 16 of the Act, the power to make a determination may be exercised by the court or an officer of the court.

Determinations by the Crown Court

6. On the application of an individual, the Crown Court may make a determination under section 16 of the Act as to whether an individual qualifies for representation for the purposes of criminal proceedings before the Crown Court—

(a) which are described in section 14(g) of the Act (criminal proceedings);

(b) which arise out of an alleged failure to comply with an order of the Crown Court and it appears to the court that there is no time to instruct a provider; or

(c) where the individual is brought before the court under section 81 of the Senior Courts Act 1981(**b**) in pursuance of a warrant issued by the Crown Court.

Determinations by the High Court

7.—(1) On the application of an individual, the High Court may make a determination under section 16 of the Act as to whether an individual qualifies for representation for the purposes of criminal proceedings before the High Court in relation to an appeal by way of case stated from a decision of the magistrates' court or the Crown Court.

(**a**) Section 6 of the Act (authorisations) makes provision for authorisations given for the purpose of section 5 of the Act (delegation) or regulations under that section.

(**b**) 1981 c. 54.

(2) On the application of an individual, or of its own motion, the High Court may make a determination under section 16 of the Act as to whether an individual qualifies for representation for the purposes of proceedings before the High Court, or proceedings before the Supreme Court on appeal from the High Court, described in—

(a) section 14(a) to (g) of the Act, other than proceedings under paragraph (1); or

(b) regulation 9(r) of the General Regulations.

Determinations by the Court of Appeal

8.—(1) On the application of an individual, or of its own motion, the Court of Appeal may make a determination under section 16 of the Act as to whether an individual qualifies for representation for the purposes of any criminal proceedings before the Court of Appeal, or criminal proceedings before the Supreme Court on appeal from the Court of Appeal.

(2) A determination made in accordance with paragraph (1)—

(a) must not be made until service of an appeal notice in respect of the proceedings has taken place; and

(b) may specify the stage of the proceedings at which the determination is to take effect.

Withdrawal of determinations by the court

9.—(1) The court before which any criminal proceedings other than those listed in regulation 9(a), (b) and (d) to (i) of the General Regulations are taking place may withdraw a determination under section 16 of the Act that an individual qualifies for representation where—

(a) the individual declines to accept the determination in the terms which are offered;

(b) the individual requests that the determination is withdrawn; or

(c) the provider named in the representation order which recorded the original determination declines to continue to represent the individual.

(2) Where the court withdraws a determination—

(a) the court must provide written notification of the withdrawal to the individual in whose favour the original determination was made and to the provider named in the representation order which records the determination; and

(b) the Director must provide written notification of the withdrawal to any advocate instructed in the proceedings.

PART 3

Choice of representative

Selection of representatives

10. This Part makes provision in relation to the right, conferred by section 27(4) of the Act (choice of provider of services etc), of an individual who qualifies for representation for the purposes of criminal proceedings by virtue of a determination under section 16 of the Act (representation for criminal proceedings), in accordance with Part 2 of these Regulations or Part 5 of the General Regulations, to select a representative.

Determinations by the relevant court under this Part

11.—(1) The relevant court may make a determination under this Part(**a**) only if it has considered an application made in accordance with paragraph (2).

(2) For the purposes of paragraph (1), an application must—

(a) be made by the individual seeking the determination;

(b) be in writing; and

(c) specify what the relevant court is being asked to determine and the grounds upon which it is being asked to do so.

(3) When it makes a determination under this Part, the relevant court must give reasons.

Representation by a provider in criminal proceedings

12. In relation to any criminal proceedings described in section 14(a) to (f) and (h) of the Act (criminal proceedings), the right of an individual conferred by section 27(4) of the Act does not include the right to select a provider unless the provider—

(a) is employed by the Lord Chancellor to provide criminal legal aid;

(b) is permitted to provide criminal legal aid to the individual under the arrangements the Lord Chancellor has made with the provider(**b**); or

(c) is representing the individual before the Court of Appeal in an appeal against a decision of the Upper Tribunal in proceedings in respect of a decision of—

(i) the Financial Services Authority;

(ii) the Bank of England; or

(iii) a person in relation to the assessment of any compensation or consideration under the Banking (Special Provisions) Act 2008(**c**) or the Banking Act 2009(**d**).

Selection of a provider by co-defendants

13.—(1) Subject to paragraph (2), in relation to any criminal proceedings involving co-defendants, the right of an individual conferred by section 27(4) of the Act does not include the right to select a provider who is not also instructed by the individual's co-defendant (or by one of the individual's co-defendants, if there are more than one) unless the relevant court or the Director determines that—

(a) there is a conflict of interest between the individual and that co-defendant; or

(b) there is likely to be a conflict of interest between the individual and that co-defendant.

(2) Paragraph (1) does not apply where the provider selected by the individual is an advocate.

(3) In this regulation "co-defendants" means defendants whose cases are to be heard together.

Change of provider

14.—(1) Subject to paragraph (2), where an individual has selected a provider in criminal proceedings, the right conferred by section 27(4) of the Act does not include a right to select a provider in place of the original provider.

(2) The relevant court may determine that the individual can select a provider in place of the original provider in the circumstances set out in paragraphs (3) or (4).

(a) Section 27(10) of the Act provides that the circumstances which may be prescribed in regulations made under section 27 include the making of a determination by a prescribed person.

(b) Under section 2(1) of the Act the Lord Chancellor may make such arrangements as the Lord Chancellor considers appropriate for the purposes of carrying out the Lord Chancellor's functions under Part 1 of the Act.

(**c**) 2008 c. 2.

(**d**) 2009 c. 1.

(3) The circumstances are that the relevant court determines that—

(a) there has been a breakdown in the relationship between the individual and the original provider such that effective representation can no longer be provided by the original provider; or

(b) there is some other compelling reason why effective representation can no longer be provided by the original provider.

(4) The circumstances are that the relevant court determines that—

(a) the original provider—

(i) considers there to be a duty to withdraw from the case in accordance with the provider's professional rules of conduct; or

(ii) is no longer able to represent the individual through circumstances outside the provider's control; and

(b) the original provider has supplied the relevant court with details as to—

(i) the nature of any such duty to withdraw from the case; or

(ii) the particular circumstances that render the provider unable to represent the individual.

Choice of provider following withdrawal of a determination

15.—(1) Paragraph (2) applies where, in relation to an individual—

(a) a determination is withdrawn in accordance with regulation 26 of the General Regulations or regulation 9 of these Regulations; and

(b) a subsequent determination under section 16 of the Act that the individual qualifies for representation is made in respect of the same proceedings.

(2) Subject to paragraph (3), the right of an individual conferred by section 27(4) of the Act does not include a right to select a provider other than the provider named in the original representation order.

(3) The relevant court may determine that the individual can select a provider other than the provider named in the original representation order if that court determines that there are good reasons why a different provider should be selected.

Criminal proceedings before a magistrates' court

16.—(1) Subject to paragraph (2), in relation to any criminal proceedings before a magistrates' court, the right of an individual conferred by section 27(4) of the Act does not include a right to select an advocate.

(2) The relevant court may determine that the individual can select an advocate if—

(a) the proceedings relate to an extradition hearing under the Extradition Act 2003(**a**) or an indictable offence; and

(b) the relevant court determines that because there are circumstances which make the proceedings unusually grave or difficult, representation by an advocate would be desirable.

Criminal proceedings before a magistrates' court: Queen's Counsel or more than one advocate

17.—(1) Subject to paragraph (2), where an individual is entitled to select an advocate in accordance with regulation 16, the right of an individual conferred by section 27(4) of the Act does not include a right to select a Queen's Counsel or more than one advocate.

(**a**) 2003 c. 41.

(2) The relevant court may determine that the individual can select a Queen's Counsel or more than one advocate if the individual is—

(a) the subject of an extradition hearing under the Extradition Act 2003; and

(b) the relevant court determines that the individual could not be adequately represented except by a Queen's Counsel or more than one advocate.

Criminal proceedings other than before a magistrates' court

18.—(1) Subject to paragraphs (2) to (6), in relation to any criminal proceedings that are not before a magistrates' court, the right of an individual conferred by section 27(4) of the Act does not include a right to select a Queen's Counsel or more than one advocate.

(2) The relevant court may determine that an individual can select a Queen's Counsel if that individual's case involves substantial novel or complex issues of law or fact which could not be adequately presented except by a Queen's Counsel, and either—

(a) the exceptional condition is met; or

(b) the counsel condition is met.

(3) The relevant court may determine that an individual can select two junior advocates if that individual's case involves substantial novel or complex issues of law or fact which could not be adequately presented by a single advocate, including a Queen's Counsel alone, and either—

(a) the exceptional condition is met; or

(b) the prosecution condition is met.

(4) The relevant court may determine that an individual can select a Queen's Counsel and a junior advocate if that individual's case involves substantial novel or complex issues of law or fact which could not be adequately presented except by a Queen's Counsel assisted by a junior advocate and either—

(a) the exceptional condition is met; or

(b) the counsel condition and the prosecution condition are met.

(5) The relevant court may determine that an individual can select three advocates if the proceedings relate to a prosecution brought by the Serious Fraud Office and the relevant court determines that three advocates are required to represent the individual.

(6) If the proceedings described in paragraph (5) are in the Crown Court, that court must also determine that the individual's case involves substantial novel or complex issues of law or fact which could not be adequately presented by two junior advocates, or by a Queen's Counsel assisted by a junior advocate, and either—

(a) the exceptional condition is met; or

(b) the prosecution condition is met.

(7) In this regulation—

"the counsel condition" means, in relation to particular criminal proceedings, that a Queen's Counsel or senior Treasury Counsel has been instructed on behalf of the prosecution;

"the exceptional condition" means, in relation to particular criminal proceedings, that the individual's case is exceptional compared with the generality of cases involving similar offences;

"the prosecution condition" means, in relation to particular criminal proceedings, any of the following circumstances—

(a) two or more advocates have been instructed on behalf of the prosecution;

(b) the number of prosecution witnesses exceeds 80;

(c) the number of pages of prosecution evidence exceeds 1000; and

"prosecution evidence" means all witness statements, documentary and pictorial exhibits and records of interview with the individual and with any other defendants which form part of the

committal or served prosecution documents or are included in any notice of additional evidence.

Judges sitting in the relevant court

19. A determination that an individual is entitled to select a Queen's Counsel or more than one advocate under regulation 18 may only be made by the following judges sitting in the relevant court—

(a) in the course of a trial or a preliminary hearing, pre-trial review or plea and directions hearing, the judge presiding at that trial or hearing;

(b) where the proceedings are in the Crown Court, by a High Court judge, the resident judge of the Crown Court or (in the absence of the resident judge) a judge nominated for that purpose by the presiding judge of the circuit; or

(c) where the proceedings are in the Court of Appeal, by the Registrar of Criminal Appeals, a High Court judge or a judge of the Court of Appeal.

Prohibition on the selection of more than one Queen's Counsel

20. Nothing in regulation 18 permits an individual to select more than one Queen's Counsel.

Written opinions

21. For the purposes of making a determination under regulation 18, the relevant court may require from any advocate already assigned to the individual a written opinion on the representation needed to adequately present the case.

Determinations by the Director in certain cases in the Crown Court

22.—(1) The Director may, upon the committal, transfer or sending for trial of an individual, determine that the individual can select a Queen's Counsel without a junior advocate if the proceedings are a trial for murder.

(2) The Director may, upon receipt of a notice of transfer of an individual's case under section 4 of the Criminal Justice Act 1987(**a**), determine that the individual can select a Queen's Counsel with one junior advocate if the prosecution is brought by the Serious Fraud Office.

Noting juniors

23.—(1) The right of an individual conferred by section 27(4) of the Act does not include a right to select—

(a) two junior advocates, unless the relevant court determines that the individual could not be adequately represented by a junior advocate and a noting junior;

(b) a Queen's Counsel assisted by a junior advocate, unless the relevant court determines that the individual could not be adequately represented by a Queen's Counsel assisted by a noting junior;

(c) three junior advocates, unless the relevant court determines that the individual could not be adequately represented by two junior advocates and a noting junior;

(d) two junior advocates and a noting junior, unless the relevant court determines that the individual could not be adequately represented by a junior advocate and two noting juniors;

(**a**) 1987 c. 38. Section 4 has been repealed by Part 4 of Schedule 37 to the Criminal Justice Act 2003 (c. 44). The repeal is in force for specified purposes, in specified areas and is subject to savings, as set out in S.I. 2012/1320 and S.I. 2012/2574, and is otherwise not yet in force.

(e) a Queen's Counsel assisted by two junior advocates, unless the relevant court determines that the individual could not be adequately represented by a Queen's Counsel assisted by a junior advocate and a noting junior; or

(f) a Queen's Counsel assisted by a junior advocate and a noting junior, unless the relevant court determines that the individual could not be adequately represented by a Queen's Counsel assisted by two noting juniors.

(2) In this regulation "noting junior" means a junior advocate whose instructions include (but are not limited to) taking a note of the proceedings.

Legal persons

24.—(1) This Part applies to legal persons(**a**) subject to the modifications in paragraphs (2) and (3).

(2) For "an individual" substitute "a legal person".

(3) For "the individual" substitute "the legal person".

Signed by authority of the Lord Chancellor

Minister of State
Ministry of Justice

Date

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 ("the Regulations") make provision for determinations by a court under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10) ("the Act") in relation to whether an individual qualifies for criminal legal aid, and in relation to the right under section 27(4) of the Act of an individual who qualifies for legal aid to select a representative of their own choice.

Part 2 of the Regulations makes provision in relation to the power of the Crown Court, High Court and Court of Appeal to make a determination under section 16 of the Act as to whether an individual qualifies for representation for criminal proceedings. Part 2 also makes provision about the form and content of applications for a determination, the requirements placed on courts in making such determinations and about the withdrawal of a determination.

Part 3 of the Regulations makes provision about the right of an individual under section 27(4) of the Act to select a representative of their own choice. Regulation 11 makes general provision about when a relevant court may make a determination under Part 3.

Regulations 12 to 15 make provision in relation to the selection of a provider. Regulation 12 specifies the types of provider (persons who have entered into arrangements with the Lord Chancellor to provide legal aid under Part 1 of the Act) that an individual may select to represent them in criminal proceedings. Regulation 13 requires co-defendants to select the same provider unless there is, or is likely to be, a conflict of interest. Regulation 14 specifies the circumstances in which an individual may change providers. Regulation 15 provides that where an individual has a determination withdrawn and there is a subsequent determination in respect of the same

(a) Paragraph 9(1) of Schedule 3 to the Act (legal aid for legal persons) provides that section 27 of the Act (choice of provider of services) applies in relation to the provision of services to a legal person, as it applies in relation to the provision of services to an individual.

proceedings, the individual must select the same provider unless the relevant court considers that there are good reasons not to do so.

Regulations 16 to 23 make provision in relation to the selection of advocates. Regulations 16 and 17 make general provision that an individual in criminal proceedings before the magistrates' court may not select an advocate, but provide that in certain specified circumstances a Queen's Counsel or more than one advocate may be selected by the individual. Regulation 18 makes general provision that an individual in criminal proceedings before a court other than the magistrate's court may only select a single junior advocate, but provides that in specified circumstances the relevant court may permit a Queen's Counsel or more than one advocate to be selected by the individual.

Regulation 19 specifies which judges sitting in the relevant court may permit an individual to select a Queen's Counsel or more than one advocate. Regulation 20 provides that an individual may not in any circumstances select more than one Queen's Counsel. Regulation 21 provides that in determining whether an individual should be able to select a Queen's Counsel or more than one advocate, the relevant court may require a written opinion about appropriate representation from an advocate already assigned to the case. Regulation 22 provides that in certain limited circumstances the Director may permit an individual to select a Queen's Counsel or a Queen's Counsel with one junior advocate. Regulation 23 provides that individuals may not select junior advocates if they can be adequately represented by noting juniors.

Regulation 24 applies Part 3 to legal persons subject to the modifications specified in that regulation.

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