EXPLANATORY MEMORANDUM TO

THE CIVIL LEGAL AID (MERITS CRITERIA) REGULATIONS 2012

2012 No. [DRAFT]

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 The Civil Legal Aid (Merits Criteria) Regulations 2012 make provision for the merits criteria which the Director of Legal Aid Casework ("the Director") must apply when making a determination in about whether an applicant qualifies for civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the Act").

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 Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the Act"). These instruments will be laid in time for the Act to come into force on 1 April 2013.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

The Minister of State for Justice, Lord McNally has made the following statement regarding Human Rights:

In my view the provisions of the Civil Legal Aid (Merits Criteria) Regulations 2012 are compatible with the Convention Rights.

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 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 and in relation to civil legal services which are not described in Part 1 of Schedule 1 to the Act. 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.

7.3 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 categories of cases. 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). 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.

7.4 The Regulations set out how the tests are met and in which circumstances and for which services these tests apply. By way of example one of the criteria which applies in relation to full representation is the prospects of success test (regulations 4 and 5). 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 50% or more 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).

7.5 Generally the specific merits criteria are less stringent than the general merits 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. For example in mental health proceedings the general merits criteria for legal representation do not apply and instead the Director must be satisfied that it would be reasonable in all circumstances for full representation to be available. These are less stringent criteria than the general merits criteria, given the potential consequences of the action for the applicant. In certain mental capacity proceedings the general merits criteria 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.

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 (Merits Criteria) Regulations 2012.

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 not been prepared specifically for this instrument.

10.2 There is no impact on business, charities or voluntary bodies.

10.3 There is no impact on the public sector arising from this instrument beyond those accounted for in the Royal Assent Impact Assessment. The merits criteria represent the tests that need to be satisfied in order for a case to qualify for civil legal aid. These tests will operate largely as they do under the Access to Justice Act 1999, albeit within the narrower range of categories of case for which legal aid will be made available, as set out in Schedule 1 to the Act. The main difference between the merits tests under the Act and those under Access to Justice Act 1999, is the treatment of conditional fee agreements

(CFA) as alternative sources of funding. Generally, where a CFA is available, legal aid will not be granted. The Funding Code which was made under the Access to Justice Act 1999 did not require applicants to seek a CFA in relation to claims against a public authority, public law claims and clinical negligence claims. This change was consulted on as part of the exercise described at paragraph 8.1 above and taken into account when producing the Impact Assessment described at 10.1 above.

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.