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

2012 No. 00

LEGAL AID AND ADVICE, ENGLAND AND WALES

The Civil Legal Aid (Merits Criteria) Regulations 2012

Made - - - -	*xx*
Coming into force - -	*1st April 2013*

The Lord Chancellor makes the following Regulations(**1**) in exercise of the powers conferred by sections 5(4), 11(1)(b) and (6) and 41(1)(a) and (b), (2)(a) and (b) and (3)(a) 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) to (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);

(b) has sought to secure that, in cases in which more than one form of civil legal service could be provided for an individual, the individual qualifies under Part 1 of the Act for the form of service which in all the circumstances is most appropriate having regard to the criteria; and

(c) 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

INTERPRETATION AND GENERAL

Citation and commencement

1. These Regulations may be cited as the Civil Legal Aid (Merits Criteria) Regulations 2012 and come into force on 1st April 2013.

Interpretation

2. In these Regulations—

"the 1990 Act" means the Courts and Legal Services Act 1990(**3**);

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

"advocate" means a person who exercises a right of audience before a court, tribunal or other person;

"case with overwhelming importance to the individual" means a case which is not primarily a claim for damages or other sum of money and which relates to one or more of the following—

(a) the life, liberty or physical safety of the individual or a member of that individual's family (an individual is a member of another individual's family if the requirements of section 10(6) are met); or

(b) the immediate risk that the individual may become homeless;

"conditional fee agreement" means an enforceable agreement which satisfies the conditions in—

(a) section 58 of the 1990 Act (conditional fee agreements)(**4**);

(b) section 58AA of the 1990 Act (damages-based agreements)(**5**); or

(c) section 58B of the 1990 Act (litigation funding agreements)(**6**);

"Convention rights" has the same meaning as in section 1 of the Human Rights Act 1998(**7**);

"domestic violence case" means any matter which is described in either of the following paragraphs of Part 1 of Schedule 1 to the Act (civil legal services)—

(a) paragraph 11 (family homes and domestic violence); or

(b) paragraph 16 (forced marriage);

"emergency representation" means the provision of civil legal services following an urgent application made in accordance with regulations made under section 12 (determinations) of the Act;

"family dispute" means any matter which is described in any of the following paragraphs of Part 1 of Schedule 1 to the Act (civil legal services)—

(a) paragraph 1 (care, supervision and protection of children);

(b) paragraph 9 (inherent jurisdiction of High Court in relation to children and vulnerable adults), to the extent that the matter relates to—

(**3**) 1990 c.41.
(**4**) Section 58 was substituted for section 58 as originally enacted by section 27(1) of the Access to Justice Act 1999 (c.22) and amended by S.I. 2005/3429 and section 44(1) and (2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c.10)("the Act").
(**5**) Section 58AA was inserted by section 154(2) of the Coroners and Justice Act 2009 (c. 25) and was amended by section 45 (1) to (11) of the Act.
(**6**) Section 58B was inserted by section 28 of the Access to Justice Act 1999 (c.22), as amended by S.I. 2005/3429.
(**7**) 1998 c.42.

(i) a child; or

(ii) a vulnerable adult, but only to the extent that the matter arises out of a family relationship within the meaning of paragraph 14(7)(b) and (c) of Part 1 of Schedule 1 to the Act;

(c) paragraph 10 (unlawful removal of children);

(d) paragraph 11 (family homes and domestic violence);

(e) paragraph 12 (victims of domestic violence and family matters);

(f) paragraph 13 (protection of children and family matters);

(g) paragraph 14 (mediation in family disputes);

(h) paragraph 15 (children who are parties to family proceedings);

(i) paragraph 16 (forced marriage);

(j) paragraph 17 (EU and international agreements concerning children); or

(k) paragraph 18 (EU and international agreements concerning maintenance);

"general merits criteria" means the criteria set out in Part 4 (general merits criteria);

"lead claim" means the claim in a multi-party action which the Director(**8**) has identified as being the appropriate claim to be a test case for common or related issues of fact or law;

"merits criteria" means the general merits criteria and the specific merits criteria;

"multi-party action" means proceedings in which a number of individuals have a cause of action which involves common or related issues of fact or law;

"private law children case" means any matter which is described in any of the following paragraphs of Part 1 of Schedule 1 to the Act (civil legal services)—

(a) paragraph 10 (unlawful removal of children);

(b) paragraph 12 (victims of domestic violence and family matters), to the extent it relates to—

(i) Part 1 or 3 of the Family Law Act 1986 (child custody and declarations of status); or

(ii) any provision of Part 1 or 2 of the Children Act 1989(**9**) (orders with respect to children in family proceedings), other than section 15(**10**) of, and Schedule 1 to, that Act; or

(c) paragraph 13 (protection of children and family matters);

"provider" means a person who provides civil legal services under Part 1 of the Act (legal aid);

"public law children case" means any matter which is described in either of the following paragraphs of Part 1 of Schedule 1 to the Act (civil legal services)—

(a) paragraph 1 (care, supervision and protection of children), to the extent that the matter is not a "special Children Act 1989 case"; or

(b) paragraph 9 (inherent jurisdiction of High Court in relation to children and vulnerable adults), to the extent that the matter relates to a child;

"public law claim" means any matter which is described in any of the following paragraphs of Part 1 of Schedule 1 to the Act (civil legal services)—

(a) paragraph 19 (judicial review);

(**8**) Section 42(1) of the Act provides that in Part 1 of the Act (legal aid) "the Director" means the Director of Legal Aid Casework.
(**9**) 1989 c.41.
(**10**) Section 15 was amended by section 116 of, and paragraph 10 of Schedule 16 to, the Courts and Legal Services Act 1990 (c.41) and section 11(1) of, and paragraph 10 of Schedule 2 to, the Maintenance Enforcement Act 1991 (c.17).

(b) paragraph 20 (habeas corpus); or

(c) paragraph 34 (homelessness);

"small claims track" means the small claims track for which provision is made in Part 27 of the Civil Procedure Rules, which are made in exercise of the power conferred by section 2 of the Civil Procedure Act 1997(**11**) to make rules of court under section 1 of that Act;

"special Children Act 1989 case" means any matter described in paragraph 1(1)(a), (b) or (c) of Part 1 of Schedule 1 to the Act (care, supervision and protection of children), to the extent that it relates to any of the following provisions of Children Act 1989—

(a) section 25 (use of accommodation for restricting liberty)(**12**), to the extent that the individual to whom civil legal services may be provided is the child who is or would be the subject of the order;

(b) section 31 (care and supervision orders)(**13**), to the extent that the individual to whom civil legal services may be provided is the child who is or would be the subject of the order, that child's parent or other person with parental responsibility for that child;

(c) section 43 (child assessment orders), to the extent that the individual to whom civil legal services may be provided is the child who is or would be the subject of the order, that child's parent or other person with parental responsibility for that child;

(d) section 44 (orders for emergency protection of children), to the extent that the individual to whom civil legal services may be provided is the child who is or would be the subject of the order, that child's parent or other person with parental responsibility for that child; or

(e) section 45 (duration of emergency protection orders and other supplemental provisions)(**14**), to the extent that the individual to whom civil legal services may be provided is the child who is or would be the subject of the order, that child's parent or other person with parental responsibility for that child,

but does not include appeals from final orders made under any of those provisions of the Children Act 1989; and

"specific merits criteria" means the criteria set out in Part 6 (specific merits criteria).

Delegation

3. A function of the Director under these Regulations may be exercised by a person authorised for that purpose by the Director, or by an employee of that person(**15**).

Prospects of success

4.—(1) In these Regulations, "prospects of success" means the likelihood that an individual who has made an application for civil legal services will obtain a successful outcome at a trial or other final hearing in the proceedings to which the application relates, as assessed by the Director in accordance with regulation 5 (prospects of success test).

(**11**) 1997 c.12. Section 2 was amended by section 15(1) of, and paragraphs 261 and 263(1) and (2) of Part 1 of Schedule 4 to, the Constitutional Reform Act 2005 (c.4).

(**12**) Section 25 was amended by section 39 of, and paragraph 15 of Schedule 3 to, the Children and Young Persons Act 2008 (c.23) and section 24 of, and paragraph 45 of Schedule 4 to, the Access to Justice Act 1999 (c.22).

(**13**) Section 31 was amended by section 75 of, and paragraph 1 of Schedule 8 to, the Criminal Justice and Court Services Act 2000 (c.43); sections 120 and 121(1) of the Adoption and Children Act 2002 (c.38) and section 6 of, and paragraph 35 of Schedule 4 to, the Criminal Justice and Immigration Act 2008 (c.4).

(**14**) Section 45 was amended by section 52 of, and paragraph 4 of Schedule 6 to, the Family Law Act 1996 (c.27); section 42 of, and paragraph 1 of Schedule 4 to, the Children and Young Persons Act 2008 (c.23); section 116 of, and paragraph 19 of Part 1 of Schedule 16 to, the Courts and Legal Services Act 1990 (c.41); S.I.2002/253 and S.I. 2004/1771.

(**15**) Section 6 of the Act (authorisations) makes provision for authorisations given for the purpose of section 5 of the Act (delegation) or regulations under that section.

(2) When the Director assesses the prospects of success, the Director must not have regard to—

(a) the possibility of settling the proceedings to which the application relates; or

(b) subject to paragraph (3), the prospects of success in any appeal or possible appeal.

(3) If the application for civil legal services is in relation to an appeal, then the prospects of success are the prospects of success in relation to that appeal.

(4) "Successful outcome" means the outcome a reasonable individual would intend to achieve in the proceedings in all the circumstances of the case.

Prospects of success test

5.—(1) Where the Director assesses, for the purposes of these Regulations, the prospects of success of a matter to which an application for civil legal services relates, the Director must classify the prospects of that matter as follows—

(a) "very good", which means an 80% or more chance of obtaining a successful outcome;

(b) "good", which means a 60% or more chance, but less than an 80% chance, of obtaining a successful outcome;

(c) "moderate", which means a 50% or more chance, but less than a 60% chance, of obtaining a successful outcome;

(d) "borderline", which means that the case is not "unclear" but that it is not possible, by reason of disputed law, fact or expert evidence, to—

(i) decide that the chance of obtaining a successful outcome is 50% or more; or

(ii) classify the prospects as poor;

(e) "poor", which means the individual is unlikely to obtain a successful outcome; or

(f) "unclear", which has the meaning given in paragraph (2).

(2) "Unclear" means the Director cannot put the case into any of the categories in paragraph (1)(a) to (e) 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.

Public interest

6.—(1) For the purposes of these Regulations, a case is of significant wider public interest if the Director is satisfied that the case is an appropriate case to realise—

(a) real benefits to the public at large, other than those which normally flow from cases of the type in question; and

(b) benefits for an identifiable class of individuals, other than the individual to whom civil legal services may be provided or members of that individual's family.

(2) In paragraph (1), an individual is a member of another individual's family if the requirements of section 10(6) are met.

Reasonable private paying individual test

7. For the purposes of these Regulations, the reasonable private paying individual test is met if the Director is satisfied that the potential benefit to be gained from the provision of civil legal services justifies the likely costs, such that a reasonable private paying individual would be prepared to start or continue the proceedings having regard to the prospects of success and all the other circumstances of the case.