

Title: The Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015 IA No: MoJ010/2015 Lead department or agency: Ministry of Justice Other departments or agencies: Legal Aid Agency	Impact Assessment (IA)				
	Date: 23/7/2015				
	Stage: Final				
	Source of intervention: Domestic				
	Type of measure: Secondary Legislation				
	Contact for enquiries: Tom Bainbridge (tom.bainbridge1@justice.gsi.gov.uk)				
Summary: Intervention and Options					RPC Opinion: Not applicable

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out?	Measure qualifies as
N/A	N/A	N/A	No	N/A

What is the problem under consideration? Why is government intervention necessary?

In a recent judgment the High Court found that the existing requirement for there to be an evens or greater than evens chance of success in order to provide civil legal aid funding for full legal representation is unreasonable. As a result, it would be unlawful for the Legal Aid Agency (LAA) to refuse the provision of civil legal aid in some cases where the prospects of success are less than evens. The Government is appealing the judgment but considers that in the meantime, and in order to minimise the risk to the legal aid scheme, an urgent statutory instrument should be made and laid to amend the existing civil legal aid merits criteria regulations to make it consistent with the current ruling.

What are the policy objectives and the intended effects?

The intention is to enable the Director of Legal Aid Casework at the LAA to continue to take lawful decisions on merits, whilst still targeting limited public resource at those cases which justify it.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The following option has been assessed against a base case of no change to the current regulations:

Option 1: Amend the civil legal aid merits criteria regulations to allow for certain cases with a prospect of success below 50% to be funded.

Will the policy be reviewed? We will review the policy following the outcome of our appeal.

Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro N/A	< 20 N/A	Small N/A	Medium N/A	Large N/A
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: NA	Non-traded: NA	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister _____ Andrew Selous _____ Date: 23/7/2015 _____

Summary: Analysis & Evidence

Policy Option 1

FULL ECONOMIC ASSESSMENT

Price Base Year 2014/15	PV Base Year 2014/15	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: N/A	High: N/A	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	N/A	£0m	N/A
High	N/A		£15m	N/A
Best Estimate	N/A		N/A	N/A

Description and scale of key monetised costs by 'main affected groups'

Legal Aid Fund: This option will involve an increase in volumes and expenditure. Though the specific response is difficult to estimate, this could cost up to £15m per annum in steady state.

Legal Aid Agency (LAA) Administration Costs: the LAA could face additional administrative costs as a result of increased numbers of legal aid applications and determinations. The LAA estimate this additional cost to be negligible.

Other key non-monetised costs by 'main affected groups'

Legal Aid Agency: There may be costs associated with any potential increase in applications, any increases in the legal aid grant rate for controlled immigration work and for increased cost orders against the LAA where cases are unsuccessful.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	N/A	£0m	N/A
High	N/A		£15m	N/A
Best Estimate	N/A		N/A	N/A

Description and scale of key monetised benefits by 'main affected groups'

Civil legal aid providers: An increase in case volumes and legal aid fee income. The additional fee income is estimated (indicatively) to be up to £15m per annum in steady state.

Other key non-monetised benefits by 'main affected groups'

Civil legal aid claimants: The number of individuals eligible to receive legal aid is likely to increase.

Key assumptions/sensitivities/risks	Discount rate (%)	N/A
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There is uncertainty in estimating the additional numbers of applications for civil legal aid and the additional numbers of cases which would be eligible for civil legal aid as a result of the policy change as both are dependent on behavioural impacts, which are very difficult to estimate with much certainty. We have therefore considered a range of indicative scenarios and present monetary values which are associated with that range. These behavioural impacts and potential scenarios are inherently uncertain and may not be realised, so the additional costs to the legal aid fund could therefore be towards the lower end of the range. Conversely, if the behavioural impacts have been underestimated the additional costs will be higher.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: n/a	Benefits: n/a	Net: n/a	No	Zero net cost

Evidence Base

Introduction

Background

1. This impact assessment accompanies the Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015 which amend the Civil Legal Aid (Merits Criteria) Regulations 2013 (“the merits criteria regulations”). This instrument was laid on Friday 24 July 2015 and comes into force on Monday 27 July 2015 and can be found on www.legislation.gov.uk
2. The legal aid scheme involves the public procurement of legal services and determines the terms and conditions of access to these services. Legal aid fund expenditure was £1.6bn in 2014-15, with around £919m spent on criminal legal aid, £622m spent on civil legal aid and £44m spent on central funds. The Legal Aid Agency (LAA) is responsible for administering the legal aid scheme in England and Wales.
3. The reform in this IA relates solely to the civil legal aid scheme. It is summarised in Option 1 below.

Policy Objectives

4. On 15 July 2015 the High Court handed down its judgment in *IS v The Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 Admin (“the IS case”)¹. The Court made a declaration that the merits criteria regulations are unlawful in the respects and to the extent set out in the Court’s judgment. In particular, the Court found that the existing requirement for there to be an even or greater than even chance of success in order to provide civil legal aid funding for full legal representation is unreasonable.
5. The main policy objective and intended effect of Option 1 is to amend the merits criteria regulations to enable the LAA to grant funding in cases where a refusal would be unlawful as a consequence of the judgment, whilst maintaining the underlying purpose of the merits criteria regulations and the legal aid scheme. That is to make sure that the limited legal aid budget is directed at the cases which most justify public funding.

Policy

6. The policy options considered in this Impact Assessment are as follows:
 - (i) Do nothing; and
 - (ii) Make amendments to the merits criteria regulations to enable legal aid funding to additionally be provided in cases with “borderline” or “poor” prospects of success, where the Director of Legal Aid Casework (“the Director”) at the LAA is satisfied that it is necessary to determine (or in the case of a risk of a breach, appropriate to determine) that the prospects of success test is met. This is in order to prevent a breach (or the risk of a breach), of the legal aid applicant’s rights under the European Convention on Human Rights or enforceable EU rights.

Main affected groups

7. The following key groups are likely to be affected by the proposals:
 - Civil legal aid applicants;
 - Civil legal aid providers; and
 - The LAA, which is responsible for administering legal aid.

¹ <http://www.bailii.org/ew/cases/EWHC/Admin/2015/1965.html>

Costs and benefits

Methodology and Assumptions

8. This IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact on society might be from implementing this proposal. The costs and benefits are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded).
9. The following assumptions have been made in the estimation of the costs and benefits:
 - I. Based on 2014-15 closed case data for civil representation (excluding special children's act cases), we assume that the mean cost for all additional civil representation certificates issued (including cases under the Exceptional Case Funding Scheme (ECF)) is approximately £ 4,000.
 - II. All costs and savings estimates are steady state.
 - III. All costs and savings figures above £0.5m have been rounded to the nearest £1m. Cost of less than £0.5m has been labelled as negligible.
 - IV. All changes to volumes estimates are made using 2014-15 LAA administrative data, where such data is available.
 - V. We assume that there will be two distinct impacts as a result of this policy:
 - a. An increase in the grant rate of existing applications for both ECF and in scope civil representation matters (where the test applies) due to a lower prospect of success test threshold being applied in cases where the Director is satisfied that it is necessary to determine that the prospects of success test is met to prevent a breach or risk of breach of the applicant's Convention or enforceable EU rights.
 - b. A behavioural response, resulting in additional numbers of applications for civil legal aid (up to 30% for both exceptional case funding (ECF) and up to 15% for in-scope representation matters), in cases where applications were previously not made by legal aid providers because the prospects of success were assessed by the provider as less than 50%. For some of these additional legal aid applications we assume there will be additional representation certificates that are granted legal aid.
 - VI. Aside from the behavioural response described above, we have assumed no other behavioural responses (e.g. a change in provider behaviour).
 - VII. When estimating the volume of additional ECF certificate applications that may receive funding, we have used existing grant rates for ECF. When estimating the number of additional in-scope certificate applications that would receive funding, we have assumed a lower grant rate of 10-30%, to reflect a. the lower prospects of success of these additional applications and b. that legal aid will only be provided for cases assessed as having "borderline" or "poor" prospects of success, where the Director is satisfied that it is necessary to determine that the prospects of success test is met to prevent a breach, or risk of a breach, of the legal aid applicant's rights under the European Convention on Human Rights or enforceable EU rights.

Option 0 (Base Case): Do nothing.

10. In order to be granted civil legal aid, an applicant's case must satisfy the merits criteria as set out in the merits criteria regulations. For applications for full representation (a specific type of civil legal service) the merits criteria regulations generally include a requirement that a prospects of success test is met.
11. Those applications that are subject to the prospects of success test must, generally, have at least a 50% (i.e. an 'evens') chance of success in order to receive legal aid funding for full representation (i.e. they must have a "moderate" or better prospects of success²). Under the existing Merits Criteria Regulations, civil legal aid for full representation is not currently available where a case has borderline or poor prospects of success.
12. The Government has sought and been given permission to appeal the IS judgment. If the 'do nothing' option were pursued, and the LAA continued to make determinations in line with the existing merits criteria regulations pending the outcome of that appeal, there is a risk that the LAA could take an unlawful decision in some cases where prospects of success are below 50%. We consider this would be contrary to good administration of the legal aid fund as it would leave the LAA open to the risk of legal challenge.

Option 1:

13. This option proposes amendments to the current merits criteria regulations which set out additional circumstances where the prospects of success test can be met and funding can be granted. These are where the prospects of success are assessed as "borderline", or "poor" (as defined in Regulation 5 of the merits criteria regulations as amended) and:
 - It is necessary for the Director to determine that the prospects of success test is met to prevent a breach of the individual's ECHR or enforceable EU rights; or
 - It is appropriate for the Director to determine that the prospects of success test is met, in the particular circumstances of the case, having regard to any risk that a failure to make such a determination would be such a breach.
14. These amendments will therefore result in a number of additional cases qualifying for civil legal aid but only to the extent that a refusal to fund due to the current prospects of success test would result in a breach of ECHR or enforceable EU law rights. The Government will consider the extent to which these amendments remain appropriate following the outcome of the appeal.

Costs of Option 1

Legal aid fund

15. We estimate there will be increased cost to the legal aid fund as a result of this option. These increased costs will arise from the following:
 - (i) Costs associated with an increase in applications and an increase in the existing grant rate for ECF representation certificates; and
 - (ii) Costs associated with the expansion of the merits test for all 'in scope' civil legal representation. This includes both an increase in applications and an increase in the grant rate of existing certificate applications due to a lower prospect of success test threshold in certain cases.
16. The extent to which any increased costs will be realised, and the magnitude of these additional costs, is difficult to estimate with accuracy. This is because it is highly dependent upon provider

² Under Regulation 5 of the Merits Criteria Regulations, cases can be classified as "very good", "good", "moderate", "borderline" or "poor" in terms of their chance of obtaining a successful outcome. There is a further category "Unclear" where the Director cannot put the case into any of the categories in Regulation 5 because, in all the circumstances of the case, there are identifiable investigations which could be carried out, after which it should be possible for the Director to make a reliable estimate of the prospects of success

and legal aid applicant behaviour and the extent to which any cases assessed as having “borderline” or “poor” prospects of success nevertheless meet the eligibility requirements under the amended merits criteria regulations. We have therefore carried out an indicative analysis, considering a range of potential scenarios in which increased numbers of applications are received and increased numbers of applications are granted.

17. These scenarios provide a range of additional costs of up to £15m per annum in steady state, including an assumption of 20% optimism bias.

LAA administrative costs

18. The one-off costs from the proposed change are expected to be negligible. These costs in the main will be one-off costs relating primarily to amending IT systems to take account of the new arrangements.
19. There are also likely to be small ongoing costs. These costs in the main will relate to contract management, case management and auditing providers’ assessments. The LAA estimate these costs to be negligible.

Non-monetised costs

20. There are areas of additional cost which have not been possible to monetise; this includes potential increases in applications or increases in the legal aid grant rate for controlled immigration work and increased cost orders against the LAA where cases are unsuccessful. These could all result in additional cost to the legal aid fund.

Benefits of Option 1

Civil legal aid claimants and civil legal aid providers

21. As set out in the costs section above, the number of individuals eligible to claim legal aid is likely to increase. The additional numbers of cases and individuals qualifying is highly dependent upon the factors set out above. We have therefore not been able to accurately estimate the numbers of additional cases or individuals who would receive funding.
22. Similarly, civil legal aid providers are likely to experience an increase in demand for their services and a consequential increase in legal aid fee income if increased numbers of cases qualify for civil legal aid. Again, this is highly dependent upon the factors set out above and we have not been able to accurately estimate the extent to which this will occur but have provided an indicative range based on increased numbers of applications and certificates granted.
23. The estimated range is for additional remuneration of up to £15m per annum in steady state including an assumption of 20% optimism bias.

Net Economic Impact of Option 1

24. As the financial cost to the LAA is equal to the increased revenue to providers, the net economic impact is negligible.

Risks and Sensitivity

25. The precise behavioural response of clients and providers is uncertain and may not be realised, and the additional costs to the legal aid fund could therefore be at the lower end of the estimated range. If however the behavioural impacts have been underestimated then additional costs could be higher than £15m.
26. Sensitivity analysis to produce the range above is an attempt to deal with some of the inherent uncertainty and provide indicative analysis.

27. There are areas of additional cost which have not been possible to monetise; this includes potential increases in applications or increases in the legal aid grant rate for controlled immigration work and increased cost orders against the LAA where cases are unsuccessful. These could all result in additional cost to the legal aid fund.