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.

2.3 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".

4.3 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.

4.4 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

Female genital mutilation protection orders

7.1 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. The relevant provisions of the Serious Crime Act 2015 will come into force on 17 July 2015.

7.2 It is the Government's intention that the legal aid provision for FGMPOs should mirror that which already exists for FMPOs. To achieve this, FGMPOs were

brought within the scope of the civil legal aid scheme, as set out in Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), by the Serious Crime Act 2015. In order to ensure that legal aid provision for FGMPOs replicates that for FMPOs it is necessary to make a number of further amendments by way of Statutory Instruments to various sets of regulations which are made under LASPO. This instrument amends the merits criteria that an applicant must meet in order to qualify for civil legal under LASPO, which are set out in the 2013 Regulations.

7.3 The amendment made to the 2013 Regulations provides for specific merits criteria to apply for applications for legal aid for FGMPOs, by specifying that the relevant merits criteria are those applied in relation to applications for full representation in relation to domestic violence cases. The relevant criteria are those set out in regulations 64 and 67 of the 2013 Regulations. These criteria include a prospects of success test and a proportionality test. The proportionality test is met where the Director is satisfied that the likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all other circumstances of the case. The amendment to the 2013 Regulations thus allows for a less stringent merits test for proceedings in relation to an FGMPO, as the Director need not, for example, consider cost-benefit criteria (whether a private paying individual would be prepared to fund the proceedings) as part of the merits test. The Government considers these merits provisions appropriate given the serious nature of these proceedings.

Modern Slavery

7.4 The Modern Slavery Act 2015 makes provision for the protection of victims of modern slavery, servitude and forced or compulsory labour. The Modern Slavery Act 2015 received Royal Assent on 26 March 2015. The relevant provisions of the Modern Slavery Act will come into force on 31 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 provision of legal aid for advice and representation for damages and employment claims in relation to their exploitation, and in relation to immigration matters. The Modern Slavery Act 2015 brought these matters within the scope of the civil legal aid scheme by amending Schedule 1 to LASPO.

7.6 The amendments to the 2013 Regulations apply the existing merits criteria for victims of human trafficking to applications for legal aid 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. The exclusion of certain types of legal aid services (help at court and investigative representation) mirrors the existing provisions in immigration matters. These types of services are not relevant in

immigration cases, however, legal aid is available for initial advice and representation. 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.

9.2 Guidance on the operation of the civil legal aid scheme, including the merits criteria, is provided in the Lord Chancellor's Guidance on Civil Legal Aid, to which no changes are required. The guidance is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330878/legal-aid-LAA-lord-chancellors-guidance.pdf.

9.3 The Legal Aid Agency continue to communicate changes and provide guidance and support to legal aid providers on the operation of the civil legal aid scheme.

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.