EXPLANATORY MEMORANDUM TO

THE CIVIL LEGAL AID (CONNECTED MATTERS) REGULATIONS 2013

2013 No. 451

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 Where an individual qualifies for civil legal services, the Civil Legal Aid (Connected Matters) Regulations 2013 provide for further services to be made available to the individual in connection with those services, where the purpose of the further services is to identify the proposed defendant or respondent. These Regulations enable matters otherwise excluded from the scope of legal aid to be funded because of their connection with matters which are within the scope of legal aid.

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 Part 1 of the Act. These instruments will be laid in time for the Act to come into force on 1 April 2013.

4.2 These particular regulations are made under paragraph 46 of Part 1 of Schedule 1 to the Act.

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 The Act sets out what services can and cannot be funded by through civil legal aid in Schedule 1. The effect of paragraph 46 of Schedule 1 to the Act is that certain matters excluded by Part 2 of Schedule 1 to the Act may nevertheless be funded because of their connection with a matter described in Part 1 of Schedule 1 to the Act. These Regulations make provision under paragraph 46.

7.3 The effect of the Regulations is that, where an individual qualifies for civil legal services, further services may be provided in relation to the identification of a proposed defendant or respondent; provision is also made that certain services which would otherwise be excluded by Part 2 of Schedule 1 may nevertheless be funded. This means that services excluded from scope by virtue of the exclusions at paragraphs 11 (trust law), 13 (company or partnership law) or 14 (business cases) of Part 2 of Schedule 1 to the Act may nevertheless be funded where the purpose of such services is to identify the proposed defendant or respondent in proceedings that are described in another paragraph of Part 1 of Schedule 1 to the Act.

7.4 For example, if a claim under the Equality Act 2010 (within the terms of paragraph 43 of Part 1 of Schedule 1) was brought, but there was a dispute about who the liable employer was, or in the event that the company was insolvent there was a dispute about whether the Director or some other person was the appropriate defendant, then funding may be available to resolve such questions of company or partnership law as are necessary to determine the identity of the liable party. Such services would otherwise have been excluded by paragraph 13 of Part 2 of Schedule 1.

7.5 Under the legal aid scheme as governed by the Access to Justice Act 1999, the Legal Services Commission are authorised by the Lord Chancellor to fund excluded services when the services relate to issues which are only minor or incidental to the main purpose of the proceedings. The Commission are also authorised to fund partially excluded proceedings in certain circumstances. This is known as the mixed cases rule.

7.6 These regulations do not recreate the mixed cases rule. After considering how to exercise the power in paragraph 46 of Schedule 1 to the Act, the Government concluded that there are very limited circumstances in which it would want excluded matters to be funded because of their connection with matters described in Part 1 of Schedule 1. A general rule along the lines of the existing mixed cases rule risks being too wide and allowing substantial numbers of out-of-scope matters to be funded. This is contrary to the policy intentions to focus limited legal aid resources on to the priority cases set out in Part 1 of Schedule 1 to the Act.

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 Civil Legal Aid (Connected Matters) 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 http://www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information. An impact assessment has been conducted on these regulations and is attached as an annex to this memorandum.

10.2 The impact on business, charities or voluntary bodies is likely to be positive, as additional legal aid work will be available to organisations offering such services. However, as noted below, these impacts are likely to be negligible.

10.3 The impact on the public sector arising from this instrument, as noted in the attached IA, is likely to be negligible.

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

Narinder Tamana at the Ministry of Justice (Tel: 020 3334 3216 or email: narinder.tamana@justice.gsi.gov.uk) can answer any queries regarding the instrument.



Ministry of JUSTICE

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 Implementation

Equality Impact Assessment

September 2012

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Summary

The draft Statutory Instruments included in this initial implementation EIA will apply to everyone with and without protected characteristics applying for civil legal services in England and Wales, regardless of whether or not they share protected characteristics. The statutory instruments will not treat anyone less favourably than others because of a protected characteristic and we therefore do not consider them to be directly discriminatory.

We know from our equalities assessment of the legal aid reforms to date that women, BAME people and those who are ill or disabled are over-represented among those who use publicly funded civil legal services when compared with the population as a whole. We therefore consider that there is likely to be a differential impact in relation to these groups as a consequence of these changes.

For the protected characteristics of marriage and civil partnership, pregnancy or maternity, gender reassignment, religion and belief and sexual orientation, we have no evidence to suggest that the nature of these statutory instruments would be likely to have any differential impact.

On the basis of the available evidence we do not, however, think that anyone sharing a protected characteristic will be put at a particular disadvantage from the changes and that therefore it is unlikely that there will be any indirect discrimination in respect of anyone sharing a protected characteristic.

In terms of advancing equality of opportunity, the specific merits tests for full representation in are, in many cases, less stringent than the general merits criteria. In some cases (e.g. in some cases favouring individuals sharing the protected characteristics of race and disability) the accessibility of funding is likely to increase due to the inclusion of specific merits criteria.

We are aware of the potential for unintended effects in implementation of these statutory instruments and will continue to monitor equalities impacts when the new Legal Aid scheme comes into effect.

Scope of this EIA

The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 received Royal Assent on 1 May 2012. This Equality Impact Assessment (EIA) sets out our analysis of the equality impacts of some of the secondary legislation required to implement the scheme for publicly funded legal services as described in Part 1 of the LASPO Act 2012.

The secondary legislation sets out in more detail how the scheme will work in practice. For example, it sets out the merits tests which will apply in relation to applications for civil legal services and the procedures for making applications for and determinations about civil legal services.

This EIA builds on previous assessments of equalities impacts made during policy formulation, consultation and as a result of policy changes made during the passage of the LASPO Act through Parliament. This EIA does not seek to re-examine the overall effect of the broader policy changes to publicly funded legal services covered by previous assessments but rather seeks to examine additional equalities issues arising specifically from the detailed secondary legislation.

The EIA analyses the potential impact of the reforms on the advancement of equality of opportunity, the fostering of good relations and the elimination of discrimination, harassment, victimisation and other conduct that is prohibited under the Equality Act 2010. It is designed to ensure that the Government has proper regard to these aims, in accordance with its public sector equality duties under section 149 of the Equality Act 2010.

The structure of this EIA

This initial version of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Implementation Equality Impact Assessment covers statutory instruments produced in draft to support the Legal Services Commission tender for certain new Civil Legal Aid contracts. This EIA will be updated as further secondary legislation is produced over the autumn and winter, in the run up to commencement of Part 1 of the Act in 2013.

This version of the EIA covers the following Regulations:

- The draft Civil Legal Services (Merits Criteria) Regulations
- The draft Civil Legal Services (Procedure) Regulations
- The draft Civil Legal Services (Family Relationship) Regulations 2012
- The draft Civil Legal Services (Amendment of Schedule 1) Order 2012
- The intended regulations under paragraph 46 of Part 1 of Schedule 1 to the Act (Connected Matters)
- The draft Civil Legal Services Legal Services (Immigration Interviews) (Exceptions) Regulations 2012
- The draft Civil Legal Services (Judicial Review of Removal Directions) Regulations 2012
- The draft Civil Legal Services (Prescribed Types of Pollution of the Environment) Regulations 2012

Policy objectives

In November 2010 the Government published its proposals for reform in the consultation paper: Proposals for the Reform of Legal Aid in England and Wales. This set out proposals for a radical, wide ranging and ambitious programme of reform, aimed to ensure that civil legal services are targeted to those who needed it most and to cases in which publicly funded legal advice or representation is justified because of, for example, the nature or seriousness of the case.

Reducing expenditure on legal aid is one of the key drivers for reform but the Government believes that legal aid is, in any event, in need of fundamental reform and there is a compelling case for going back to first principles.

The proposals in the consultation paper were estimated to deliver a saving of £350 million to the public purse in 2014/15, against a scheme which now costs over £2 billion each year, an increase of around 6% in real terms since 1997/98. It is one of the most comprehensive and expensive legal aid provisions in the world upon which we spend around £39 a head (2010-11).

The intention is that the legal aid reforms will:

- discourage unnecessary and adversarial litigation at public expense;
- target legal aid to those who need it most;
- make significant savings in the cost of the scheme; and
- deliver better overall value for money for the taxpayer.

Legal duties

Under the Equality Act 2010 (s.149) ("the Act"), when exercising its functions the Ministry of Justice is under a legal duty to have 'due regard' to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Act;
- Advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and
- Foster good relations between different groups.

The relevant protected characteristics for those purposes are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, and sexual orientation.

Consistent with that duty, and with the statutory objectives of s.149 of the Act in mind, this EIA considers how the policies in question are likely to impact on people sharing protected characteristics.

The forms of prohibited conduct

The provisions of the Act currently in force contain, in Chapter 2, several forms of prohibited conduct, namely:

- direct discrimination (s.13)
- discrimination arising from disability (s.15)
- pregnancy and maternity discrimination (s.17 and s.18)
- harassment (s.26)
- victimisation (s.27)
- breach of a non-discrimination clause (s.61)
- indirect discrimination (s.19)
- failure to comply with a duty to make reasonable adjustments (s.20 and s.21)

Those forms of prohibited conduct are considered, where relevant, in more detail in the analysis that follows.

Advancement of equality of opportunity and fostering good relations

In relation to the second and third statutory objectives to which, under s.149, the Ministry is obliged to have due regard, guidance is provided in s. 149(3) and (5):

'(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are connected to that characteristic;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.'

'(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice

(b) promote understanding.'

Those provisions indicate that the matters to which the Ministry must have due regard include the need for steps to be taken – although the duty remains one of due regard (as opposed to, for example, a duty actually to take steps or a duty to achieve a particular result).

We have considered the implications of the policies in question for the advancement of equality of opportunity and the need to foster good relations with the guidance in s.149(3) and (5) in mind.

Assessment to date

References are made throughout this EIA to our previous assessments of the likely impacts of the legal aid reforms.

The LASPO Act 2012 received Royal Assent on 1 May 2012. Equality impact assessments first accompanied the November 2010 consultation paper *Proposals for the Reform of Legal Aid in England and Wales*. A further Equality Impact Assessment (EIA) was published in June 2011 alongside the Government Response to the consultation. Following Royal Assent, *Reform of Legal Aid in England and Wales: Equality Impact Assessment (EIA)* was published in July 2012[1]. This EIA accounted for changes made to the LASPO Bill in its passage through Parliament.

In the 2010 EIAs, LSC data for 2008/09 was used to assess the potential impacts on providers and clients. The EIA that accompanied the Government response to the consultation updated this analysis by using data for 2009/10 that had subsequently become available. This 2009/10 data set was also used for the Royal Assent EIA to try to facilitate consistency and comparability.

This EIA does not seek to re-examine the overall effect of the broader policy changes to publicly funded legal services covered by the previous assessments. Rather it seeks to examine any additional equalities issues arising specifically from certain secondary legislation being prepared to implement the LASPO Act 2012.

1 Available at: www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information

Data sources & Methodology

The consultation response and Royal Assent EIAs used LSC data collected through provider billing for financial year 2009/2010 (LSC Client Data) to assess the impact of the reforms on legal aid clients. This data included records of client's sex, age, race, and illness or disability status. The distribution of protected characteristics in the LSC Client Data was compared to that of the general population, in order to identify potential differential impacts on legal aid clients. A full description of the data sources and the methodology used, and its limitations, is available in the published Royal Assent EIA (pages 8-11).

We considered the arrangement and use of data in the initial EIA, the EIA that accompanied the Government response to the consultation and the Royal Assent EIA, including the pooling and assessment of impacts under the specific policies and more generally (for example whether it is appropriate to undertake analysis at the level of category of law). Although the data has limitations, we consider the approach adopted in the EIAs to be robust. As such, the most recent Royal Assent EIA is a suitable reference point for assessment of any additional equalities issues arising from the secondary legislation being prepared to implement the LASPO Act 2012.

The assessment of impacts

Overall, we consider that the efforts that we have made to gather information have been entirely reasonable; the information on which we have relied, both in the initial EIAs, the EIAs published alongside the Government response to the consultation, the Royal Assent EIA and in this one, was adequate, and the conclusions which we have drawn as to potential equalities impacts in the EIAs have been appropriate and sufficiently informed.

Justification of any adverse impacts

The policy objectives

As set out at previously, the aims of the reforms are to:

- discourage unnecessary and adversarial litigation at public expense;
- target legal aid to those who need it most;
- make significant savings in the cost of the scheme; and
- deliver better overall value for money for the taxpayer.

These objectives, of reforming legal aid to reflect the principles on which it was founded and achieving the stringent budgetary savings necessary across government, are of critical importance. We believe these to be legitimate aims with regard to principles of equality and non discrimination.

These objectives underpin and motivate the entire package of reforms. As we explained in paragraph 8 of the introductory sections of the initial EIAs:

‘The proposals in this consultation seek to deliver substantial savings in a fair, balanced and sustainable way. They will encourage people to resolve their problems themselves and to use alternatives to the courts where they are effective. They will help reserve the courts for serious legal issues where there is a public interest in assuring access, and then only as a last resort. They also seek to ensure that scarce resources are targeted efficiently and effectively, delivering overall value for money.’

The Government believes that the programme, modified and refined as set out in the response to consultation document and the LASPO Act 2012, is a proportionate means of achieving these aims.

1. The draft Civil Legal Services (Merits Criteria) Regulations

Description

This section examines specific additional equalities considerations arising from the future operation of the draft Civil Legal Services (Merits Criteria) Regulations. It does not re-examine the impacts of the scope changes enacted by the LASPO Act; these impacts have been assessed in the Royal Assent EIA.

Background

The draft Civil Legal Services (Merits Criteria) Regulations set out the merits criteria both for applications made for legal aid in relation to civil legal services described in Part 1 of Schedule 1 to the Act ("in scope cases") and in relation to civil legal services which are not described in Part 1 of Schedule 1 to the Act ("out of scope cases"). The Regulations set out the forms of civil legal services which are available and where certain forms of legal services are not appropriate in certain types of cases.

The regulations set out the merits criteria which the Director of Legal Aid Casework (the Director), and providers (where delegated the authority to do so) must apply deciding whether an individual qualifies for civil legal services. When the Director delegates his functions under the regulations to providers or his employees, for example, they will also be required to apply these criteria. In certain circumstances, the Director has some discretion in relation to which merits criteria are applied, this is set out in Part 5 of the Regulations.

The merits criteria are divided into two main sections: general merits criteria, and specific merits, which disapply, modify or supplement the general criteria in specific types of cases.

General Merits

In order to determine whether a person qualifies for civil legal services the Director will apply the general merits criteria (except where they are disapplied modified or supplemented by the specific merits criteria for certain categories of case, which are set out below). The general merits criteria consist of a number of tests to establish the merits of a case to be publically funded. Legal aid is not generally intended to be

more generous than private funding. The merits criteria are generally intended to model the kinds of rational judgements that would be made by a reasonable privately-paying person of modest means in deciding whether to bring or continue with litigation.

The Regulations set out how the tests are met and in which circumstances and for which services these tests apply. By way of example the main tests which apply in relation to full representation include the following concepts:

Prospects of success - for the purpose of deciding whether to fund an individual's case the Director must, in certain circumstances, assess the prospects of success of the case. Generally this means that the case must have a reasonable chance of succeeding. Less stringent prospects of success criteria apply to cases with certain features (e.g. cases with an "overwhelming importance to the individual", cases which are of "significant wider public interest" or where "the substance of the claim relates to a breach of Convention Rights").

Public interest - Where applicable, the Director must be satisfied that there is significant wider public interest (as defined in the regulations), such that funding the case would provide real benefits to the public at large (rather than simply to the individual applicant). This means that in some cases where the benefits to the individual alone would not warrant funding, the case can be funded if it will benefit wider society.

Reasonable private paying individual - Where applicable, the Director must be satisfied that the potential benefit to be gained from the provision of civil legal services justifies the likely costs, such that a reasonable private paying individual would be prepared to fund the case.

Proportionality - Where applicable, the Director must be satisfied that the likely benefits of the proceedings to the applicant and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case.

The specific merits criteria

Specific merits criteria disapply, modify or supplement the general merits criteria for certain matters described in Part 1 of Schedule 1 to the Act. Generally the specific merits criteria indicate types of case which benefit from less stringent criteria. Some of the specific merits criteria consist of additional tests to ensure funding is targeted on appropriate cases. Some of the specific merits criteria are tailored to the

specific types of case and establish criteria that would not have general application elsewhere.

A summary of how the specific criteria modify the general criteria, along with the policy rationale for these differences, is set out in the following table:

Area of law	Examples of Types of cases	Differences to general merits criteria and policy rationale
Mental Health and Mental Capacity	a) Applications for full representation before the First-tier (Mental Health) Tribunal and Mental Health Review Tribunal for Wales and b) full representation before the Court of Protection in the most serious mental capacity cases	a) In mental health proceedings the General Merits Criteria ("GMC") for full representation do not apply and instead the Director must be satisfied that it would be reasonable in all circumstances of the case for full representation to be provided to the applicant. These are less stringent criteria than the GMC, given the potential consequences of the action for the applicant. b) In certain mental capacity proceedings the GMC apply (with the exception of the multi-party action rules), but the Director must also be satisfied that the Court of Protection has ordered an oral hearing and legal representation is necessary in addition to the general merits criteria.
Public law	Applications for legal representation Judicial Review, habeas corpus proceedings, certain cases relating to homelessness	Specific criteria must be met for Legal representation (including investigative representation and full representation) in public law cases. These include a requirement to notify the defendant of the case and give them a chance to respond. The standard cost benefit test is disapplied in relation to full representation, given the nature of the proceedings, and is replaced by the less strict proportionality test. The standard prospects of success test is also disapplied (a bespoke

		prospects of success test is applied instead). This prospects of success test is more generous than the general merits test in that funding will also be granted in borderline cases the substance of which relates to a breach of Convention rights.
Claims against public authorities	Applications for legal representation in relation to Civil claims against public authorities where there is an abuse of position or powers by public authority or significant breach of convention rights - for example, a tort claim or a claim under section 7 of the Human Rights Act 1998.	For claims against public authorities concerning abuse of position or powers, or significant breach of human rights, generally less stringent merits criteria are applied, as these are treated as priority cases. The rules in relation to minimum damages (in relation to investigative rep) and multi party actions (in relation to full rep) are disapplied entirely in relation to claims relating to abuse of a child or vulnerable adult and discrimination claims.
Immigration	Applications for full representation in immigration and human trafficking cases	As investigative representation is not available for cases before the first and upper tier tribunals (as it is not practicable), it is necessary for different criteria to apply for full representation in these cases compared to the standard criteria. The test applied is therefore less stringent than generally for full representation. For example, full representation is available in a wider range of “unclear” cases.
Housing	Court orders for possession or eviction, claims, claims of housing disrepair or claims under the Protection from Harassment Act 1997	In relation to full representation for court orders for possession the GMC will not apply and the tests are less stringent. The Director must be satisfied that the individual is the defendant to a claim for possession; that they have a substantive legal defence to the claim; the prospects of success are very good, good, moderate or borderline and the proportionality

		test is met. For full representation in cases concerning unlawful eviction, housing disrepair and protection from harassment certain GMC will not apply and instead less stringent criteria apply. These are that the Director must be satisfied that the proportionality test is met and the landlord or other person responsible has been notified of the complaint and an opportunity has been given for resolution. For investigative representation in claims of unlawful eviction the GMC apply except that the rule limiting funding to claims of £5000 or more is reduced to £1000 or more, which reflects the small claims limit for these cases.
Family	Applications relating to private family law cases, public law children or special children Act 1989 cases or matters relating to EU and international agreements concerning maintenance	Certain general merits criteria are replaced by specific criteria for different types of case. In each case, this is either because of the importance of the type of case or because the general criteria are not relevant to that type of case. For example, the general merits criteria tests whether the proceedings are likely to be allocated to the 'small claims track'. This is not relevant to family law cases so is disapplied.
Cross-border disputes	Implements Council Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.	Disapplies the general merits criteria for legal help and full representation. Applies specific tests in order to implement the Directive.

Statistical analysis - Breakdown of protected characteristics of clients subject to specific merits tests

Whilst there is a lack of data regarding how the merits tests may apply to groups sharing different protected characteristics, assessment of the legal aid reforms to date shows that women, BAME people and those who are ill or disabled are over-represented among those who use publicly funded civil legal services when compared with the population as a whole. For the protected characteristics of marriage and civil partnership, pregnancy or maternity, gender reassignment, religion and belief and sexual orientation, we have no evidence to suggest that the nature of the Civil Legal Services (Merits Criteria) Regulations would be likely to have any differential impact.

Elimination of discrimination, harassment, victimisation and other prohibited conduct

Broadly speaking, the policy intention is that the merits criteria will operate in the same way as the Funding Code merits tests currently do under the Access to Justice Act 1999(in so far as this is possible). Publicly funded legal services, which remain in scope, will be no harder to access under the LASPO Act. There is one important difference: currently under the Funding Code if a Conditional Fee Agreement is available as an alternative means of funding a case, then legal aid will be refused. However claims against a public authority (as defined above), a public law claim, or a clinical negligence claim are currently exempt from this requirement under the provisions of the Funding Code, so clients can effectively choose whether to use legal aid or not. Under LASPO, all cases other than family cases which are deemed to be suitable for a CFA will be expected to use one, and legal aid will not be available. This change has been assessed in previous EIAs and we consider that the reforms are a proportionate means of meeting our legitimate policy objectives. Anyone refused legal aid on the basis that the case is suitable for a CFA is entitled to ask for a review and an appeal against that decision. In addition, if as a matter of fact the case is not suitable for a CFA, then the Director will re-consider the application.

The general merits criteria set out reasonable and proportionate tests, which have to be met to access funding. The specific merits criteria are set in a way that reflects the relative priority, in terms of access to public funding, that we have attached to particular matters and proceedings. There are a number of examples where the specific merits criteria make funding for certain types of cases more accessible. In many cases this

is likely to benefit people sharing protected characteristics. For example the immigration merits test for full representation before the first and upper tier tribunals (which will apply predominantly to asylum applications who are more likely to be from a BAME background) provides a higher likelihood of funding for full representation than the general merits criteria. Similarly in Mental Health and Mental Capacity cases the accessibility of funding for clients with some disabilities is likely to increase due to the inclusion of the specific merits criteria.

In particular, in actions against the police (which are claims against public authorities), clients are disproportionately BME. We do not think that the merits criteria for claims against public authorities indirectly discriminate. For the most part these specific merits criteria actually apply less stringent criteria than the general merits criteria.

Publically funded legal services are delivered, currently on behalf of the LSC, by contracted providers. When Part 1 of the LASPO Act 2012 is commenced, the new legal aid agency will similarly procure services from contracted providers, on behalf of the Lord Chancellor. The terms and conditions of those contracts, currently and in the future, require that providers assist in meeting public sector equality duties. Section 5 of the 2010 standard terms and Section 5 of the 2013 draft standard terms outlines the steps providers must take in supporting our equalities duties and includes a requirement for each firm to have a written Equality and Diversity policy and assist with the collection of Management Information to enable us to monitor equalities impacts. In addition, contracted firms must have a Specialist Quality Mark or Lexcel accreditation. Both of these contain requirements for equality and diversity policies and processes and are monitored as part of the on-going accreditation.

Advancement of equality of opportunity, fostering of good relations

We have considered whether these proposals have implications for the advancement of equality of opportunity and the fostering of good relations and do not consider that the reforms would affect the participation of persons who share a relevant protected characteristic and who are under-represented in public life.

The specific merits criteria will help advance equality of opportunity where less stringent criteria favour individuals with protected characteristics.

2. The draft Civil Legal Services (Procedure) Regulations

These regulations make provision about the making and withdrawal of determinations under sections 9 and 10 of the LASPO Act 2012. They establish procedures for Controlled Work (where decisions are generally made by legal aid providers) and Licensed Work (where decisions are generally made by the Director or civil servants).

Part 2 (Gateway Work) makes provision for applications for determinations for Legal Help in certain areas of law (broadly Special Educational Needs, debt and discrimination) to be made (with a number of exemptions) via a specific gateway (principally by telephone but with the potential to use other electronic means). Exemptions to this requirement are children (under 18), those deprived of their liberty (e.g. prison or secure hospital) and those who have been assessed by the gateway as requiring advice face-to-face within the last twelve months and who are seeking further help to resolve linked problems from the same face-to-face provider.

Specific procedures are also established for particular classes of case (e.g. special case work, emergency representation, family mediation and exceptional funding).

Statistical analysis and due regard

The draft Civil Legal Services (Procedure) Regulations will apply to everyone applying for civil legal aid in England and Wales. As stated above, women, BAME people and those who are ill or disabled are over-represented among those who use civil legal aid services when compared with the adult population as a whole, so any impacts may disproportionately fall on these groups.

The draft Civil Legal Services (Procedure) Regulations also set out the procedures for applying for a determination for legal services (Legal Help) through the gateway. As explained above, the gateway is the mandatory route (with limited exceptions) for applying for Legal Help for debt, discrimination and special educational needs cases. Our understanding of the statistical impacts of the gateway is fully explained in the Royal Assent EIA published 13 July 2012.

Elimination of discrimination, harassment, victimisation and other prohibited conduct

The procedures, as set out in the draft Civil Legal Services (Procedure) Regulations will apply to all groups within the population of England and Wales, irrespective of whether they share one of the protected characteristics, and we do not therefore, consider that they will give rise to any direct discrimination.

In general, applications will be completed on behalf of the client by a contracted service provider. Providers have a contractual obligation to assist us in meeting our equality duties and a number of contract clauses ensure that equality and diversity issues are recognised and addressed by providers.

The July 2012 Royal Assent EIA sets out our extensive assessment of the impacts of and reasonable adjustments proposed for the mandatory gateway. Refinement of the policy has continued in this area. The following areas of specific interest for the EIA were explored during the development of the Regulations:

- Part 2 – Regulation 18 - methods for contacting the gateway facilitate multiple routes for all groups of potential clients

- Part 2 – Regulation 19 – determinations may be amended to change the description of the provider (to reflect the need for clients to be referred from telephone to face to face providers or vice versa in particular circumstances)

- Part 2 Regulation 20 - definitions relevant to the gateway have been drafted to link to the provider contracts (which impose obligations in relation equalities duties).

- The treatment of emergency cases maintains appropriate provision for emergency applications for legal representation (that is not controlled work) and legal help (higher)

- Part 4 – Regulation 33 (supporting documents: domestic violence) sets out the evidence that may be provided to support applications involving domestic violence

Part 2 – Regulation 18 - Contacting the gateway to make an application for a determination

Regulation 18 sets out that an application to the gateway for a determination may be made by:

- telephone
- email
- electronic format made available by the Lord Chancellor for the purpose of such applications; or
- post

This will provide a number of access routes to the gateway. In addition, as explained in the July 2012 Royal Assent EIA, the gateway will have in place a number of reasonable adjustments and general adaptations to assist potential clients in their application through the gateway. So the telephone will not be the sole method of contacting the gateway to apply for a determination.

The additional alternative methods of email, other electronic format and post may assist some groups of disabled people, such as those with a speech impediment / communication difficulties to contact the gateway without the need to do so through a third party (which is a reasonable adjustment that will be operated by the gateway).

Part 2 – Regulation 19 – Amending the description of providers

Once it has been determined that an individual client qualifies for Gateway Work, the key consideration will be whether they are able to give instructions and act on the advice given over the telephone. The Regulation allows clients to be referred on to face to face providers, for example where legal help cannot effectively be provided by a specialist telephone provider.

Part 2 – Regulation 20 – Interpretation - Discrimination

The Regulation sets out the definitions for the areas of law required to go through the gateway with reference to the LASPO Act 2012– debt, discrimination and Special Educational Needs. ‘Discrimination’ will include discrimination, harassment, victimisation and other prohibited conduct as covered by the Equality Act 2010 or previous discrimination enactments.

The Government recognises that many people may be unaware that they have a ‘discrimination’ problem. For example, they may think that

they have a housing problem, and that it is only after discussing the problem with a housing specialist that it emerges that the problem relates to discrimination.

Therefore, the Regulations make the following provision for discrimination cases to go through the gateway. Where discrimination relates to:

- an out of scope area of law (i.e. consumer or employment) – the individual would be required to apply through the gateway for a determination for Gateway Work
- another area of law subject to the gateway (debt or Special Educational Needs) – the individual would be required to apply through the gateway
- a matter within the scope of where face-to-face advice contracts are available (for example, mental health, family, asylum (formerly immigration), housing, Actions against the Police, Public Law & Community Care) – the individual could contact the face to face provider without contacting the gateway, although they would still be able to contact the gateway instead if they wished.

The definition in Regulation 20 of 'Gateway discrimination matter' reflects this policy intention.

The Government also recognises that cases which appear to concern a matter that is out of scope may involve discrimination and therefore that it may be necessary to explore such cases in more detail. The Ministry of Justice and the Legal Services Commission are therefore working with the Government Equalities Office to develop the questions that the gateway central operator service will ask to identify whether a case relates to discrimination.

Emergency cases

The Government's consultation response explained that people would be exempt from contacting the gateway in cases of emergency. This was defined as being:

'where a client needs Legal Representation or Controlled Legal Representation **and**

a) there is a need for an urgent injunction or other emergency judicial procedure and the advisor will be required to represent the client in person, either at a

court, tribunal or other location for procedural reasons; and

b) there is an imminent risk to the life, liberty, or physical safety of the client or his/her family or the roof over their heads; or

c) any delay will cause a significant risk of miscarriage of justice, or unreasonable hardship to the client or irretrievable problems in handling the case and there are no other appropriate options to deal with the risk.'

In developing the Regulations, we have excluded reference to this exception because the Regulations make clear that the gateway will only operate with regard to Legal Help.

Part 4 – Regulation 33 – supporting documents: domestic violence

The regulation sets out that an application for civil legal services described in paragraph 12 of Part 1 of Schedule 1 of LASPO must include evidence of domestic violence, or the risk of domestic violence. It goes on to stipulate the types of evidence that fulfil this:

(a) a conviction or police caution for a domestic violence offence;

(b) evidence of criminal proceedings for a domestic violence offence which have not concluded;

(c) one of the following —

(d) a non-molestation order;

(e) an occupation order; or

(f) a forced marriage protection order

(g) a restraining order; or

(h) an exclusion order

provided that it is currently in force or was made within the previous two years;

(i) an undertaking given to a court under the Family Law Act 1996 by the respondent, where there has not been an undertaking given by the applicant.

(j) a letter from the Chair of a multi-agency risk assessment conference confirming that the applicant has been referred to the conference and a plan put in place for their protection from the respondent within the last two years

(k) a copy of the court record of a finding of fact of domestic violence within the previous two years

(l) a letter or medical report from a doctor working at a UK hospital confirming that they examined the applicant within the last two years, that the applicant had injuries or a condition consistent with domestic abuse and that the doctor had no reason to believe that the injuries or condition were not caused by domestic abuse.

(m) a letter from a social services department confirming the applicant has in the last two years been assessed as being at risk from domestic abuse by the respondent

(n) a letter or report from a domestic violence support organisation confirming that the applicant had stayed in a refuge for at least 24 hours within the previous two years.

We have considered whether any of the types of evidence would be more difficult to acquire for those with any of the protected characteristics. We do not consider that in most cases they do. We propose to limit evidence from a doctor or domestic violence support organisation to those in the United Kingdom. In addition some forms of evidence will only be available in the UK (such as a referral to a multi-agency risk assessment conference). We have considered the potential that this creates for indirect discrimination on the grounds of race or ethnicity for applicants where abuse occurred outside of England and Wales and evidence would therefore need to be accessed there. However we consider that this approach is justified because of the disproportionate level of work that would be required to verify this type of evidence (from a doctor or domestic violence support organisation) from abroad. In order to minimise the impact of this, the decision maker will be given discretion over whether a conviction from outside the UK qualifies as a domestic violence offence for the purpose of the regulations.

It may also be that the ability to stay in a domestic violence refuge is more limited for those with a disability because of potential problems physically accessing the building. There may also be limited access to refuges for men. However, given the wide range of evidence available and because some refuges will be available in these circumstances, we consider that the approach taken is proportionate and does not unduly prevent those with a disability or men from qualifying for legal aid.

We have further considered whether the evidence would be more difficult to acquire as a result of someone's nationality. We consider that someone of a different nationality may be less likely to have evidence from the UK. This is also true of a UK citizen who has lived

abroad. Weighed against this, we have considered the practical need for any evidence accepted to be able to be verified to guard against abuse of the system.

We have therefore allowed for evidence involving domestic violence offences from outside the UK to be accepted with the Director of Legal Aid having discretion to determine if a particular offence is a domestic violence one. Equivalent evidence of domestic violence or child abuse offences from outside the UK will therefore be accepted. We consider this approach to be proportionate. The evidence requirements will not prevent non-UK nationals from applying for legal aid.

We have considered whether potential charges for evidence that may be applied have a disproportionate impact on any groups of people with a protected characteristic. We have no evidence to suggest that this would be the case. [2]

Advancement of equality of opportunity, fostering of good relations

Regulation 19 explains that, where an individual is assessed by the gateway as being eligible for civil legal services, the determination will specify whether the individual has qualified for those services to be provided by a:

a. specialist telephone provider
b. face-to-face provider

An assessment of an applicant's suitability for telephone advice will be undertaken as part of the determination. The Regulations do not contain the criteria for that assessment which will be included elsewhere. The assessment will take account of the potential impact of disability on clients which may restrict their capacity to receive advice in a particular format. There will also be engagement with equality groups as part of the development of that assessment criteria.

As explained, the Regulation does permit the amendment of the determination, to change the description of the provider, should the client ultimately require a referral on from telephone to face to face providers in particular circumstances.

In addition, Regulation 27 (Part 3) allows for an individual to apply for a review of the determination, and this can include the review of their suitability for telephone advice.

2 This section has been added since development of this EIA to address the agreed approach on domestic violence offences outside the UK

3. The draft Civil Legal Services (Family Relationship) Regulations 2012

These regulations make provision about when matters arise out of a family relationship for the purposes of paragraphs 12 and 14 of Part 1 of Schedule 1 to the Act. The regulations make provision for a matter arising out of a family relationship to include an application under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 where the application concerns:

A) the home or former home of the individuals between whom there is or has been a risk of domestic violence (for the purpose of paragraph 12); or

B) the home or former home of the individuals between whom there is a family dispute which is the subject of mediation (for the purpose of paragraph 14).

Section 14 of TLATA is relevant in property disputes between unmarried couples as well as married couples.

Statistical analysis and due regard

Previous EIAs have noted that women were more likely to have a case in the family private category, representing 63% of total clients, as are those in the 25- 64 age group (86% of clients fall into this age group, compared with 53% of the England and Wales population.) This reflects the common financial inequality between parties at the dissolution of a relationship, and, as such any proposal to alter policy in this area would have a disproportionate impact on women with consequent effects on children. We do not believe that this necessarily translates to a particular or substantial disadvantage and we have taken steps to assess how disadvantageous effects could be minimised and to make reasonable adjustments, for example through including guidance for litigants-in-person; monitoring the scale of any impact; through providing funding for mediation and through the work being undertaken by the Family Justice Review currently being implemented, which is looking at the whole system of family justice.

Elimination of discrimination, harassment, victimisation and other prohibited conduct

These regulations essentially make it possible for publically funded legal services to be made available in relation to disputes about property which is or was the family home and which happened to be subject to a trust. These services are made available regardless of whether a client has or does not have a protected characteristic and we do not therefore, consider that they will give rise to any direct discrimination. Although this policy has the potential to have a particular impact on women (with consequent effects on children) we do not believe that this impact would amount to a particular or substantial disadvantage that would give rise to indirect discrimination.

Advancement of equality of opportunity, fostering of good relations

We have considered whether these proposals have implications for the advancement of equality of opportunity and the fostering of good relations and do not consider that the reforms would affect the participation of persons who share a relevant protected characteristic and who are under-represented in public life.

4. The draft Civil Legal Services (Amendment of Schedule 1) Order 2012

This Order provides for a general exclusion for civil legal services provided in relation to judicial reviews where they might arise under a paragraph of Part 1 of Schedule 1 to the LASPO Act, other than those services described in paragraph 19 of Part 1 of Schedule 1 to the LASPO Act.

Statistical analysis and due regard

This Order corrects a technical issue with the LASPO Act, restoring the intended policy effect. This proposal is not therefore expected to have any equalities impact beyond those already considered in the Royal Assent EIA.

5. The intended regulations under paragraph 46 of Part 1 of Schedule 1 to the Act (Connected Matters)

The Government intends to use the regulation-making power under paragraph 46 of Part 1 of Schedule 1 to prescribe that civil legal services excluded from scope by virtue of the exclusions at paragraphs 11 (trust law), 13 (company or partnership law) or 14 (business cases) may be funded where the purpose of such services is to identify the correct defendant in proceedings that are described in Part 1 of Schedule 1 to the Act. The regulations will allow for legal aid to be made available for both initial advice and assistance and for advocacy services.

Elimination of discrimination, harassment, victimisation and other prohibited conduct

This provision will extend the scope of legal aid to some extent. We do not therefore consider that this provision directly or indirectly discriminates against anyone.

We do not intend to use the power at paragraph 46 of Part 1 of Schedule 1 to prescribe that cases can be brought into scope by virtue of any other connection with matters described in Part 1 of Schedule 1. Nor do we intend to use the power to prescribe a general rule for such matters. This means that these regulations will establish a stricter rule than the existing "mixed cases" rule set out in the *Lord Chancellor's Direction on Scope of the Community Legal Service*, issued under the Access to Justice Act 1999. This means that excluded aspects of partially excluded proceedings which would be funded under the mixed cases rule will not be funded under the connected matters regulations.

We are not aware of any data to indicate that the "mixed cases" rule (which is exercised rarely) is exercised disproportionately in one or more areas of law, and therefore we do not consider that this change will directly or indirectly discriminate against anyone.

Drawing the rule more widely would have brought more matters into scope, and may to that extent have had a positive equality impact. However we do not consider that it would be appropriate or proportionate to exercise the power under paragraph 46 in this way given our intentions to focus limited legal aid resources on the priority cases set out in Part 1 of Schedule 1 to the Act.

6. The draft Civil Legal Services (Immigration Interviews) (Exceptions) Regulations 2012

These regulations set out the exceptions to general rule that legally aided representation is not available to individuals attending an interview conducted on behalf of the Secretary of State with a view to reaching a decision on that individual's asylum application. The regulations allow for legally aided representation at such interviews where:

- the individual being interviewed is, or is being treated as, a child;
- the individual is detained at a location where their application for asylum may be subject to the Fast Track processing scheme; or
- the individual lacks mental capacity.

The regulations permit individuals who are, or are being treated as, a child legally aided representation at both their initial screening interview and the subsequent substantive interview. Individuals falling into the latter two categories are only permitted legally aided representation at their substantive interview.

Elimination of discrimination, harassment, victimisation and other prohibited conduct

These regulations are intended to reflect the current exceptions to general rule that legally aided representation is not available to individuals attending an interview conducted on behalf of the Secretary of State with a view to reaching a decision on that individual's asylum application. We do not therefore consider that the regulations constitute a change in policy that could have the effect of directly or indirectly discriminating against anyone.

Three of the exceptions set out in the Secretary of State's Direction of 31 March 2004 – one relating to persons being interviewed in accordance with the Police and Criminal Evidence Act 1984 (PACE), one relating to persons alleged to pose a threat to national security and one relating to persons involved in the Early Legal Advice Project (ELAP) pilot – have not been included in the regulations, but we do not consider that anyone will actually be affected by this change. All persons interviewed in accordance with PACE will be eligible for criminal legal aid, so duplicate provision under the civil legal aid scheme is not necessary. The exception relating to persons alleged to pose a threat to national security has never been used by anyone in more than eight years and we cannot envisage any circumstances in which it would be used in the future. The ELAP pilot will expire prior to the

implementation of these regulations, so no one will fall within this exception going forward. If a decision is made to renew the pilot beyond this point, we will re-review the position.

The other minor difference between the regulations and the Secretary of State's Direction is that the regulations provide an exception for persons detained at a location where their application for asylum may be subject to the Fast Track processing scheme, whereas the Direction refers to persons subject to the Fast Track processing scheme. As all persons subject to the Fast Track processing scheme are detained at a location where their application for asylum may be subject to the Fast Track processing scheme however, we do not consider that anyone will actually be affected by this change either.

Even if these minor changes were, contrary to our expectations, to affect any person, as they apply regardless of whether a person has or does not have a protected characteristic, we do not consider that the changes are likely to place persons in protected groups at a significantly increased risk of suffering harassment, victimisation or breach of an equality clause, or that they will give rise to any direct or indirect discrimination.

Advancement of equality of opportunity, fostering of good relations

We have considered and do not regard that these regulations have any impact in relation to the advancement of equality of opportunity and the fostering of good relations. We consider that this proposal is not expected to have any equalities impact, beyond those already considered in the Royal Assent EIA.

7. The draft Civil Legal Services (Judicial Review of Removal Directions) Regulations 2012

These Regulations prescribe a condition for the purposes of paragraph 19(8) of Part 1 of Schedule 1 to the Act which, if met, allows for legal aid to be made available for judicial review of removal directions (thereby providing an exception to the exclusion in paragraph 19(5) and (6) of Part 1 of Schedule 1).

Removals of persons at short notice were suspended in May 2010 as a result of litigation culminating with judgment in *R (on the application of Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710. The UK Border Agency is considering how to address the issues that arose in this litigation and may seek to resume certain short-notice removals in the future. In particular, the UK Border Agency may seek to give short notice of removal to an individual where it believes that service of the removal directions will create a risk of suicide or self-harm. These Regulations would ensure that legal aid is available if UKBA do decide to resume these short notice removals. The Regulations make provision for legal aid to be available for judicial review of removal directions in these circumstances where the reason for proposing the notice period given to the individual is that service of the removal directions will create a risk of suicide or self-harm.

Statistical analysis and due regard

In the event that UKBA resume short-notice removals, these regulations will enable legal aid to be provided where the prescribed condition is met. They will therefore benefit affected groups.

Elimination of discrimination, harassment, victimisation and other prohibited conduct

These services are made available regardless of whether a client shares a protected characteristic and we do not therefore consider that they will give rise to any direct discrimination. Any policy decision by UKBA to restart removals would have the potential to have a particular impact on BAME clients, although we do not have figures on this because there have been no recent removals in this category. However, if the removals are restarted, then legal aid would be available to people who meet the prescribed condition, regardless of whether the client does or does not share a protected characteristic. Therefore, although

the policy of removals may have a particular impact on BAME clients, we do not think the policy to provide legal aid for such removals would have a particular or substantial disadvantage for BAME clients that would give rise to indirect discrimination.

Advancement of equality of opportunity, fostering of good relations

We have considered and do not regard that these proposals have any implications in relation to the advancement of equality of opportunity and the fostering of good relations.

Advancement of equality of opportunity, fostering of good relations

We have considered and do not regard that these regulations have any impact in relation to the advancement of equality of opportunity and the fostering of good relations. We consider that this proposal is not expected to have any equalities impact, beyond those already considered in the Royal Assent EIA.

8. The draft Civil Legal Services (Prescribed Types of Pollution of the Environment) Regulations 2012

Paragraph 42(1) of Part 1 of Schedule 1 to the Act makes available civil legal services provided in relation to injunctions in respect of nuisance arising from prescribed types of pollution of the environment. These regulations prescribe the types of pollution of the environment for the purposes of paragraph 42(1) of Part 1 of Schedule 1. The Government has retained legal aid for judicial review challenges to public authorities concerning environmental matters. Paragraph 42(1) of Part 1 of Schedule 1 supplements this by providing legal aid for injunctions relating to environmental pollution when a claim in private nuisance is brought against a public authority or private party.

Statistical analysis and due regard

We do not currently collect data on cases relating to environmental pollution. These cases could arise in a variety of Categories of Law.

The draft Civil Legal Services (Prescribed Types of Pollution of the Environment) Regulations 2012 will apply to everyone applying for legal aid in England and Wales. As stated above, women, BAME people and those who are ill or disabled are over-represented among those who use civil legal aid services when compared with the adult population as a whole, so any impacts may disproportionately fall on these groups.

Elimination of discrimination, harassment, victimisation and other prohibited conduct

The draft Civil Legal Services (Prescribed Types of Pollution of the Environment) Regulations 2012 prescribe the types of “pollution of the environment” for the purposes of paragraph 42(1) of Part 1 of Schedule 1. This will mean that the scope of legal aid for these cases is clear. These regulations apply to all applicants equally and do not directly discriminate. Nor do we have any data to indicate that these regulations and the prescribed types of environmental pollution will indirectly discriminate

Advancement of equality of opportunity, fostering of good relations

These regulations prescribe types of “pollution of the environment” for the purposes of defining clearly legal aid scope. They afford no

opportunity to promote equality of opportunity or to encourage the fostering of good relations.