

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 1: Legal Aid

Criminal legal aid

Section 13: Advice and assistance for individuals in custody

123. [Section 13](#) makes provision about initial advice and assistance for an individual who is arrested and held in custody at a police station or other premises.
124. The current provision governing police station advice and assistance is at section 13(1) (a) of the Access to Justice Act 1999.
125. *Subsection (1)* requires initial advice and assistance to be made available to individuals who are arrested and held in custody at a police station or other premises if the Director has determined that the individual qualifies for advice and assistance and has not withdrawn that determination. “Initial advice” and “initial assistance” are defined in *subsection (7)* as the sort of advice and assistance that an individual might need while in custody. *Subsection (8)* enables the Lord Chancellor to make regulations providing that certain advice and assistance is not initial advice and assistance for the purposes of this section.
126. In making a determination, *subsection (2)* places a duty on the Director to have regard to the interests of justice.
127. *Subsection (3)* provides that any determination under this section must specify the types of advice or assistance to be made available. *Subsection (4)* provides that the Lord Chancellor may make regulations about determinations and the withdrawal of determinations. *Subsections (5) and (6)* make further provision about the procedure for determinations under this section.
128. *Subsection (5)* provides that the regulations may include provision about the form and content of applications and determinations (for example specifying an application form) and about how an application or determination must be made or withdrawn. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn and provision requiring applicants to be given reasons for the making or withdrawal of a determination.
129. *Subsection (6)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Act, for example, to provide information under section 23.

Section 14: Criminal proceedings

130. **Section 14** defines “criminal proceedings” for the purposes of this Part of the Act and is based on the existing provision at section 12(2) of the Access to Justice Act 1999.
131. “Criminal proceedings” include criminal trials (section 14(a)), sentencing hearings (section 14(b)), extradition hearings (section 14(c)), binding over proceedings (section 14(d)), appeals on behalf of a convicted person who has died (section 14(e)), proceedings on a reference on a point of law following acquittal on indictment (section 14(f)) and proceedings for contempt in the face of a court (section 14(g)). Section 14(h) allows the Lord Chancellor to specify in secondary legislation further types of proceedings that are to be considered to be criminal proceedings for the purposes of this Part of the Act.

Section 15: Advice and assistance for criminal proceedings

132. **Section 15** gives the Lord Chancellor the power to prescribe in regulations when advice and assistance must be made available to individuals in connection with criminal proceedings (*subsection (1)*). The power broadly reflects the provision about advice and assistance in section 13(1)(b) of the Access to Justice Act 1999.
133. *Subsection (2)* describes the individuals in respect of whom provision can be made under this section. It covers those involved in investigations that could lead to criminal proceedings (other than where the individual has been arrested and held in custody), those who are before a court, tribunal or other person in criminal proceedings, and those who have been the subject of criminal proceedings.
134. When making the regulations, the Lord Chancellor must take into account the interests of justice (*subsection (3)*) and the regulations must require the Director, in making a determination whether an individual qualifies for advice and assistance, to take into account the interests of justice (*subsection (4)*).
135. *Subsection (5)* provides that the regulations may also require the Director, in making determinations, to apply the means testing provisions (section 21) and any other criteria specified in the regulations.
136. *Subsection (6)* provides that the regulations may make provision about determinations and the withdrawal of determinations. *Subsections (7) to (9)* make further provision about the procedure for determinations under this section.
137. *Subsection (7)* provides that the regulations may include provision about the form and content of applications and determinations (for example specifying an application form) and provision that an application or determination may or must be made and withdrawn in writing, by telephone or by other prescribed means. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn, and provision requiring applicants to be given reasons for the making or withdrawal of a determination.
138. *Subsection (8)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Act, for example, to provide information or to make a payment under section 23.
139. *Subsection (9)* provides that the regulations may make provision about reviews of and appeals to a court, tribunal or other person against a decision of the Director that an individual does not qualify for advice and assistance on the grounds that the interests of justice or other criteria set out in regulations made under *subsection (5)(b)* are not met.

140. *Subsection (10)* ensures that under this section “assistance” can include advocacy (as defined in section 42(1)) undertaken on behalf of the individual.

Section 16: Representation for criminal proceedings

141. *Section 16* identifies the circumstances and conditions under which representation for the purposes of criminal proceedings is to be made available.
142. *Subsection (1)* provides that representation is to be available if the individual is a specified individual in relation to the proceedings (see *subsection (6)*) and the Director or, as the case may be, a court has determined, provisionally or otherwise, that the individual qualifies for representation.
143. *Subsection (2)* requires representation for the purposes of criminal proceedings to be made available on appeal to the Crown Court to private prosecutors whom the Director or court has determined, provisionally or otherwise, qualify for such representation.
144. *Subsection (3)* provides that where an individual qualifies for representation for the purposes of criminal proceedings, representation is also to be made available for the purposes of any related bail proceedings as well as any preliminary or incidental proceedings. *Subsection (4)* enables the Lord Chancellor in secondary legislation to specify whether proceedings are or are not preliminary or incidental for this purpose and also to make exceptions to *subsection (3)*. Under the current regulations made under the Access to Justice Act 1999, for example, proceedings dealing with an individual for non-compliance with a Crown Court order are not to be regarded as incidental.
145. *Subsection (5)* provides that regulations under *subsection (4)(b)* making exceptions from *subsection (3)* may make provision by reference to proceedings that take place more than a specific period of time before or after the main proceedings. This would allow, for example, a period of time to be specified after which the original determination on representation would not cover advice on an appeal or after which a new determination would be needed for the purposes of applying to vary or appeal against an order made at the conclusion of the proceedings.

Section 17: Qualifying for representation

146. *Section 17* makes provision about how the Director or a court must make determinations about whether an individual qualifies for representation for the purposes of criminal proceedings.
147. *Subsection (1)* requires the Director or a court to determine (whether provisionally or otherwise) whether an individual qualifies for representation by applying the means testing provisions (section 21) and the interests of justice test provided for in *subsection (2)*.
148. *Subsection (2)* sets out the factors that are to be considered in assessing whether an individual meets the interests of justice. These mirror the existing provision at paragraph 5 of Schedule 3 to the Access to Justice Act 1999. *Subsection (3)* enables the Lord Chancellor to add to or vary these factors. The Lord Chancellor may also make regulations specifying circumstances in which the interests of justice will be considered to be met (*subsection (4)*).

Section 18: Determinations by Director

149. *Section 18* makes provision about the power of the Director to make determinations about representation for the purposes of criminal proceedings and the procedure to be followed.
150. *Subsection (1)* provides that the Director may determine whether an individual is eligible for representation for criminal proceedings unless a court is authorised to do so under section 19. This reverses the default position in the Access to Justice Act

1999 where the decision as to whether to grant legal aid is for the court unless the LSC is given the power to make the decision. However, over recent years, most decision-making powers have transferred in practice to the LSC and there are now only limited circumstances in which the court can make a determination.

151. *Subsection (2)* requires the Director, in the determination, to specify the criminal proceedings in respect of which the individual qualifies for representation. *Subsection (3)* provides that the regulations may make provision about determinations and the withdrawal of determinations. *Subsections (4) to (7)* make further provision about the procedure for determinations under this section.
152. *Subsection (4)* provides that the regulations may include provision about the form and content of applications and determinations and provision that an application or determination must be made and withdrawn in writing, by telephone or by other prescribed means. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn, and provision requiring applicants to be given reasons for the making or withdrawal of determinations. Provision may also be made about the review of a decision by the Director that the individual does not qualify, or no longer qualifies, for representation on the grounds that the interests of justice are not met.
153. *Subsection (5)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Act, for example, to provide information or to make a payment under section 23.
154. *Subsection (6)* provides that in cases where representation is refused or withdrawn on the grounds that the interests of justice do not require it, the individual has a right of appeal to a court, tribunal or other person prescribed by regulations. The right of appeal is subject to exceptions specified in regulations under *subsection (7)*.
155. *Subsection (8)* provides that this section does not authorise the Director to make a provisional determination, and as such any reference to a determination in this section does not include a provisional determination. Section 20 makes provision about provisional determinations.

Section 19: Determinations by court

156. **Section 19** makes provision about the power of a court to make determinations about representation for the purposes of criminal proceedings and the procedure to be followed.
157. *Subsection (1)* enables the Lord Chancellor to make regulations providing for a court to determine whether an individual qualifies for representation. Under the current provisions made under the Access to Justice Act 1999, the Crown Court may grant a representation order for contempt proceedings, for proceedings that arise from an alleged failure to comply with an order of the Crown Court where it appears to the court that there is no time to instruct a solicitor and for proceedings where the individual is brought before the court following the issue of a bench warrant. The High Court and the Court of Appeal (Criminal Division) may grant a representation order for proceedings before those courts and the Supreme Court.
158. *Subsection (2)* enables regulations to make provision about the procedure for determinations, including the form of the application to the court and the form of the determination of the court, provision that applications and determinations may or must be made and withdrawn in writing, by telephone or by other prescribed means, and provision about time limits and circumstances in which a determination may or must be withdrawn.

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c.10) which received Royal Assent on 1 May 2012

159. *Subsection (3)* ensures that the circumstances in which a determination may or must be withdrawn may relate to whether an individual has complied with requirements imposed on them under Part 1, for example, a requirement to provide documents or to make a payment under section 23.
160. *Subsection (4)* requires the regulations to provide that, subject to prescribed exceptions, in cases where representation is refused on the grounds that the interests of justice do not require it, the individual has a right of appeal to such court, tribunal or other person, as may be prescribed.
161. *Subsection (6)* provides that regulations under this section may not authorise a court to make a provisional determination, and as such any reference to a determination in this section does not include a provisional determination. Section 20 makes provision about provisional determinations.

Section 20: Provisional determinations

162. **Section 20** makes provision about the power of the Director or a court to make a provisional determination about whether an individual qualifies for representation in certain cases. This reflects paragraph 1A of Schedule 3 to the Access to Justice Act 1999.
163. *Subsection (1)* enables the Lord Chancellor to make regulations to allow the Director or a court to make a provisional determination about whether an individual qualifies for representation where the individual is involved in an investigation which may result in criminal proceedings, the determination is for the purposes of criminal proceedings that may result from that investigation and other specified conditions are met. A provisional grant of a representation order is currently permitted in investigations where the prosecution has initiated plea discussions under the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud.
164. *Subsection (2)* provides that the regulations may make provision about the stage of an investigation when a provisional determination may be made, provision about when the provisional determination becomes a full determination and ceases to be provisional, and provision about the withdrawal of a provisional determination.