EXPLANATORY MEMORANDUM TO

THE CRIMINAL LEGAL AID (DETERMINATIONS BY A COURT AND CHOICE OF REPRESENTATIVE) 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 Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 make provision for the circumstances under which a Court may make a determination that an individual qualifies for criminal legal aid and limits in specified circumstances the right, under section 27(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the Act"), of a person who qualifies for legal aid to select a representative of their own choice in criminal 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 Part 1 of the Act. These instruments will be laid in time to come into force on 1 April 2013, and should be considered alongside the Criminal Legal Aid (General) Regulations 2013.

4.2 These Regulations are made under sections 19 and 27 of the Act.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Minister of State for Justice, Lord McNally has made the following statement regarding Human Rights:

In my view the provisions of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 are compatible with the Convention Rights.

7. Policy background

7.1 The Act gives effect to the Government's policy position on Legal Aid. The Government considers that those who are accused of criminal offences should be able to benefit from publicly funded legal assistance when they cannot afford to pay for their own representation, if the interests of justice require it. Therefore the policy intention for criminal legal aid is unchanged from that set out in the Access to Justice Act 1999 ("AJA 1999"). These regulations substantially replicate the effect of the secondary legislation made under the AJA 1999.

7.2 The framework outlined in these Regulations, and the Criminal Legal Aid (General) Regulations 2013, differs from that under the AJA 1999 in so far as the default position under the AJA 1999 was that the court had the power to grant legal aid unless regulations specified otherwise. Since implementation of the Criminal Defence Service (General)(No.2) Regulations 2001 the circumstances in which a court may grant representation have been gradually reduced due to the roll-out of means testing for magistrates' courts and the Crown Court. The responsibility has passed to the Legal Service Commission, although this is largely delegated to Her Majesty's Courts and Tribunals Service under a service level agreement. Given this shift, the default position under the Act is that the Director of Legal Aid Casework has the power to grant legal aid unless regulations specify otherwise. These regulations aim to mirror the Criminal Defence Service (General)(No.2) Regulations 2001 in effect and should be considered alongside The Criminal Legal Aid (General) Regulations 2012 which set out the circumstances in which determinations are made by the Director and not the court.

7.3 Part 2 of the Regulations prescribes the manner in which applications should be made to the Court: orally to the Crown court and orally or in writing to the High Court and Court of Appeal. Applications may only be made orally to the Crown Court due to the urgency of the proceedings prescribed in Regulation 6; the same considerations regarding urgency do not apply to applications made to the High Court or Court of Appeal. There are no circumstances in which a magistrates' court may make a determination as all such determinations are made by the Director. The Crown Court is able to make determinations in limited circumstances where there is a need for urgency. In all other circumstances the determination would be made by the Director. The High Court and Court of Appeal may also make a determination where an individual wishes to apply to the Supreme Court.

7.4 Part 3 makes provision that 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 in criminal proceedings is limited in specified circumstances. As with Part 2, these regulations aim to mirror the effect of the current regulations, which can be found in Part IV of Criminal Defence Service (General)(No.2) Regulations. The policy aim behind both the current and the new regulations is ensuring that publicly funded defendants in criminal proceedings are able to select representation appropriate to their case, but no more than that.

7.5 The regulations therefore specify the types of provider an individual may select to represent them in criminal proceedings and make general provision that individuals

may not change providers once they have selected one, must select the same provider as their co-defendants, and must choose the same provider as was previously selected following withdrawal of a determination. The regulations also set out exceptions to these general provisions, namely the circumstances where the court may permit an individual to select a different provider.

7.6 In relation to advocates, the regulations generally provide that individuals may not select an advocate in proceedings before a magistrates' court and set out circumstances where the court may permit an individual to select an advocate in the magistrates' court. The regulations also generally provide that individuals may only select a provider and a single junior advocate in proceedings in the Crown Court and above and set out circumstances where the court (or in limited circumstances, the Director of Legal Aid Casework) may permit an individual to select a Queen's Counsel or more than one advocate. These provisions allow the selection of a Queen's Counsel or more than one advocate in the same circumstances as under the Criminal Defence Service (General)(No2) Regulations 2001.

7.7 Regulation 24 applies Part 3 of these Regulations to legal persons as well as individuals.

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. The Government concluded that: "*those who are accused of criminal offences should be able to benefit from publicly funded legal assistance when they cannot afford to pay for their own representation, if the interests of justice require it. We do not therefore consider that it is appropriate to restrict further legal aid in criminal cases.*"

8.2 The proposals consulted on as part of this exercise were therefore largely aimed at reforming civil legal aid. The only reform proposals in respect of criminal legal aid were changes to remuneration, which were implemented in October 2011. A detailed Government response to this consultation exercise is available on the MoJ Website at www.justice.gov.uk/consultations/legal-aid-reform.

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 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/bills-and-acts/acts/legal-aid-

and-sentencing-act/laspo-background-information. An Impact Assessment has not been prepared specifically for this instrument.

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

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

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

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.