

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

2013 No. 534

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) Regulations 2013 (“the Regulations”) make transitional arrangements for the treatment of existing legal aid cases. The instrument also makes consequential amendments to secondary legislation.

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

3.1 Transitional provision will be necessary in relation to the Civil Legal Aid (Costs) Regulations 2013 (“the Costs Regulations”). The Costs Regulations are subject to the affirmative resolution procedure and the debate in the House of Commons was on 6th March 2013. However, the motion for approval in the House of Commons is not likely to be until the week of 11th March and the Costs Regulations will be made after that. We therefore intend to amend the Regulations, to make transitional provision in relation to the Costs Regulations, once the Costs Regulations have been approved by both Houses and made. This will involve laying those amending regulations within a period shorter than 21 days before they are due to come into force on 1st April.

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 On 14 September 2012, the Legal Services Commission issued an invitation to tender for contracts to provide face to face civil legal services under the 2013 Standard Civil Contract. The Ministry of Justice made a number of documents available for background information to support the 2013 Standard Civil Contract, including one entitled "Policy statement – transitional arrangements" which is available on the Ministry of Justice website at the following link (document number 12 under MoJ Material):

www.justice.gov.uk/legal-aid/contracts-and-tenders/standard-civilcontract-2013

7.3 That policy statement was in connection with civil legal aid and the Regulations, in so far as they relate to civil legal aid, reflect the policy statement.

7.4 The Regulations make transitional and saving provisions and consequential amendments to secondary legislation, in connection with the replacement of the legal aid scheme under Part 1 of the Access to Justice Act 1999 ("the 1999 Act") by Part 1 of the Act. Part 1 of the Act (with the exception of section 19(4)) is commenced on 1st April 2013 by article 3(a) and (e) to (i) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 6) Order 2013.

7.5 In particular, the Regulations make provision about the treatment of pre-commencement cases, which are defined in regulation 2 of the Regulations (and for which further provision is made in regulations 3 to 5).

7.6 Regulation 6(1) has the effect that, subject to regulation 6(4) and (5) and regulations 7 to 13, Part 1 of the Act does not apply to pre-commencement cases, with the exception of section 38(1) of the 2012 Act (abolition of Legal Services Commission). Instead, Part 1 of the 1999 Act and the Legal Aid Act 1988 and all orders, regulations, guidance, directions or authorisations made or given under them, in so far as they were in force immediately before 1st April 2013, continue to apply to a pre-commencement case, as will any power or duty to make orders or regulations or give guidance, directions or authorisations. Regulation 6(4) and (5) set out provisions repealed or amended by Part 1 of the Act that do apply to pre-commencement cases.

7.7 On 1st April 2013, section 38(1) of the Act is commenced and the Legal Services Commission (“the Commission”) will be abolished. Part 1 of the 1999 Act, which continues to apply to pre-commencement cases, confers powers, duties and other functions on the Commission. In order for Part 1 of the 1999 Act to operate in relation to pre-commencement cases in the absence of the Commission, it is necessary to divide the powers, duties and other functions of the Commission under Part 1 of the 1999 Act between the Director of Legal Aid Casework and the Lord Chancellor. Therefore, regulation 7 makes provision, in relation to pre-commencement cases, about the exercise of powers, duties and other functions of the Commission that remain in force on 1st April 2013 and that were exercisable by the Commission before that date. Regulation 7(1) to (3) makes clear which of those powers, duties or other functions are exercisable after 31st March 2013 in relation to a pre-commencement case by the Director of Legal Aid Casework and which are exercisable by the Lord Chancellor. Regulation 7(1) and (2) relates to those powers, duties and other functions of the Commission under Part 1 of the 1999 Act. Regulation 7(3) relates to those powers, duties and other functions of the Commission in relation to services provided under the Legal Aid Act 1988 (which the Commission provides on the basis of transitional and saving provisions made when the Legal Aid Act 1988 was replaced by Part 1 of the 1999 Act). Regulation 7(4) and (5) allows the Director of Legal Aid Casework and the Lord Chancellor to authorise others to exercise powers, duties or other functions on their behalf and ensures that the delegations conferred by the Commission continue to have effect as such authorisations.

7.8 Regulation 8 modifies certain terms currently used in respect of Part 1 of the 1999 Act to ensure the effective operation of that Part (as modified by these regulations) to pre-commencement cases after 31st March 2013.

7.9 Regulation 9 gives effect to paragraph 13 of the policy statement referred to at paragraph 7.2 above, namely that should financial eligibility limits be increased at any point, following the commencement of Part 1 of the Act, the revised threshold will apply to that assessment.

7.10 Regulation 10, relating to the statutory charge created by section 25 of the Act, addresses the situation where both civil legal services under Part 1 of the Act and previously funded services under the Community Legal Service have been provided in the same matter and modifies the provisions relating to the statutory charge accordingly.

7.11 Regulation 11 provides that where an application for funding under the Criminal Defence Service is not considered until after 31st March 2013, it is treated as an application for criminal legal aid under Part 1 of the Act.

7.12 Regulation 12 provides that where, in the same proceedings, there is both a grant of a right to representation under Part 1 of the 1999 Act and a determination for representation for the purposes of criminal proceedings under Part 1 of the Act, the Criminal Defence Service (Funding) Order 2007 (S.I. 2007/1174) applies and the Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435) do not apply.

7.13 Regulation 13 provides that an exclusion under section 42 of the Administration of Justice Act 1985 (c. 61) or section 47 of the Solicitors Act 1974 (c. 47) from providing

services under the Legal Aid Act 1988 or from providing representation as part of the Criminal Defence Service also takes effect as an exclusion from criminal legal aid work under Part 1 of the Act.

7.14 Regulation 14 of, and the Schedule to, the Regulations make necessary consequential amendments to secondary legislation.

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 In relation to criminal legal aid 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.”

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

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