EXPLANATORY MEMORANDUM TO

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

2014 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

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 introduce a residence test for individuals applying for civil legal aid. An individual will need to satisfy the residence test in order to access civil legal aid services within the scope of the civil legal aid scheme (as described in Part 1 of Schedule 1 to LASPO), subject to certain exceptions.

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

3.1 The Committee will note the report of the Joint Committee on Human Rights on *The implications for access to justice of the Government's proposals to reform legal aid*, published on 11 December 2013.[1] In that report, the Joint Committee on Human Rights considered whether the residence test could be implemented through secondary legislation. As set out in the Government response to that report,[2] the Government believes that the power exists under LASPO to provide for a residence test for civil legal aid via secondary legislation. Section 9(2) of LASPO confers a power on the Lord Chancellor to add to, vary or omit services in Part 1 of Schedule 1 by secondary legislation. Further, section 41 of LASPO makes clear that secondary legislation may make different provision for different cases and may make provision by reference to services provided for a particular class of individual. The Government therefore considers that LASPO enables provision to be made in secondary legislation that certain services listed in Part 1 of Schedule 1 can be made available to certain classes of individual and not others.

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[1] Available at: http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/100/100.pdf

[2] Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285666/8821-government-response-to-jchr.pdf

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*.

4.2 Subject to Parliamentary approval of this Order, a further set of regulations will be brought forward to amend the Civil Legal Aid (Procedure) Regulations 2012 (S.I. 2012/3098) to make provision for some of the evidence requirements for the residence test for civil legal aid. It is intended that the amending regulations will be made and laid in time to come into force on 4 August 2014. A policy statement is attached to this Memorandum summarising the intended evidence requirements for the test, including those that we intend to prescribe in the amendments to the Civil Legal Aid (Procedure) Regulations 2012.

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, 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) Order 2014 are compatible with Convention Rights.

7. Policy background

7.1 Following on from the reforms set out in the 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 In the consultation *Transforming Legal Aid*,[3] the Government set out its belief that individuals should in principle have a strong connection to the UK in order to benefit from the civil legal aid scheme. As with any other public service, legal aid must be fair to the people who use it but also fair for the taxpayer who pays for it. The Government therefore proposed to introduce a residence test for applicants for civil legal aid. The test would comprise two limbs. First the individual would need to be lawfully resident in the UK, Crown Dependencies or British overseas territories at the time they apply for civil legal aid and secondly, to have been lawfully resident there for a continuous period of 12 months in the past. The

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

Government considers that the Crown Dependencies and British overseas territories have a strong connection to the UK in view of their close association and historical links, as reflected through a shared head of state and the UK having responsibility for defence. The Government proposed that serving members of the Armed Forces and their immediate families would not be required to satisfy the residence test, recognising that such people will often be posted overseas but are acting in accordance with their duties and in defence of the UK and therefore clearly maintain a strong connection to the UK, even when they are not resident in the UK. The Government also proposed that asylum seekers would not be required to satisfy the test, recognising that by virtue of their circumstances this group tends to be amongst the most vulnerable in society. The Government also confirmed that legal aid would continue to be available where necessary to comply with obligations under EU or international law set out in Schedule 1 to LASPO.

7.3 In response to the consultation, respondents raised concerns regarding the proposal and the potential impact it would have on access to the courts, particularly for vulnerable groups of people, such as victims of trafficking and victims of domestic violence.

7.4 In the Government response to this consultation, *Transforming Legal Aid: Next Steps*, the Government confirmed that it continued to believe that individuals should in principle have a strong connection to the UK in order to benefit from the civil legal aid scheme and therefore set out its intention to implement the residence test for civil legal aid. However, having carefully considered consultation responses, it proposed a number of modifications to the original proposal. In particular:

- Applicants for civil legal aid on certain matters of law (as set out in Schedule 1 to LASPO) would not be required to meet the residence test. These broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children, as follows:
    - Detention cases (paragraph 5, 9[4], 20, 25, 26 and 27 (and challenges to the lawfulness of detention by way of judicial review under paragraph 19) of Part 1 of Schedule 1 to LASPO);
    - Victims of trafficking (paragraph 32 of Part 1 of Schedule 1 to LASPO), victims of domestic violence and forced marriage (paragraphs 11, 12, 13, 16, 28 and 29 of Part 1 of Schedule 1 to LASPO);

[4] As set out in the Government's response to the report of the Joint Committee on Human Rights, *The implications for access to justice of the Government's proposals to reform legal aid*, there would also be an exception for deprivation of liberty cases falling under paragraph 9 of Part 1 of Schedule 1 to LASPO.

- Protection of children cases (paragraphs 1, 3[5], 9[6], 10, 15 and 23 of Part 1 of Schedule 1 to LASPO); and

- Special Immigration Appeals Commission (paragraph 24 of Part 1 of Schedule 1 to LASPO).

- Exceptions would be made for certain judicial review cases for individuals to continue to access legal aid to judicially review certifications by the Home Office under sections 94 and 96 of the Nationality, Immigration and Asylum Act 2002.

- Children under 12 months old would not be required to satisfy the requirement to have a continuous period of at least 12 months previous lawful residence; they only need to be lawfully resident in the UK, Crown Dependencies or British overseas territories at the time of applying for civil legal aid in order to satisfy the residence test.

- Breaks of up to 30 days (whether taken as a single break or several shorter breaks) would not breach the requirement for 12 months of previous residence to be continuous.

7.5 Following publication of *Transforming Legal Aid: Next Steps*, the Joint Committee on Human Rights published their report *The implications for access to justice of the Government's proposals to reform legal aid* on 11 December 2013. This report made a number of recommendations in relation to the proposed residence test for civil legal aid. The Government published its response to this report on 27 February 2014, where it agreed that some further modifications to the proposed residence test (as set out in *Next Steps*) were justified in order to achieve the essential policy aim of targeting legal aid at those with a strong connection to the UK, whilst providing protection for those who are particularly vulnerable. The Government response therefore set out a number of additional exceptions and modifications to the residence test, as follows:

- An asylum seeker who is successful in their asylum claim will not be required to satisfy the residence test until 12 months after their claim for asylum was made, or until their claim for asylum was determined (whichever occurs later). The effect will be to ensure that an asylum seeker who is successful in their asylum claim would be either exempt from the residence test, or able to accrue sufficient previous lawful residence to satisfy the second limb of the test for any civil legal aid applications;

[5] Exceptions to the residence test for cases under paragraph 3 of Part 1 of Schedule 1 to LASPO would only apply for cases where the abuse took place at a time when the individual was a child.
[6] This exception to the residence test for cases under paragraph 9 of Part 1 of Schedule 1 to LASPO would only apply to cases under the inherent jurisdiction of the High Court in relation to children.

- Similarly, other categories of refugee who never make a claim for asylum in the UK, but are resettled or transferred here would not be required to satisfy the residence test until 12 months after they arrive in the country (after which point they would have been able to accrue sufficient lawful residence to satisfy the test);

- Alongside other exceptions for protection of children cases previously set out in *Next Steps* there will be a further exception for sections 17 and 20 of the Children Act 1989 cases falling within paragraph 6 of Part 1 of Schedule 1 to LASPO. In addition, we will make exceptions for sections 22A, 22B, 22C, 23, 23B, 23C, 24, 24A and 24B of that Act cases falling within paragraph 6 of Part 1 of Schedule 1 to LASPO.

7.6 Following the Government response in *Transforming Legal Aid: Next Steps* and the Government's response to the report of the Joint Committee on Human Rights, this instrument therefore amends Schedule 1 to LASPO to introduce a residence test for civil legal aid.

7.7 Article 2 of the Order amends Part 2 of Schedule 1 to LASPO to introduce a new general exclusion for services provided to an individual who does not satisfy the residence test (new paragraph 19 of Part 2 of Schedule 1). This means that, in general, services described in Part 1 of Schedule 1 will only be available for an individual who can satisfy the residence test. To satisfy the residence test, the individual must be: (i) lawfully resident in the United Kingdom, the Channel Islands, the Isle of Man or a British overseas territory at the time of applying for civil legal aid; and (ii) must meet the requirements set out at sub-paragraphs (3), (4) or (5) of new paragraph 19. The sub-paragraph (3) requirement is that the individual is under 12 months old on the day of application for civil legal services. The sub-paragraph (4) requirement is that, on the day of application for civil legal services, the individual has been lawfully resident in the United Kingdom, the Channel Islands, the Isle of Man or a British overseas territory for a period of 12 consecutive months at any time in the past and has not been absent for more than 30 days in that 12 month period.

7.8 Sub-paragraph (5) has two requirements. The first is that, on the day of application for civil legal services 12 months or more have elapsed since the individual made a claim for asylum which has resulted in them being granted leave to enter or remain in the UK based on the rights described in paragraph 30(1) of Part 1 of Schedule 1, and that there has been a period of 12 consecutive months since their claim for asylum during which they have not been absent for more than 30 days. This ensures that the 12 month period in the case of an asylum seeker who is successful in their asylum claim begins from the date they submitted their asylum claim, rather than the date when that claim for asylum is accepted. The second requirement under sub-paragraph (5) is that the individual continues to have leave to enter or remain in the UK based on the rights described in paragraph 30(1) of Part 1 of Schedule 1 when civil legal services are provided. This ensures that in

circumstances where an individual's grant of leave to enter or remain in the UK is revoked or curtailed, for example, during the life of a case, civil legal aid funding would cease to be provided.

7.9 New paragraph 19 of Part 2 of Schedule 1 also provides for several exceptions to the general requirement to meet the residence test. In particular, asylum seekers, refugees and members of the armed forces and their immediate families do not need to satisfy the residence test.

7.10 Sub-paragraph (6) provides that asylum seekers (i.e. those who have made a claim for leave to enter, or to remain in, the United Kingdom based on rights described in paragraph 30(1) of Part 1 of Schedule 1 to LASPO) will not be required to satisfy the residence test. In order to benefit from this exception, an individual must have a claim for asylum under consideration on the date of application for civil legal services and either that asylum claim must remain undetermined throughout the time that civil legal services are provided or it must have been granted in the individual's favour (with the effect that the individual has leave to enter or remain in the UK based on the rights described in paragraph 30(1) of Part 1 of Schedule 1 to LASPO). Where an asylum seeker is unsuccessful in their asylum claim and their appeal rights had been rejected, they would no longer benefit from this exception and civil legal aid funding would cease to be provided.

7.11 Sub-paragraph (7) provides that an asylum seeker who is successful in their claim for asylum will not be required to satisfy the residence test for up to 12 months after their claim for asylum was determined in their favour. In order to benefit from this exception, an individual must have leave to enter or remain as a result of a claim for asylum determined in their favour both on the date of application for civil legal services and throughout the time that civil legal services are provided. In circumstances where an individual's grant of leave to enter or remain in the UK is revoked or curtailed, for example, during the life of a case, civil legal aid funding would cease to be provided.

7.12 Sub-paragraph (8) provides that a resettled refugee (as defined at sub-paragraph (12)) will not be required to satisfy the residence test for up to 12 months after they entered the United Kingdom before becoming a resettled refugee. In order to benefit from this exception, an individual must be a resettled refugee both on the date of application for civil legal services and throughout the time that civil legal services are provided. In circumstances where an individual's ceases to hold resettled refugee status during the life of a case, civil legal aid funding would cease to be provided.

7.13 Sub-paragraph (9) provides that an individual who is a member of Her Majesty's United Kingdom forces or part of the immediate family of such a person on the day of application for civil legal services does not need to satisfy the residence test.

7.14 Article 3 of the Order amends certain paragraphs in Part 1 of Schedule 1 to disapply new paragraph 19 of Part 2 of Schedule 1. Where paragraph 19 of Part 2 is disapplied for a paragraph in Part 1, an individual applying for legal aid under that paragraph would not need to satisfy the residence test. For example, article 3(2) of the Order provides that the new exclusion in paragraph 19 of Part 2 does not apply to paragraph 1 of Part 1 of Schedule 1. This means an applicant for civil legal services under paragraph 1 of Part 1, which concerns the care, supervision and protection of children, does not need to satisfy the residence test.

7.15 This instrument also sets out, in Part 3, the transitional provisions that apply to the amendments made by articles 2 and 3 of the instrument. The transitional provisions provide that those amendments will not apply to:

a) applications for civil legal services made before this instrument comes into force;

b) applications for civil legal services made on or after the date on which this instrument comes into force, but which relate to the same case in which services have already been provided to the applicant as a result of an application made before this instrument comes into force (where the further application is for a different form of service which falls within the same variety of work as the earlier form of service);

c) applications for civil legal services made on or after the date on which this instrument comes into force, but which relate to a case in which Licensed Work has already been provided to the applicant as a result of an application made before this instrument comes into force (and the Director has decided that the certificate should cover both sets of proceedings).

7.16 Provision is also made to determine when different forms of application (e.g., for Controlled Work, Licensed Work, emergency representation and telephone applications to the CLA advice line) will have been made before this instrument comes into force. The provision in respect of applications made to the CLA reflects its operating hours (i.e. an application cannot be made after 12.30pm on Saturdays, when the lines close for the weekend).

7.17 As set out in *Transforming Legal Aid: Next Steps,* the civil legal aid residence test would be carried out by the legal aid provider who was dealing with the application for civil legal aid. The provider would need to see the evidence that the client was lawfully resident and had been lawfully resident for 12 months in the past and they would need to retain copies of this evidence on file for audit purposes. A policy statement is attached to this Memorandum summarising the intended evidence requirements for the test. As set out in the Government response to the Joint Committee on Human Rights, there will be some flexibility in the evidential requirements for individuals whose personal circumstances (e.g. age,

mental disability or homelessness) may make it impracticable for evidence to be supplied.

8. Consultation outcome

8.1 The consultation *Transforming Legal Aid: Delivering a more credible and efficient system* was published on 9 April 2013 and closed on 4 June 2013. Around 16,000 responses were received from representative bodies, practitioners 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.

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, including changes made to the residence test proposal, as described above.

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 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument. However, 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 as a result of the residence test and other *Transforming Legal Aid* reforms. This will include guidance to be issued by the Director of Legal Aid Casework (DLAC) setting out examples of forms of evidence for demonstrating a right of lawful residence or that an individual falls into an excepted category of person. The DLAC will also issue guidance setting out a list of documentation which the DLAC considers demonstrates that a person is currently exercising their right to reside and did so for a continuous 12 month period at some time in the past. The Lord Chancellor's Guidance on Civil Legal Aid[7] and the Lord Chancellor's Guidance on Exceptional Funding (Non-Inquests)[8] will also be updated to take account of the residence test.

[7] http://www.justice.gov.uk/downloads/legal-aid/funding-code/lord-chancellors-guidance.pdf
[8] http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf

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*. An updated assessment of potential equality impacts was published following publication of this instrument. 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 In summary, the number of individuals eligible to claim legal aid will reduce as eligibility is restricted by the residence test. There is uncertainty in estimating the impact of introducing a residence test on the volumes of cases. Legal Aid Agency data does not record the residence status of an application for civil legal aid and therefore does not allow a robust estimate of the number of cases impacted by the introduction of a residence test. Individuals who do not already have evidence of lawful residence may have to pay a fee for a copy of documentary evidence to satisfy the test if they do not have easy access to it. Civil Legal Aid providers are likely to experience a fall in demand for their services. Providers would also need to collect evidence that clients meet the residence test and retain copies of this evidence on file for audit purposes.

10.3 The impacts on business have been assessed as part of those impact assessments. There is no impact on 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.

10.4 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. The impact on affected businesses will be the requirement to collect evidence that clients meet the residence test and retain copies of this evidence on file for audit purposes.

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 David Holmes at the Ministry of Justice (Tel: 020 3334 3821 or email david.holmes@justice.gsi.gov.uk) can answer any queries regarding the instrument.