

*Draft Regulations laid before Parliament under section 41(6) of the Legal Aid, Sentencing and
Punishment of Offenders Act 2012, for approval by resolution of each House of Parliament.*

DRAFT STATUTORY INSTRUMENTS

2013 No. XX

**LEGAL AID AND ADVICE,
ENGLAND AND WALES**

**The Civil Legal Aid (Merits Criteria)
(Amendment) (No. 2) Regulations 2013**

Made - - - - *****
Coming into force - - *27th January 2014*

The Lord Chancellor makes the following Regulations⁽¹⁾ in exercise of the powers conferred by sections 11(1)(b), 41(1)(a) and (b), (2)(b) and (3)(c) of, and paragraph 3(2) of Schedule 3 to, the Legal Aid, Sentencing and Punishment of Offenders Act 2012⁽²⁾ (“the Act”).

In making these Regulations, in accordance with section 11(2), (3) and (5) of the Act, the Lord Chancellor—

- (a) has considered the circumstances in which it is appropriate to make civil legal services available under Part 1 of the Act and, in particular, the extent to which the criteria ought to reflect the factors in section 11(3); and
- (b) is satisfied that the criteria reflect the principle that, in many disputes, mediation and other forms of dispute resolution are more appropriate than legal proceedings.

In accordance with section 41(6) of the Act, a draft of this instrument was laid before Parliament and approved by resolution of each House of Parliament.

(1) Section 42(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10) provides that in Part 1 of that Act “regulations” means regulations made by the Lord Chancellor.
(2) 2012 c. 10.

PART 1

GENERAL AND AMENDMENTS

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2013 and come into force on 27th January 2014.

(2) In these Regulations—

“the Act” means the Legal Aid, Sentencing and Punishment of Offenders Act 2012; and

“the Merits Criteria Regulations” means the Civil Legal Aid (Merits Criteria) Regulations 2013(3).

Amendments to the Merits Criteria Regulations

2.—(1) The Merits Criteria Regulations are amended as follows.

(2) In regulation 2 (interpretation), in paragraph (b) of the definition of “private law children case”—

(a) after “(victims of domestic violence and family matters)” insert “or paragraph 15 (children who are parties to family proceedings)”; and

(b) for “it relates to” substitute “such provisions relate to”.

(3) In regulation 43 (prospects of success criterion for determinations for full representation), omit paragraph (b) and the “or” preceding it.

(4) In regulation 56 (criteria for determinations for full representation in relation to public law claims), omit paragraph (3)(b) and the “or” preceding it.

(5) In regulation 58 (criteria for determinations for full representation in relation to claims against public authorities)—

(a) in paragraph (1)(a), before “apply” insert “and regulation 43 (prospects of success criterion for determinations for full representation)”; and

(b) in paragraph (1)(b), for the words from “; regulation 42” to the end of paragraph (1)(b) substitute “and regulation 42 (cost benefit criteria) do not apply”; and

(c) for paragraph (1)(c) substitute—

“(c) paragraph (2) applies.”;

(d) omit paragraph (2)(b) and the “and” preceding it; and

(e) omit paragraph (3).

(6) In regulation 60(3)(b) (criteria for determinations for full representation in relation to immigration), omit “borderline or”.

(7) In regulation 61 (criteria for determinations for full representation in relation to court orders for possession)—

(a) in paragraph (1)(a), before “apply” insert “and regulation 43 (prospects of success criterion for determinations for full representation)”; and

(b) in paragraph (1)(b), for “41 to 44” substitute “41, 42 and 44”;

(c) in paragraph (2)(a), after “a defence to the claim;” insert “and”; and

(d) omit paragraph (2)(b).

(3) [S.I. 2013/104](#), to which there are amendments not relevant to these Regulations.

(8) In regulation 64(2) (standard criteria for determinations for full representation in relation to certain family disputes), omit sub-paragraph (c).

(9) In each of—

(a) regulation 66(2)(b) (criteria for determinations for full representation in relation to public law children cases);

(b) regulation 67(2)(a) (criteria for determinations for full representation in relation to domestic violence cases); and

(c) regulation 68(2)(a) (criteria for determinations for full representation in relation to private law children cases and certain cases relating to EU and international agreements),

for “very good, good, moderate or borderline” substitute “very good, good or moderate”.

(10) In regulation 69(3)(b) (criteria for determinations for full representation in relation to other family cases to which specific merits criteria apply), omit “or borderline”.

(11) After regulation 69(4)(b) insert—

“(ba) a determination for full representation in relation to any matter described in paragraph 15 of Part 1 of Schedule 1 to the Act (children who are parties to family proceedings), to the extent that regulations 64 and 68 do not apply;”.

(12) In regulation 75 (criteria for determinations for legal representation in relation to legal persons), omit paragraph (3)(c)(ii) and the “or” preceding it.

PART 2

TRANSITIONAL PROVISIONS

Application

3. The amendments made by regulation 2 do not apply to a pre-commencement application for civil legal services.

Pre-commencement applications for civil legal services

4. In this Part, a “pre-commencement application for civil legal services” means an application for civil legal services that is—

(a) made before 27th January 2014; or

(b) a new application for civil legal services within the meaning of regulation 6.

5.—(1) For the purpose of regulation 4(a), an application is made before 27th January 2014 if the application is—

(a) for Controlled Work and the application is signed and dated before 27th January 2014;

(b) for Licensed Work or an exceptional case determination under section 10 of the Act, other than an application for emergency representation, and the application is—

(i) signed and dated before 27th January 2014 and received by the Director by 5.00pm on 3rd February 2014; or

(ii) submitted through the Client and Cost Management System before 27th January 2014; or

(c) for emergency representation and the application—

- (i) results in a determination being made by a provider before 27th January 2014 and that determination is notified within five working days of the determination to the Director;
- (ii) is emailed or faxed to, and received by, the Director before 27th January 2014; or
- (iii) is submitted through the Client and Cost Management System before 27th January 2014.

(2) In this regulation—

- (a) “Client and Cost Management System” means the client and cost management system used by the Director in relation to applications for civil legal services;
- (b) “emergency representation” means—
 - (i) legal representation (within the meaning of regulation 18 of the Merits Criteria Regulations) that is not Controlled Work; or
 - (ii) family help (higher) (within the meaning of regulation 15(3) of the Merits Criteria Regulations),which is provided following a determination made on an urgent application;
- (c) “provider” means a person who provides civil legal services under Part 1 of the Act (legal aid); and
- (d) “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday for the purposes of paragraph 1 of Schedule 1 to the Banking and Financial Dealings Act 1971⁽⁴⁾.

6.—(1) An application is a new application for civil legal services referred to in regulation 4(b) if either paragraph (2) or (3) applies.

(2) This paragraph applies where an individual makes an application for civil legal services on or after 27th January 2014 and the following conditions are met—

- (a) civil legal services have been provided to that individual as a result of a pre-commencement application for civil legal services under regulation 4(a) (“the original application”);
- (b) the further application for civil legal services relates to the same case for which civil legal services were provided as a result of the original application; and
- (c) the further application for civil legal services is—
 - (i) for a different form of civil legal services to that provided as a result of the original application; and
 - (ii) the different form of civil legal services falls within the same variety of work as the form of service for which civil legal services were provided as a result of the original application.

(3) This paragraph applies where an individual makes an application for civil legal services on or after 27th January 2014 and the following conditions are met—

- (a) civil legal services that are Licensed Work have been provided to that individual as a result of a pre-commencement application for civil legal services under regulation 4(a) (“the original application”);
- (b) the further application for civil legal services relates to the case for which civil legal services were provided as a result of the original application; and

(4) 1971 c. 80.

- (c) as a result of the further application for civil legal services, the Director has decided in accordance with regulation 37(3)(b) of the Procedure Regulations that the certificate should cover more than one set of proceedings.
- (4) In this regulation “variety of work” means one of the following—
- (a) Controlled Work; or
 - (b) Licensed Work.

Interpretation of Part 2

7. In this Part—
- “the Procedure Regulations” means the Civil Legal Aid (Procedure) Regulations 2012(5);
- “Controlled Work” has the meaning given in regulation 21(2) of the Procedure Regulations;
- “form of civil legal services” has the meaning given in regulation 12(3) of the Merits Criteria Regulations; and
- “Licensed Work” has the meaning given in regulation 29(2) of the Procedure Regulations.

Signed by authority of the Lord Chancellor

Date

Name
Parliamentary Under Secretary of State
Ministry of Justice

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Civil Legal Aid (Merits Criteria) Regulations 2013 (S.I. 2013/104) (“the Merits Criteria Regulations”), which make provision for the criteria which the Director of Legal Aid Casework (“the Director”) must apply when determining whether an individual or legal person qualifies for civil legal services under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10) (“the Act”).

Regulation 2(3) to (7) and (9) to (10) and (12) amends the merits criteria which the Director must apply in relation to determinations for legal representation in certain cases. Where an application for civil legal services is subject to an assessment of its prospects of success, it will no longer fulfil the merits criteria if the case is assessed as having a “borderline” prospect of success. Consequently, borderline cases will be ineligible for legal aid. “Borderline” is defined in regulation 5(1)(d) of the Merits Criteria Regulations.

Regulation 2(8) makes an amendment to the Merits Criteria Regulations to ensure that a prospects of success test applies to cases falling within paragraph 15 of Part 1 of Schedule 1 to the Act. Regulation 2(2) amends the definition of “private law children case” in the Merits Criteria Regulations to include reference to specific types of case falling within paragraph 15. The consequence of this is that those cases will be subject to the merits criteria detailed in paragraph 68 of the Merits Criteria Regulations. Regulation 2(11) amends the merits criteria which the Director must apply in certain family cases to include reference to matters described in paragraph 15 of Schedule 1 to the Act to the extent that regulations 64 and 68 do not apply. This amendment ensures that the prospects of success test applies to the types of paragraph 15 case that do not fall within the definition of “private law children case”.

Regulation 3 provides that the amendments made by regulation 2 do not apply to pre-commencement applications for civil legal services. Regulations 4 to 6 define a “pre-commencement application”.

A full impact assessment of the effect of the policy implemented by this instrument on the costs of business and the voluntary sector was produced with the Government’s response to consultation, *Transforming Legal Aid: Next Steps*, and is available at <https://consult.justice.gov.uk/>.