

Title: <b>The Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016</b> IA No: MoJ011/2016 Lead department or agency: <b>Ministry of Justice (MoJ)</b> Other departments or agencies: <b>Legal Aid Agency (LAA)</b>	<b>Impact Assessment (IA)</b>
	<b>Date: 21/07/2016</b>
	<b>Stage: Final</b>
	<b>Source of intervention: Domestic</b>
	<b>Type of measure: Secondary Legislation</b>
	<b>Contact for enquiries:</b> Hannah Cook (Hannah.Cook1@justice.gsi.gov.uk)
<b>Summary: Intervention and Options</b>	<b>RPC Opinion: Not applicable</b>

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year	In scope of One-In, Two-Out?	Measure qualifies as
N/A	N/A	N/A	N/A	N/A

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

The Court of Appeal handed down judgment on 20<sup>th</sup> May 2016 in *IS versus the Director of Legal Aid Casework and the Lord Chancellor* holding that the version of the Civil Legal Aid (Merits Criteria) Regulations 2013 (“the Merits Criteria Regulations”) in place up to July 2015 was lawful. This version contained a general funding requirement for civil legal aid applicants seeking full legal representation to have 50% or higher prospects of their case succeeding. This judgment overturns a previous judgment of the High Court in July 2015, which ruled that this aspect of the Merits Criteria Regulations was unlawful.

In response to the High Court judgment, the Merits Criteria Regulations were amended so that the prospects of success test could be treated as met in cases where prospects of success are 20% or more, but below 50% (“20-49%” prospects) or ‘borderline’<sup>1</sup>, if failure to do so breached or risked breaching the applicant’s rights under the European Convention on Human Rights (“ECHR”) or enforceable EU law. As a result of the Court of Appeal’s judgment, the Legal Aid Agency (“the LAA”) are no longer funding any applications for civil legal aid where the prospects of success test applies and the prospects are assessed as 20-49% or ‘borderline’. The Government intends to amend the Merits Criteria Regulations to retain the general requirement that civil cases must, with some exceptions, have a 50% or higher prospect of success to receive legal aid funding for full representation, but to provide an additional exception to allow funding for certain cases where prospects of success are 45% or more, but less than 50% (“marginal”), or ‘borderline’, subject in most cases to the case being either i) of overwhelming importance to the individual<sup>2</sup> or ii) of significant wider public interest (the ‘specified criteria’)<sup>3</sup>.

**What are the policy objectives and the intended effects?**

The policy objective is to make sure that limited legal aid funds are directed at cases that most justify public funding. The intended effect is to broaden the eligibility of legal aid relative to the current position.

**What policy options have been considered, including any alternatives to regulation?**

The following options have been assessed against a base case of no change:

Option 1 - Amend the Merits Criteria Regulations to retain the general requirement that cases must, with some exceptions, have a 50% or higher prospect of success to receive legal aid funding for full representation, but with an additional exception to allow funding for cases with ‘borderline or ‘marginal’ prospects of success, subject to fulfilling specified criteria.

**Will the policy be reviewed?**

The operation of, and expenditure on, the legal aid scheme is continually monitored by the MoJ and the LAA.

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.	<b>Micro</b> N/A	<b>&lt; 20</b> N/A	<b>Small</b> N/A	<b>Medium</b> N/A	<b>Large</b> N/A
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)				<b>Traded:</b> N/A	<b>Non-traded:</b> N/A

**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 \_\_\_\_\_ Oliver Heald \_\_\_\_\_ Date: \_\_\_\_\_ 20/07/2016 \_\_\_\_\_

<sup>1</sup> ‘Borderline’ means that it is not possible, by reason of disputed law, fact or expert evidence, to quantify the prospects of success.

<sup>2</sup> A 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; or
- (b) the immediate risk that the individual may become homeless.

<sup>3</sup> A case is of “significant wider public interest” if the Director of Legal Aid Casework 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.

# Summary: Analysis & Evidence

# Policy Option 1

**Description:** Amend the Merits Criteria Regulations to retain the general requirement that civil cases must, with some exceptions, have a 50% or higher prospect of success to receive legal aid funding for full representation, but with an additional exception to allow funding for cases with 'borderline' or 'marginal' prospects of success, subject to specified criteria.

## FULL ECONOMIC ASSESSMENT

Price Base Year 2015- 16	PV Base Year N/A	Time Period Years N/A	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			
High			
Best Estimate	0.005	0.25	N/A

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

LAA: The LAA will face one-off administrative costs from changing their legal aid application forms and IT systems to account for the regulatory changes. The LAA estimates this additional one-off cost to be £5,000. There may also be an increase in workload for the Agency's staff as they will have to handle and assess more cases per year. The LAA estimates this cost to be absorbed within their existing budget.

Legal aid fund: There will be an increase in costs to the legal aid fund as the LAA is expected to fund more cases compared to the current position, as some borderline and marginal cases will receive funding. This is estimated to result in costs to the fund of around £250,000 per year, in nominal terms.

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

N/A

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate	N/A	0.25	N/A

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

Civil legal aid providers: This option may result in an increase in case volumes and thus legal aid fee income for providers, as some marginal and borderline cases will be eligible for funding. This is estimated at approximately £250,000 per year in aggregate, and in nominal terms.

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

Civil legal aid claimants: As certain cases with 'borderline' or 'marginal' prospects will be eligible for funding, subject to certain criteria, more individuals will be eligible to receive legal aid. It is estimated that there will be around 70 more grants of legal aid funding per year.

### Key assumptions/sensitivities/risks

Discount rate

N/A

There is uncertainty in estimating the cost that may result from the policy change, as it depends on the behavioural impacts of clients and providers which are difficult to estimate with much certainty. As such, the cost is based on data gathered on the '20-49%' and 'borderline' cases funded since the policy change necessitated by the High Court judgment in July 2015. The costs themselves are uncertain, as they are based on only eight months of data, and costs to the legal aid fund could be different over a longer period. Certain assumptions have also been made regarding the proportion of cases qualifying as 'marginal' or 'borderline' cases to reflect the specified criteria a case must satisfy.

## 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	N/A

# Evidence Base

## A. Background

1. This impact assessment (IA) accompanies the Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016 which amend the Civil Legal Aid (Merits Criteria) Regulations 2013 (the “Merits Criteria Regulations”). This instrument was laid on 21 July 2016 and comes into force on 22 July 2016. The instrument can be found on [www.legislation.gov.uk](http://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 £889m spent on criminal legal aid, £685m spent on civil legal aid and £63m spent on central funds. The Legal Aid Agency (LAA) is responsible for administering the legal aid scheme in England and Wales.
3. This IA relates solely to the civil legal aid scheme. In order to be granted civil legal aid for certain types of proceeding, an applicant’s case must satisfy the merits criteria set out in the Merits Criteria Regulations. For most applications for full civil representation the merits criteria generally require that a prospects of success test is met. This test determines 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.

## B. Policy Rationale and Objectives

4. On 15 July 2015 the High Court handed down judgment in the case of *IS v The Director of Legal Aid Casework and the Lord Chancellor*<sup>4</sup>. The Court made a declaration that the Merits Criteria Regulations were unlawful in the respects and to the extent set out in the Court’s judgment. In particular, the Court found that the general requirement for a case to have a 50% or higher prospect of success in order for civil legal aid for full legal representation to be provided was unlawful.
5. The version of the Merits Criteria Regulations considered by the High Court contained a general requirement for an applicant’s case to have a 50% or higher prospect of success to qualify for civil legal aid for full representation, with exceptions for inquests, many mental health cases, and many types of public law children cases. The Merits Criteria Regulations were amended in July 2015 following the High Court’s judgment so that the prospects of success test could be treated as met in cases with 20-49% or borderline prospects of success, to avoid a breach, or in some cases a risk of a breach, of the applicant’s rights under the ECHR or enforceable EU law.
6. The Government appealed the High Court judgment, and on 20<sup>th</sup> May 2016 the Court of Appeal<sup>5</sup> ruled that the version of the Merits Criteria Regulations that had been before the High Court in June 2015 was lawful, overturning the High Court’s judgment. The effect of this is that the general requirement for a case to have a 50% or higher prospect of success in order to be eligible for civil legal aid funding for full legal representation is lawful. As a result of the Court of Appeal’s judgment, the LAA are no longer funding any applications for civil legal aid where the prospects of success test applies and the prospects are assessed as 20-49% or ‘borderline’.
7. The aim of the merits criteria is to make sure that public funding is targeted at cases that most justify it. Whilst there is no legal requirement to broaden eligibility for legal aid, in consideration of

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<sup>4</sup> [2015] EWHC 1965 (Admin)

<sup>5</sup> [2016] EWCA Civ 464

the policy intention underpinning the merits criteria, and various criticisms of the criteria, the Government has reviewed the arrangements that were in place following the High Court's judgment, and the effect of the Court of Appeal judgment, and has decided to make legal aid funding available for certain cases where prospects are just below 50%, or borderline, but where the case concerns a matter that is of overwhelming importance to the individual, or is of significant wider public interest. This is consistent with the Government's longstanding policy underlying the merits test that taxpayers should not be expected to fund cases which a reasonably acting, privately paying individual would not pursue, but takes account of the nature of certain cases in determining whether a private client would choose to litigate, as is consistent with existing exemptions to the 50% prospects of success requirement in the Merits Criteria Regulations.

8. To address this the Government is amending the Merits Criteria Regulations to retain a general requirement for cases to have 50% or higher prospects of success, with certain exemptions that were in place in the version of the Merits Criteria Regulations considered by the High Court, but with an additional exception for certain cases with borderline or marginal prospects of success. In most instances this is subject to the case being of overwhelming importance to the individual, or of significant wider public interest, but is without qualification in cases where by nature the type of case is likely to satisfy these criteria, such as domestic violence cases, or cases relating to court orders for possession. The effect of this is that the LAA will be able to fund certain cases with 'borderline' or 'marginal' prospect of success where under the current regulations they do not.

## C. Description of Options Considered

9. The policy options considered in this Impact Assessment are as follows:

- a) **Option 0 - No change**; The LAA would continue to require that cases must generally have a 50% or higher prospect of success in order to be granted civil legal aid funding for full legal representation. The Merits Criteria Regulations would be amended to undo the changes made in July 2015 following the High Court's judgment.
- b) **Option 1** - Amend the Merits Criteria Regulations to maintain a general requirement that cases must have a 50% or higher prospect of success to receive legal aid funding for full representation, but with an additional exception to allow funding for cases with 'borderline' or 'marginal' prospects of success (45-49%), that are either i) of overwhelming importance to the individual, or ii) of significant wider public interest.

## D. Affected Groups

10. 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.

## E. Cost Benefit Analysis

11. Where possible, this IA outlines the potential costs and benefits from implementing the proposal on the key groups identified. The costs and benefits are compared to Option 0, the no change option. IAs place a strong emphasis on valuing the costs and benefits in monetary terms but

there are some aspects that cannot always be meaningfully monetised. This IA considers the impact of the proposed reform in isolation.

## Key Assumptions

12. The following key assumptions have been made in estimating the costs and benefits of the policy:
- a) The estimates are based on eight months of legal aid data collected since the High Court judgment for cases that received funding having had their prospects of success assessed as either 20-49% or 'borderline'.
  - b) It has been assumed, for 20-49% and 'borderline' cases where funding has been granted as a result of the High Court judgment, that the average costs used to estimate the eventual costs of the cases would not change in future years in the absence of any policy changes.
  - c) Various assumptions have been made regarding the volume of cases that would qualify as 'borderline' or 'marginal' prospects of success depending on the category of law a case relates to, based on LAA caseworker experience. It has been assumed that the following proportions of cases with '20-49%' or 'borderline' prospects of success that the LAA have funded since the High Court judgement, will continue to receive funding under Option 1 even though they have 'marginal' or 'borderline' prospects of success:
    - I. 25% of all immigration cases;
    - II. 80% of all family cases; and
    - III. 20% of all other cases.

## Option 0: No change

13. In order to be granted civil legal aid for certain types of proceeding, 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 regulations generally include a requirement that a prospects of success test is met.
14. Under the Merits Criteria Regulations as amended in July 2015 after the High Court ruling, the prospects of success test could be treated as met in cases with '20-49%' or 'borderline' prospects, if failure to do so breached or risked breaching the applicant's rights under the European Court of Human Rights or enforceable EU law.
15. As a result of the Court of Appeal's judgment, the LAA are no longer funding applications for civil legal aid that are subject to a prospects of success test where the prospects are assessed as 20-49% or borderline.
16. As the no change option is compared against itself, the costs and benefits are necessarily zero.

## **Option 1: Amend the Merits Criteria Regulations to maintain a general requirement that civil cases must have a 50% or higher prospect of success to receive legal aid funding for full representation, but with an additional exception to allow funding for certain cases with borderline or marginal prospects of success, subject to specified criteria in some cases.**

17. Option 1 proposes amending the Merits Criteria Regulation to require that, with some exceptions, funding for full representation will only be available for cases that have at least a 50% prospect of

success, with an additional exception for certain cases that have 'borderline' or 'marginal' prospects of success, subject to specified criteria in some cases.

18. Under this option the eligibility for legal aid would be wider than what is legally required, in line with the purpose of the merits criteria to direct public funding at cases the Government considers most justify it.

### **Costs of Option 1**

#### **Legal aid fund**

19. Based on the cost to the legal aid fund since the amendments to the Merits Criteria Regulations in July 2015, it is estimated that the cost to the fund would be around £250,000 per year if Option 1 is implemented.

#### **LAA administrative costs**

20. The one-off costs for the LAA from Option 1 is expected to be £5,000, relating primarily to amending the relevant legal aid application forms to take account of the removal of the category 'very poor', which is no longer required, the addition of the category 'marginal' in the prospects of success test and the specific criteria that must be satisfied, and adjustment of any related IT systems.
21. There is likely to be an increase in workload for the Agency's staff with Option 1 as they will have to handle and assess more cases per year. The LAA estimates this cost to be absorbed within existing budgets.

### **Benefits of Option 1**

#### **Civil legal aid claimants**

22. As eligibility for legal aid would be broadened by Option 1, more individuals would be eligible to receive legal aid than under the current position. It is estimated that there will be around 70 more grants for legal aid funding per year.

#### **Civil legal aid providers**

23. Civil legal aid providers may experience an increase in demand for their services, and consequently their legal aid fee income if more cases qualify for civil legal aid. The estimated annual legal aid fee gain to civil legal aid providers as a result of implementing Option 1 is estimated to be £250,000.

## **F. Risks and Uncertainties**

24. The precise behavioural response of clients and providers is uncertain and savings to the legal aid fund may be over or underestimated. If, for instance, the number of applications would increase in coming years or the number of grants would go up, then the cost estimates in this IA could be underestimated.
25. The costs to the legal aid fund, and benefits to providers, may be underestimated as the estimate does not take into account the increased propensity for the LAA to have to pay the other side's legal costs as a result of funding cases with lower than 50% prospects of success. Funding 'borderline' cases or cases with prospects of success lower than 50% may mean a greater

likelihood that a case loses, but no estimate has been made of this additional liability as it is not possible to predict with any accuracy.

26. There are uncertainties in estimating the proportion of cases that are likely to be 'marginal' or 'borderline' and satisfy the specified criteria in Option 1. The LAA does not hold enough detailed data to estimate these proportions with much accuracy so they are based on caseworker experience of the types of case received and whether they are likely to satisfy the specified criteria, and the prospects of success of cases that were previously categorised as having prospects below 50%. Volumes may therefore be different to those assumed, and could change according to trends in the types of applications received.

## **G. Enforcement and Implementation**

27. The proposed amendments to the Merits Criteria Regulations (Option 1) will be implemented by way of affirmative Statutory Instrument made under an urgency procedure. This will be laid before Parliament on 21 July 2016 and will come into force on 22 July 2016. Approval from Parliament will then need to follow within 120 sitting days.

## **H. Monitoring and Evaluation**

28. The operation of, and expenditure on, the legal aid scheme is continually monitored by the MoJ and the LAA.

## **I. One in Three Out**

29. Legal aid is out of scope of the regulatory agenda. It is excluded by section 22 (4) (c) of the Small Business Enterprise and Employment Act 2015 on the grounds that it relates to 'the giving of grants or other financial assistance by or on behalf of a public authority'. The measure does not require Reducing Regulation Committee or Regulatory Policy Committee clearance.