EXPLANATORY MEMORANDUM TO

THE CIVIL LEGAL AID (MERITS CRITERIA AND INFORMATION ABOUT FINANCIAL RESOURCES) (AMENDMENT) REGULATIONS 2015

2015 No. [DRAFT]

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 Merits Criteria Regulations"). The Merits Criteria Regulations relate to the merits criteria which the Director of Legal Aid Casework ("the Director") at the Legal Aid Agency (LAA) 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 expand the definition of "private law children case" to include certain proceedings under Section 51A of the Adoption and Children Act 2002 (which was brought into force on 22 April 2014) and provide for the application of specific merits criteria when determining an individual's eligibility for legal representation in such proceedings.

2.3 This instrument also amends The Legal Aid (Information about Financial Resources) Regulations 2013 ("the Information Regulations"). The Information Regulations provide the Director with a power to make a request to the relevant Secretary of State for information about prescribed benefits made to individuals, in order to determine whether a person is financially eligible for legal aid. The amendments enable the Director to make a request to the Secretary of State for information about: (i) direct payments made to individuals to secure the provision of services for children with special educational needs (SEN) and other disabilities ("SEN direct payments"); and (ii) direct payments made under regulations made under s.17A of the Children Act 1989 for the provision of services to children with disabilities ("Children Act direct payments").

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

3.1 Regulation 3 of this instrument replicates the amendment made by S.I. 2015/838, which was made erroneously by negative Parliamentary process and subsequently revoked by S.I. 2015/1408.

4. Legislative Context

The Merits Criteria Regulations

4.1 The Merits Criteria Regulations set out the merits criteria that must be applied by the Director when determining whether an applicant qualifies for civil legal services (i.e. civil legal aid) under Part 1 of Schedule 1 to LASPO. Broadly speaking, these criteria provide the basis for deciding whether it is justified to provide, or to continue to provide, public funds in an individual case. The factors to be considered are similar to those that would influence a privately paying client of moderate means when considering whether to become involved in proceedings.

4.2 Regulation 2 of the Merits Criteria Regulations sets out the interpretation and definition of terms used within those Regulations. This instrument adds certain civil proceedings in relation to post-adoption contact orders to the definition of "private law children case". As a result, the merits criteria which apply to such proceedings when determining an individual's eligibility for legal representation will be those set out in Regulations 64 and 68.

4.3 Regulation 69 of the Civil Merits Regulations sets out the criteria for determinations for legal representation in relation to family cases to which specific merits criteria apply, other than those specifically provided for elsewhere in the Merits Criteria Regulations. This instrument also excludes determinations in relation to certain post-adoption contact orders proceedings from the scope of Regulation 69. This exclusion is necessary because, as set out in para 4.2 above, the applicable criteria for such matters will be those in Regulations 64 and 68.

The Information Regulations

4.4 The Information Regulations give the relevant authority (the Director) the power to request information from the relevant Secretary of State about a prescribed benefit an individual is receiving, for the purposes of assessing the financial resources of the individual in the course of assessing the individual's eligibility for legal aid.

4.5 This instrument prescribes direct payments made under regulations under section 49(3) of the Children and Families Act 2014 and section 17A of the Children Act 1989. As a result, the Director will have the power to request information on these payments from other Government Departments.

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 and Information about Financial Resources) (Amendment) Regulations 2015 are compatible with the Convention rights.

7. Policy background

The Merits Criteria Regulations

7.1 The Children and Families Act 2014 inserted sections 51A and 51B into the Adoption and Children Act 2002. These sections make specific provision for orders for post-adoption contact by persons named in section 51A(3). They came into effect on 22 April 2014. The Children and Families Act 2014 also amended Part 1 of Schedule 1 to LASPO so that any application for post-adoption contact is within the scope of the civil legal aid scheme, where the person applying for legal aid provides evidence of domestic violence or child abuse or where they are a child who is a party to the proceedings. The amendments to the Merits Criteria Regulations ensure that these cases are treated as private law children cases for the purposes of applying merits criteria. Unless a matter is within the definition of private law children proceedings, family justice matters are treated as 'finance and other' by default.

The Information Regulations

7.2 Where a child has a special educational need they may be eligible for an Education Health Care (EHC) plan. An EHC plan brings a child's education, health and social care needs into a single, legally-binding document. Direct cash payments may be made directly to the child's parent or guardian, the young person or their nominee, allowing them to arrange provision of necessary services (e.g. transport) as identified in the individual's EHC plan. These direct payments are currently made under the Special Educational Needs (Personal Budgets) Regulations 2014, made under section 49(3) of the Children and Families Act 2014. Direct payments may also be made under section 17A of the Children Act 1989 to parents of disabled children, a disabled person with parental responsibility for a child, or disabled children aged 16 or 17 to meet their assessed needs.

7.3 These direct payments are disregarded for the purposes of a legal aid financial eligibility assessments following the amendments made in the Legal Aid, Community Legal Service and Criminal Defence Service (Amendment) Regulations 2015 (S.I. 2015/838), which came into force on 13 April 2015. Therefore, these direct payments are not included when calculating a person's disposable income.

7.4 It is the intention of Government that the Director should be able to make an information request to the Secretary of State to find out whether or not a legal aid applicant is in receipt of direct payments that are disregarded for the purposes of the legal aid financial eligibility assessment. The amendment to the Information Regulations will enable the Director to make a request to the Secretary of State for

information these direct payments, making these direct payments consistent with those currently included in the Information Regulations.

8. Consultation outcome

8.1 We have not consulted on the Civil Legal Aid (Merits Criteria and Information about Financial Resources) (Amendment) Regulations 2015, as the amendments are consequential. The direct payments made under the Special Educational Needs (Personal Budgets) Regulations 2014 where piloted from November 2011 to August 2014 in 36 local authorities prior to coming into force on 1 September 2015.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument.

9.2 Guidance was prepared and published in April 2015 by the Legal Aid Agency regarding the treatment of direct payments for disposable income assessments, available here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420970/laa-determine-controlled-work-mediation.pdf

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420972/laa-determining-eligibility-certificated-work.pdf.pdf

9.3 No further guidance is considered necessary for the Information Regulation amendments, as only the Legal Aid Agency can rely on these provisions.

9.4 Guidance is not needed for applications for cases under section 51A of the Adoption and Children Act 2002. Volumes are expected to be low and the Legal Aid Agency will clarify procedures for providers.

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.