

EXPLANATORY MEMORANDUM TO
THE CRIMINAL LEGAL AID (DETERMINATIONS BY A COURT AND CHOICE OF
REPRESENTATIVE) (AMENDMENT) REGULATIONS 2013

2013 No. 2814

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 Part 3 of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 (S.I. 2013/614) (“the 2013 Regulations”) makes provision for the circumstances in which a court may permit a defendant who qualifies for criminal legal aid to select a QC or multiple advocates to represent them (“enhanced representation”). This instrument amends the criteria for allowing enhanced representation and specifies the circumstances in which the consent of the presiding judge of the circuit is necessary before allowing enhanced representation.

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 legal aid reform proposals set out in the document: *Transforming Legal Aid: Next Steps*. This instrument amends the 2013 Regulations so that representation by more than one advocate may only be allowed where, in addition to meeting other relevant conditions, the court is satisfied that the defendant will be prejudiced, or will likely to be prejudiced, if they are not represented by two or more advocates in circumstances in which the prosecution has two or more advocates. It also requires the resident judge, his nominee or the assigned trial judge to obtain the agreement of a presiding judge to allow representation by a QC or more than one advocate.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

- What is being done and why

7.1 Following on from the reforms set out in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (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 *Transforming Legal Aid: Next Steps* sets out a number of reforms which the Government intends to make under Part 1 of LASPO. They include reducing the use of multiple advocates in criminal cases.

7.3 This instrument implements changes to the 2013 Regulations to change the circumstances in which an individual might be allowed to be represented by more than one advocate. It amends one of the criteria for allowing enhanced representation (“the prosecution condition”) so that that condition will be met only where the court is satisfied that the defendant will be prejudiced, or will likely to be prejudiced, if they are not represented by two or more advocates in circumstances in which the prosecution has two or more advocates. The prosecution condition is one of the conditions set out in the 2013 Regulations. If the relevant conditions are met, this enables the court to make a determination that permits a defendant to instruct multiple advocates.

7.4 In addition, the grant of representation by Queen’s Counsel or more than one advocate may be allowed in future by a judge of the High Court, or the resident judge of a Crown Court centre (or in his absence a judge nominated to deal with such applications) or the assigned trial judge. The grant of enhanced representation, other than by a judge of the High Court, must be made with the concurrence of a presiding judge of the circuit. The presiding judge of the circuit may delegate his functions to any other judge or judges. As is currently the case, this instrument will continue to allow the Registrar of Criminal Appeals and the Court of Appeal to make determinations in relation to cases in the Court of Appeal.

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, 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. 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 to ensure their implementation is fully consistent with Government's wider objectives, for example:

- the proposals on prison law have been amended to ensure criminal legal aid remains available for all proceedings before the Parole Board in which it has the power to direct release, as opposed to all cases that engage Article 5.4 of the European Convention on Human Rights (ECHR). Sentence calculation cases where the date of release is disputed will also be retained.
- the residence test was revised to include exceptions for certain cases which broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children.
- changes to expert fees will proceed, subject to retaining the rates payable to experts in those areas where recent increases have been made to address market supply issues. Fees payable to interpreters in London will be retained and the reduction in rates payable to interpreters outside London will be limited to ensure these do not fall below rates paid by CPS.

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 separately on this instrument.

9. Guidance

9.1 A programme of training and guidance is being prepared by the Legal Aid Agency to support the transition to the new arrangements.

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. 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 There is no impact on business, charities or voluntary bodies other than where it affects a contractual relationship between the Legal Aid Agency and providers of legal aid services or the payment arrangements for barristers.

10.3 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 or the payment arrangements for barristers.

11.2 MoJ has not taken any specific steps to minimise the impact of the requirements on firms employing up to 20 people.

11.3 This instrument does not impose any additional regulatory burdens on small firms.

12. Monitoring & review

12.1 The operation of and expenditure on the legal aid scheme is continually monitored by the MoJ and the LAA. 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

James MacMillan at the Ministry of Justice, Tel: 020 3334 4258 or email: james.macmillan2@justice.gsi.gov.uk can answer any queries regarding the instrument.