EXPLANATORY MEMORANDUM TO

THE CIVIL LEGAL AID (MERITS CRITERIA) (AMENDMENT) REGULATIONS 2015

2015 No. 1414

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 This instrument amends The Civil Legal Aid (Merits Criteria) Regulations 2013 ("the 2013 Regulations"). The 2013 Regulations relate to the merits criteria which the Director of Legal Aid Casework ("the Director") must apply when determining whether an applicant qualifies for civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO").

2.2 The amendments provide specific merits criteria for applications for civil legal aid in relation to the making, varying, discharging or appeal of a female genital mutilation protection order.

2.4 The amendments also add specific merits criteria for determining applications made by victims of slavery, servitude or forced or compulsory labour for legal representation in relation to immigration matters. The amendments exclude help at court and investigative representation as appropriate levels of service for victims of slavery, servitude or forced or compulsory labour in relation to immigration matters.

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

3.1 This instrument will be brought into force on 17 and 31 July 2015. An urgency statement was presented to Parliament pursuant to section 41(9) of LASPO on 25 June 2015. The Lord Chancellor considers it desirable for this instrument to come into force without delay for the reasons given in that statement.

4. Legislative Context

4.1 The 2013 Regulations set out the merits criteria that must be applied by the Director when determining whether an applicant qualifies for civil legal services under Part 1 of Schedule 1 to LASPO.

4.2 Regulation 2 of the 2013 Regulations sets out the interpretation and definition of terms used within the 2013 Regulations. The amendment in regulation 2(2)(a) adds civil proceedings in relation to female genital mutilation protection orders to the definition of "domestic violence cases". The amendment in regulation 2(2)(b) adds civil proceedings in relation to female genital mutilation protection orders to the definition of "family dispute".

4.4 Regulation 22 of the 2013 Regulations sets out that help at court and investigative representation are not appropriate levels of service in immigration matters. The amendment in regulation 2(3) expands the list of relevant immigration matters to include services provided to victims of slavery, servitude or forced or compulsory labour.

4.5 Regulation 60 of the 2013 Regulations sets out the specific merits criteria for determination of an application for legal representation in relation to immigration. The amendment in regulation 2(4) adds services provided to victims of modern slavery, servitude or forced or compulsory labour to the matters for which these criteria apply.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

The Parliamentary Under-Secretary of State, Shailesh Vara, has made the following statement regarding Human Rights:

In my view the provisions of the Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2015 are compatible with the Convention rights.

7. Policy background

7.1 In order to qualify for civil legal aid under LASPO, an applicant must meet the financial eligibility rules and merits criteria. The 2013 Regulations set out the merits criteria that must be applied for applications made in relation to civil services described in Part 1 of Schedule 1 to LASPO. The Regulations set out the merits tests for various forms of civil legal services and where certain forms of legal services are not appropriate in certain types of cases.

Female genital mutilation protection orders

7.2 In July 2014, as part of its wider work to tackle Female Genital Mutilation (FGM) with victims, communities and professionals, the Government consulted on the creation of a new civil law measure to protect victims or potential victims of FGM. Following that consultation, provisions to introduce female genital mutilation protection orders ("FGMPO"), which are based on the existing forced

marriage protection orders ("FMPO"), were included in the Serious Crime Act 2015. The Serious Crime Act 2015 received Royal Assent on 3 March. It is intended that a commencement order will be made shortly as to bring the relevant provisions of the Serious Crime Act 2015 into force on 17 July 2015.

7.3 It is the intention of Government to replicate the legal aid arrangements for FMPOs for FGMPOs. The Serious Crime Act 2015 brought these proceedings within the scope of the civil legal aid scheme by amending Schedule 1 to LASPO. The amendment to the 2013 Regulations permits the application of less stringent merits criteria for FGMPOs than those applied more generally in relation to applications for legal representation, namely, the criteria in regulations 64 and 68 of the 2013 Regulations will apply to applications for full represenation. The Government considers appropriate given the serious nature of these proceedings.

Modern Slavery

7.4 The Modern Slavery Act 2015 makes provision in relation modern slavery with a view in particular to make sure perpetrators can receive appropriate punishments and to enhance the support and protection for victims. The Modern Slavery Act 2015 received Royal Assent on 26 March 2015. It is intended that a commencement order will be made shortly as to bring the relevant provisions of the Serious Crime Act 2015 into force on 17 July 2015

7.5 It is the intention of Government to replicate the civil legal aid arrangements for victims of human trafficking for victims of modern slavery. The Modern Slavery Act 2015 brought certain matters for victims of modern slavery within the scope of the civil legal aid scheme by amending Schedule 1 to LASPO. The amendments to the 2013 Regulations provide for specific merits criteria to be applied to applications for legal representation in relation to immigration matters made by victims of modern slavery. The effect of these amendments are to provide that, for applicants relying on paragraph 32A(1) of Schedule 1 to LASPO: 1) help at court and investigative representation are not appropriate forms of civil legal service for immigration matters; and 2) the existing merits test in regulation 60 is applied for full representation in immigration matters. These criteria are equivalent to those applied in relation to applications made by victims of human trafficking in relation to immigration matters. The Government considers these merits provisions appropriate given the nature of these proceedings.

8. Consultation outcome

8.1 In July 2014, the Government consulted on the creation of FGMPOs, the aim of which would be to provide an additional tool to prevent and/or help eliminate FGM. This consultation, and the Government's response to it, can be found at: https://consult.justice.gov.uk/digital-communications/female-genital-mutilation-proposal-to-introduce-a

8.2 That consultation did not relate specifically to the availability of legal aid for FGMPOs. However, a significant majority of those who responded to the

consultation supported the introduction of FGMPOs and agreed that the existing Forced Marriage Prevention Order would be a good model for this purpose.

8.3 The Government did not consider that it was appropriate to consult on this instrument. The approach taken in relation to legal aid for FGMPOs reflects the approach taken to legal aid for Forced Marriage Prevention Orders and is therefore consistent with general views of respondents to the consultation. A stakeholder engagement meeting with the Law Society took place on 15th June 2015, at which the civil legal aid arrangements were discussed.

8.4 Prior to publishing the draft Modern Slavery Bill, Frank Field MP was commissioned by the Home Secretary to review the evidence base for the Bill. The Review Panel, which included Baroness Butler-Sloss and Sir John Randall MP, spent two months consulting with NGOs, campaigners, frontline professionals, international experts and victims of modern slavery, in order to build a set of evidence-based recommendations to underpin the new clauses in the proposed Bill.

8.5 We did not consider it was appropriate to consult on this instrument because the approach taken replicates the provisions currently in place for victims of human trafficking.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument.

10. Impact

10.1 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.

11. Regulating small business

11.1 The Regulations do not impose any additional regulatory burdens on small firms.

11.2 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.

11.3 The Ministry of Justice has not taken any specific steps to minimise the impact of the requirement on firms employing up to 20 people.

12. Monitoring & review

12.1 The operation of and expenditure on the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency.

13. Contact

Ruth Duffin at the Ministry of Justice Tel: 020 3334 3304 or email: Ruth.Duffin@justice.gsi.gov.uk can answer any queries regarding the instrument.