EXPLANATORY MEMORANDUM TO

THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012 (CONSEQUENTIAL, TRANSITIONAL AND SAVING PROVISIONS) (AMENDMENT) REGULATIONS 2013

2013 No. 621

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 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Consequential, Transitional and Saving Provisions) (Amendment) Regulations 2013 ("the Regulations") provide for transitional arrangements in relation to the Civil Legal Aid (Costs) Regulations 2013 ("the Costs Regulations"). They also make a consequential amendment to the Damages-Based Agreements Regulations 2013 ("the DBA 2013 Regulations").

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

3.1 As noted in the Explanatory Memorandum to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Consequential, Transitional and Saving Provisions) Regulations 2013, as these regulations modify the Costs Regulations, they could only be made following the making of those regulations. The Cost Regulations were laid in draft on 21 January and, following approval by the Lords on 5 March and the Commons on 12 March, were immediately made on 13 March. As a result, these Regulations are being made less than 21 days before they are due to come into force on 1st April.

3.2 The need to amend the reference to the Community Legal Service in the DBA Regulations 2013 is explained further below. Unfortunately, the reference to the Community Legal Service (which replicated wording from the earlier Damages-Based Agreements Regulations 2010), was not noticed until after the DBA Regulations 2013, which are subject to affirmative resolution by both Houses, had been laid before Parliament. The Parliamentary debates took place on the 26 February and 11 March this year and, as such, any consequential amendment has had to be delayed until they were made. The consequential amendment will come into force on 1 April 2013 and, therefore, will breach the 21 day rule. The DBA Regulations 2013 operate on the basis that, if any one of the requirements in the regulations are breached, the agreement will be unenforceable. While any challenge to the enforceability of a damages-based agreement entered into on or after 1 April 2013 on the basis that the availability of advice under the

Community Legal Service was not mentioned would be unlikely to succeed, in order to remove any uncertainty as to the effect of regulation 5(2)(c)(i) and to ensure that parties are aware of the information that should now be provided, on balance it was considered appropriate to breach the 21 day rule in this instance.

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 for the Act to come into force on 1 April 2013.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The Act gives effect to the Government's policy position on Legal Aid. The Government believes that legal aid has expanded far beyond its original intentions and is available for a wide range of issues, many of which need not be resolved through the courts. Irrespective of the current economic situation, a wide ranging programme of reform is required to ensure that legal aid is targeted to those who need it most, for the most serious cases in which legal advice and representation is justified.

7.2 Regulation 3 of the Regulations inserts a new regulation 9A into the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Consequential, Transitional and Saving Provisions) Regulations 2013 to make transitional provision in relation to the Costs Regulations. The Cost Regulations make provision for an individual who receives certain lower forms of civil legal services under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the Act") and later receives, in respect of the same proceedings, higher levels of service under the Act to have cost protection applied to both those lower and higher forms of services received. The provision inserted by regulation 3 of the Regulations ensures that the same principle applies where the equivalent lower levels of service are provided under the Access to Justice Act 1999 and the higher levels of civil legal services are provided in the same proceedings, under the Act. The effect is to ensure legal aid recipients are not unfairly disadvantaged from receiving cost protection merely because their case was partly funded under the Access to Justice Act 1999 and partly under the Act. Regulation 3 also makes provision to enable funded services under the Access to Justice Act 1999 to be taken into account for the purpose of determining costs payable by the Lord Chancellor to a non-legally party.

7.3 Regulation 4 amends regulation 5(2)(c)(i) of the DBA Regulations 2013. Regulation 5 of the DBA Regulations specifies the information that a representative must provide before a damages-based agreement is made in an employment matter. In particular, paragraph (2) requires a representative to provide information concerning other methods of pursuing a claim or financing proceedings, including, at paragraph (2)(c)(i), advice under the Community Legal Service. On 1st April 2013, the same date that the DBA Regulations 2013 come into force, Part 1 of the Act (with the exception of section 19(4)) is fully commenced. The Community Legal Service forms part of the scheme under the Access to Justice Act 1999 and is not continued under Part 1 of the Act. Accordingly, the effect of the amendment made by regulation 4 of the Regulations is to substitute a reference to arrangements made for the purposes of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This amendment will not apply to pre-commencement cases (within the meaning of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Consequential, Transitional and Saving Provisions) Regulations 2013).

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. Over 5,000 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.

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. Most changes widened access to legal aid for certain types of case compared to the original proposals, for example an expansion of the criteria to qualify for legal aid in a private family law case involving domestic violence. However, other changes further limited access to legal aid, such as removing funding for certain immigration and asylum judicial reviews where there has been an appeal or judicial review to a tribunal or court on the same issue or a substantially similar issue within a period of one year.

8.3 A detailed Government response to the consultation exercise is available on the MoJ Website at www.justice.gov.uk/consultations/legal-aid-reform.

8.4 We have not consulted on the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Consequential, Transitional and Saving Provisions) (Amendment) Regulations 2013.

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:
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 these Regulations.

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

Joe Parsons at the Ministry of Justice (tel: 020 3334 2979 email: Joe.Parsons@justice.gsi.gov.uk) can answer any queries regarding the instrument.