EXPLANATORY MEMORANDUM TO

THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012 (AMENDMENT OF SCHEDULE 1) (ADVOCACY EXCEPTIONS) ORDER 2014

2014 No. [XXXX]

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 This Order amends Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPO") to enable advocacy funded by civil legal aid in certain proceedings. It adds to the list of proceedings for which advocacy is available in the magistrates' court to include:

- injunctions under Part 4 of the Policing and Crime Act 2009 (PCA) (injunctions to prevent gang-related violence for under 18s) and;
- injunctions under Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014 (ASBCPA).

2.2 This Order also adds to the list of proceedings for which advocacy is available in the Crown Court the following proceedings on appeal from the Youth Court:

- where a parenting order has been made under s8(1)(b) of the Crime and Disorder Act 1998 (CDA) following the award of an injunction under Section 1 of the ASBCPA;
- gang-related injunctions under Part 4 of the PCA; and
- injunctions under Part 1 of the ASBCPA.

2.3 This Order also makes provision to ensure that advocacy funded by civil legal aid is available for Special Educational Needs matters in the Upper Tribunal under Part 3 of the Children and Families Act 2014 (CFA) (children and young people in England with special educational needs or disabilities).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This Order supersedes the draft statutory instrument entitled 'The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1: injunctions to prevent gang-related violence) Order 2014', which was laid on the 9th June 2014 and subsequently approved by the House of Commons on the 8th July 2014 and the House of Lords on the 9th July 2014. This Order also replicates substantively the provision contained in Paragraph 49(3) of Schedule 11 to the Anti-social Behaviour, Crime and Policing Act

2014, which has been rendered defective by subsequent legislation. Further detail is set out below at paragraphs 4.2 and 7.6, respectively.

4. Legislative Context

4.1 Part 1 of Schedule 1 to LASPO sets out the matters for which civil legal aid is to be made available (the scope of the civil legal aid scheme), subject to means and merits tests. This is subject to the exclusion and exceptions in respect of advocacy in Part 3 of Schedule 1.

4.2 Part 1 of the ASBCPA introduces a new form of injunction which replaces Anti-Social Behaviour Orders (ASBOs) and Anti-Social Behaviour Injunctions (ASBIs) under the CDA and paragraph 49(2) of Schedule 11 ASBCPA brings proceedings in respect of such injunctions within scope of Part 1 of Schedule 1 to LASPO. This Order adds to the list of advocacy exceptions set out in Part 3 of Schedule 1 to LASPO to include proceedings in respect of the new injunctions in the magistrates' court and Crown Court. Although ASBCPA itself contains an amendment to paragraph 7 of Part 3 of Schedule 1 to LASPO in relation to proceedings in the magistrates' court (paragraph 49(3) of Schedule 11 ASBCPA), that amendment has been superseded by the amendment to paragraph 7 of Part 3 by the Crime and Courts Act 2013 (Family Court: Consequential Provision) Order 2014 (S.I. 2014/605) and will not be commenced. It is therefore accomplished by means of this Order instead.

4.3 The ASBCPA also amends the CDA to provide for parenting orders under section 8(1)(b) of that Act following the grant of an injunction under Section 1 of the ASBCPA. Legal services provided in relation to those proceedings will come within scope of civil legal services for the purposes of legal aid pursuant to paragraph 1(1)(e) of Part 1 of Schedule 1 LASPO, including advocacy in the magistrates' court pursuant to paragraph 7(a) of Part 3 of Schedule 1 (as amended by S.I. 2014/605). This Order adds to the list of advocacy exceptions set out in Part 3 proceedings the appeal of such parenting orders in the Crown Court.

4.4 Section 18 of the Crime and Court Act 2013 (CCA) amends Part 4 of the Policing and Crime Act 2009. The effect of this amendment will be that proceedings relating to gang-related injunctions which concern persons under the age of 18 will be heard in the Youth Court (which is a specialist magistrates' court). The appeal route from the Youth Court is to the Crown Court under Section 46B of the PCA (inserted by paragraph 2 of Schedule 12 to the CCA). This Order amends Part 3 of Schedule 1 to LASPO to provide for civil legal aid for advocacy in relation to gang-related injunctions and related appeals.

4.5 Part 3 of the Children and Families Act 2014 (CFA) reforms the present statutory framework for identifying children and young people with special educational needs, assessing their needs and making provision for them. Paragraph 96 of Schedule 3 to the CFA amends paragraph 2 of Part 1 of

Schedule 1 to LASPO to bring within scope of civil legal services proceedings under the CFA. This Order adds to the exceptions set out in Part 3 of Schedule 1 to LASPO to provide for civil legal aid to be available for advocacy in the Upper Tribunal for proceedings under Part 3 of the CFA (children and young people in England with special educational needs or disabilities).

4.6 Part 3 of the CFA is already in force. It is currently anticipated that Part 1 ASBCPA will be brought into force early next year and section 18 CCA next spring. This draft Order amends LASPO in advance of the commencement of the proceedings introduced by CCA 2013 and ASBCPA 2014.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales only.

6. European Convention on Human Rights

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

In my view the provisions in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) (Advocacy Exceptions) Order 2014 are compatible with the European Convention on Human Rights (ECHR).

7. Policy background

Advocacy in the Youth and Crown Court

7.1 ASBOs and ASBIs will be replaced by Injunctions under Part 1 of the ASBCPA. Legal aid for advocacy in respect of applications for ASBOs under the CDA 1998 is provided under the criminal legal aid scheme currently but ASBCPA brings all Part 1 injunctions within scope of the civil legal aid scheme. For under 18s, Part 1 injunctions, along with Parenting Orders made in respect of a youth subject to such an injunction, will be heard in a Youth Court and the route of appeal from the Youth Court is to the Crown Court.

7.2 The policy intention is to include advocacy within the overall scope of the civil legal services that are to be made available for Part 1 injunctions. Schedule 1 to LASPO sets out the matters on which civil legal aid is available (the scope of the civil legal aid scheme). This is subject to the exclusions at Parts 2 and 3 of the Schedule (certain services and advocacy respectively). Because of the general exclusion of advocacy except for specified proceedings, it is necessary to add the relevant venues to the exceptions in Part 3 of Schedule 1, which will expand the scope of civil legal aid to include advocacy in these proceedings.

7.3 Section 18 of the CCA will amend Part 4 of the PCA, with the effect of proceedings relating to gang-related injunctions which concern persons under

the age of 18 being heard in the Youth Court and not in the County Court, which is where they are heard currently. The appeal route from the Youth Court will be to the Crown Court, as described above. The policy intention is to enable civil legal aid for advocacy for such proceedings to remain available (subject to the means and merits tests) despite the change in venue. It is therefore necessary to add them to the list of exceptions for advocacy in the magistrates' and Crown courts in Part 3 of Schedule 1 to LASPO to reflect the change in venue for these proceedings.

7.4 Part 1 injunctions (and related Parenting Orders) under ASBCPA are substantively the same as ASBO/ASBI's for which legal aid (including advocacy) is currently available. We therefore consider that legal aid for the new injunctions (including related Parenting Orders) should be made available. That intention is achieved in part by the amendment made by ASBCPA itself (and paragraph 1(1)(e) of Schedule 1 to LASPO in respect of Parenting Orders) however, the amendments made by ASBCPA did not include advocacy in the Crown Court (and the amendment in respect of advocacy in the magistrates' court is defective as noted above); this SI therefore enables both.

7.5 The change of venue to a Youth Court for under-18s in relation to gang injunctions reflects the Government's view that a Youth Court is a more suitable place for proceedings to be conducted which involve a child. This amendment to Part 3 of Schedule 1 to LASPO allows for legal aid in relation to advocacy in the Youth and Crown Courts.

7.6 A draft Statutory Instrument entitled 'The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1: Injunctions to Prevent Gang-Related Violence) Order 2014' to ensure the availability of civil legal aid for advocacy relating to proceedings in a Youth Court for injunctions to prevent gang-related violence under Part 4 of the PCA was debated and approved by both Houses in July 2014. However, subsequent to the approval of this order, it became apparent that the instrument was defective. In particular, the order sought to amend paragraph 7 of Part 3 of Schedule 1 to LASPO, but failed to take account of the amendment of that paragraph by 'The Crime and Courts Act 2013 (Family Court: Consequential Provision) Order 2014' (S.I. 2014/605), which came into force on 22nd April 2014 (upon commencement of section 17(3) of the Crime and Courts Act 2013, pursuant to article 1 of S.I. 2014/605 and article 2(a) of S.I. 2014/954). As a result, the Lord Chancellor did not make the draft Order. This Order supersedes that defective instrument and replicates the substantive provisions made within it. This Order is being issued free of charge to all known recipients of that defective draft statutory instrument. The Ministry of Justice has introduced internal mechanisms to avoid similar difficulties arising in the future.

Advocacy for Special Educational Needs (SEN) proceedings in the Upper Tribunal

7.7 Part 3 of the CFA came into force on the 1st September 2014. Paragraph 96 of Schedule 3 to the CFA makes amendments to paragraph 2 of

Part 1 of Schedule 1 to LASPO to allow for the funding of civil legal aid services in SEN matters. However. as set out above, Parts 2 and 3 of Schedule 1 allow for advocacy only in certain circumstances and the amendments made by the CFA do not allow for the availability of advocacy for SEN proceedings in the Upper Tribunal (funded by civil legal aid).

7.8 The Government considers it appropriate that legal aid should be available for advocacy in the new SEN matters under the CFA before the Upper Tribunal as these proceedings are aimed at resolving disputes about state assistance that will enable persons with disabilities to live independent and fulfilled lives. Advocacy is available already for similar proceedings arising under Part 4 of the Education Act 1996 and the Government therefore considers that it should be available for these proceedings. Therefore in order that advocacy for such matters is in scope, an Order under section 9 of LASPO is required to amend Part 3 of Schedule 1.

8. Consultation outcome

8.1 We have not consulted on the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) (Advocacy Exceptions) Order 2014. The Order makes minor changes to LASPO to maintain the current availability of civil legal aid for advocacy (where the venue for proceedings has changed) or to enable it in respect of proceedings under the ASBCPA which replace ASBOs and ASBIs (where assistance was previously available under the legal aid scheme) and the new SEN proceedings under the CFA.

9. Guidance

9.1 Guidance is not being prepared specifically for this instrument on the basis that this instrument will not implement a change in policy, but is designed to maintain the status quo for access to civil legal aid for certain types of advocacy (where the venue for proceedings has changed) or to enable it in respect of replacement proceedings (where assistance was previously provided under the legal aid scheme) or new proceedings similar to those in which assistance is already provided.

10. Impact

10.1 The impact on business, charities or voluntary bodies from this instrument is expected to be minimal. The instrument ensures that civil legal aid will:

- remain available for advocacy in proceedings in respect of injunctions to prevent gang-related violence;
- be available for proceedings relating to injunctions under part 1 of the Anti-social Behaviour Crime and Policing Act 2014, including where a parenting order has been made under s8(1)(b) CDA following the award of an injunction under section 1 ASBCPA; and

- be available in proceedings held at the Upper Tribunal in SEN matters under the CFA.

10.2 The impact on the public sector from this instrument is expected to be minimal.

10.3 An Impact Assessment has not been prepared for this instrument as it makes only minor changes to the scope of civil legal aid under LASPO.

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.

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

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

13.1 Chris Rant at the Ministry of Justice (Tel: 020 3334 6095 or email chris.rant1@justice.gsi.gov.uk) can answer any queries regarding the instrument.