

# **LORD CHANCELLOR'S GUIDANCE UNDER SECTION 4 OF THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012**

## **1. Background and Introduction**

The guidance contained at section 2 onwards is issued by the Lord Chancellor to the Director of Legal Aid Casework under section 4(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('the Act'). The Director must have regard to this guidance in determining whether civil legal services are to be made available under section 11(1) of the Act. As, in practice, applications will be considered by caseworkers on the Director's behalf, this guidance is addressed to caseworkers.

This guidance sets out some of the factors that caseworkers should take into account in deciding applications for civil legal services. It is not intended to be an exhaustive account of those factors. In particular, it is not intended to replace the need for consideration of representations in individual cases and new case law that arises. Applications should be considered on a case by case basis. This guidance will apply to applications made on or after 8 January 2018.

### *Scope of the scheme*

- 1.1. The Legal Aid Sentencing and Punishment of Offenders Act 2012 ('the Act') governs applications for legal aid from 1 April 2013.
- 1.2. A significant difference with the new scheme is that, whereas the funding code contained provision for certain matters to be elaborated in guidance, the Regulations are necessarily self-contained in meaning.
- 1.3. Section 4 of the Act creates the role of Director of Legal Aid Casework ('the Director') who has the role of decision maker in relation to applications for legal aid. The Director's decisions are referred to in the Act as determinations.
- 1.4. Under section 1(2)(a) of the Act, civil legal aid is defined as those "civil legal services" made available under sections 9 and 10 of the Act or paragraph 3 of schedule 3 to the Act. "Legal services" is further defined at section 8 of the Act. Sections 8 to 12 and 21 to 26 govern the provision of these services.
- 1.5. Under section 9, only those services "described in" Part 1 of Schedule 1 to the Act can be provided. Services not described in Part 1 of Schedule 1 can only be provided through exceptional funding under section 10 of the

Act. This distinction in effect replaces the previous terminology under the Access to Justice Act 1999 whereby services as a whole were either in scope or excluded.

- 1.6. However, in order to be “described” in Part 1 of Schedule 1 the services must both fall within the general description of services in a paragraph of Part 1 and must not fall within an exclusion either set out in that paragraph itself (a ‘specific exclusion’) or listed by Part 2 (types of case that are excluded) or Part 3 (advocacy services excluded other than in certain venues) of Schedule 1. Each paragraph of Part 1 Schedule 1 states which of the exclusions listed in Parts 2 and Part 3 apply to the relevant services.
- 1.7. The boundaries of the cases covered by the different Paragraphs of Part 1 of Schedule 1 to the Act is outside of the scope of this guidance, although separate guidance is available in relation to “significant breach of Convention rights” (paragraph 22) and serious risk of harm to the health or safety arising from a deficiency in rented accommodation (paragraph 35). Hence the guidance to the Regulations is limited in nature compared to that under the funding code.

#### *Qualification*

- 1.8. Most applications for civil legal aid, for services described in Part 1 of Schedule 1 to the Act to be made available to an individual, are considered under section 9 of the Act. Services not described by Part 1, Schedule 1 can only be made available to an individual if the Director has made an exceptional case determination under section 10 of the Act. Services can only be made available to a legal person if the Director has made an exceptional case determination under Schedule 3 to the Act.
- 1.9. In each of the above three circumstances, the Director must have determined, pursuant to section 11 of the Act, that the applicant qualifies for the civil legal services sought before those services can be made available. Under section 11(1) of the Act, such a determination has two components: financial eligibility of the applicant pursuant to Regulations made under section 21 of the Act and application of merits criteria set out in Regulations made under section 11(1)(b). The procedure in relation to determinations under sections 9 and 10 and Schedule 3 are governed by section 12 and Regulations under subsection 12(2).
- 1.10. The Regulations made under section 11(1)(b) and section 12(2) are, respectively, the Civil Legal Aid (Merits Criteria) Regulations 2013 (‘the merits Regulations’) and the Civil Legal Aid (Procedures) Regulations 2012 (‘the Procedure Regulations’). These replace the Funding Code Criteria and Procedures made under section 8 Access to Justice Act 1999.
- 1.11. The content of the merits and procedure Regulations broadly corresponds with that of the funding code. In respect of the merits criteria to be applied, the major policy change was to extend the range of cases that are subject to the criterion that, in order to qualify for legal aid, a case should not be suitable for a conditional fee agreement. This requirement now applies to

all applications for legal representation in non-family proceedings other than Mental Health First-tier Tribunal cases. Conditional fee agreement is now given an extended meaning to include damages based agreements and litigation funding agreements under the amended Courts and Legal Services Act 1990.

- 1.12. More generally, the contents of the merits Regulations are in some cases extended beyond those of the equivalent criteria in the Funding Code through the incorporation of relevant provisions of the funding code guidance. The drafting differs considerably to reflect the formal wording required for a statutory instrument and, more particularly, to state positive criteria which must be met before the Director may determine that an applicant qualifies for services rather than criteria under which an application may be refused.
- 1.13. The arrangement of the merits Regulations in essence follows that of the funding code criteria for legal representation. Underlying standard criteria apply to most applications, with an overlay either of specific merits criteria in relation to particular types of cases or, by default, general merits criteria corresponding to the provisions of the General Funding Code. Unlike the funding code criteria, however, the regulations do not define specific case categories such as clinical negligence, housing, family, mental health and immigration; the specific merits criteria are applied by reference to paragraphs of Part 1 Schedule 1 to the Act itself.
- 1.14. In relation to the Procedure Regulations, following the requirements of the Act, an applicant has a right of a review in respect of refusals or withdrawal of legal help. There is no a right of appeal to an Independent Funding Adjudicator, however, in respect of determinations that the services sought by an individual are not described by Part 1 of Schedule 1 to the Act. The Regulations have a wider scope than the funding code procedures in that they cover requirements for applications for Legal Help in Gateway areas of law (see section 8 below) in addition to applications for other types of legal aid services. The scope of certificated work has also been extended to include exceptional funding (section 10/ Schedule 3) applications, which are now in part governed by the procedures for licensed work.
- 1.15. Within this guidance regulations, within the merits regulations and procedure regulations are referred to, respectively as “MR x” and “PR x” (e.g. regulation 4 of the merits regulations is referred to as “MR 4”). References to “merits criteria” are to the general and specific merits criteria, as defined by regulation 2 of the merits regulations, and not to those regulations as a whole.

## **2. Delegation**

- 2.1. Section 5(3) of the Act permits functions of the Director conferred by the Act to be exercised by, or by employees of, a person authorised by the Director for that purpose. Under section 5(4) regulations may provide for a

particular function under regulations to be exercisable by, or by employees of, a person authorised by the Director for that purpose (there are equivalent provisions in relation to the Lord Chancellor at sections 5(1) and 5(2)). Section 6 of the Act makes provision in relation to authorisations under section 5. Both the merits regulations (regulation 3) and procedure regulations (regulation 12) make provision for delegation in relation to the Director's functions. Under the Act and regulations this is described as delegation.

- 2.2. Authorisations given for the purposes of the Act and regulations will be published separately. There will be two types of authorisation made by the Director: an authorisation permitting determination to be made on his/her behalf by officers of the Legal Aid Agency, and authorisations permitting certain determinations to be made by certain providers. The latter delegated powers correspond to devolved powers under the Access to Justice Act regime.
- 2.3. Note that not all the functions referred to in the regulations are those of the Director. The appointment of Independent Funding Adjudicators, creation of forms and entering into of arrangements (contracts) for provision of services are functions of the Lord Chancellor.

### **3. Applications covered by the Regulations**

- 3.1 The merits and procedure regulations apply to all applications for civil legal services made on or after 1<sup>st</sup> April 2013. There are three important limits on the scope of the regulations:
  - (a) Existing legal aid cases. Any case granted legal aid under the Access to Justice Act 1999, or the earlier Legal Aid Acts, as determined by the provisions of any transitional regulations under the Act continues under the provisions of the earlier act.
  - (b) Criminal legal aid. Under s.8(3) of the Act "civil legal services" do not include advice, assistance and representation that are required to be made available under sections 13, 15 and 16 of the Act.
- 3.2 Under s.14 of the Act criminal proceedings are defined to include proceedings before any court for dealing with an individual accused of an offence or for dealing with an individual convicted of an offence (including proceedings in respect of a sentence or order). In addition, a range of other proceedings come within the definition of criminal either because they are listed in s.14 of the Act or because they are prescribed as criminal for this purpose under the Criminal Legal Aid (General) Regulation 2013 (S.I.2014/9) (see regulation 9).

Note that quasi-criminal proceedings, where the applicant for funding is facing penalties that are considered as criminal penalties in ECHR terms, which

previously had their own case category under the funding code, have now be incorporated into criminal legal aid.

- 3.3 Certain proceedings in the High Court also fall outside the definition of civil legal services either because they are criminal proceedings under the above definitions or are to be treated as preliminary or incidental to criminal proceedings (see section 16(3) of the Act, and regulation 19 Criminal Legal Aid (General) Regulations 2013). These include:
- (a) Bail proceedings.
  - (b) Representations to the High Court against a voluntary bill of indictment.
  - (c) Proceedings under the Criminal Procedure and Investigations Act 1996 to quash an acquittal.
  - (d) Proceedings under RSC Order 115 in Sch.1 to the Civil Procedure Rules 1998 for confiscation or forfeiture in connection with criminal proceedings.

Note that, under regulation 20 Criminal Legal Aid (General) Regulations 2013, judicial review and habeas corpus proceedings which arise out of criminal investigations or proceedings do not fall within the above definitions and so may be available as civil legal services.

## **4. Merits, Costs and Damages**

### **4.1 Prospects of Success (MR4)**

- 4.1.1 The prospect of success test is an objective test as to how likely the case would be to succeed in a final hearing. The prospects of a case being resolved in advance of a contested trial should be taken into account only to the extent that the case may be finally concluded by the court or tribunal at an earlier stage. If, for example, in a claim for damages there is an argument that the opponent has a defence under the Limitation Acts, the danger of the case being defeated on this ground must be taken into account, whether or not the limitation issue is dealt with as a preliminary point or at the final hearing.
- 4.1.2 Under regulation 4(4), the question of what an applicant may reasonably consider a successful outcome to proceedings may not directly equate to whether the court finds in the applicant's favour on particular heads of claim. For example, in claims primarily for damages, a reasonable claimant would not view succeeding on liability but failing to beat an offer under Part 36 Civil Procedure Rules as a successful outcome. Conversely, a defendant might reasonably view a substantial reduction in damages claimed against him as her as constituting success in the proceedings.

#### ***Categories of Prospects of Success (MR 5)***

- 4.1.3 There are seven, mutually exclusive, categories of prospects of success:

- Very good;
- Good;
- Moderate;
- Borderline;
- Marginal;
- Poor; and
- Unclear

“Unclear” prospects differ from “borderline” prospects in that in an unclear case there must be identifiable preliminary investigations that can be undertaken after which it should be possible to assess prospects as within one of the other categories; by contrast, the prospects of success of a case assessed as borderline may remain uncertain up to a final hearing itself.

- 4.1.4 Note that from 22 July 2016 “poor” now refers to a case that has less than a 45% prospect of succeeding. A case with “marginal” prospects of success means a case that has a 45% or more chance, but less than a 50% chance, of obtaining a successful outcome.
- 4.1.5 For any application where the standard prospects of success criterion for determinations for full representation apply (MR 43), if the prospects of success of the case can be assessed as “borderline” or “marginal”, the Director must also be satisfied that the case is either a case with

overwhelming importance to the individual, or of significant wider public interest, in order for the prospects of success criterion to be met.

- 4.1.6 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 (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
- 4.1.7 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.
- 4.1.8 Where MR 43 does not apply but there is an assessment of prospects of success that must be satisfied, any additional criteria specified in the merits regulations relating to cases with borderline or marginal prospects of success must be applied when determining whether the prospects of success test element is met.
- 4.1.9 Where MR 43 does not apply but there is an assessment of prospects of success that must be satisfied, any additional criteria specified in the merits regulations relating to cases with borderline or marginal prospects of success must be applied when determining whether the prospects of success test element is met.
- 4.1.10 The effect of this is that in general cases are required to have moderate or higher prospects of success in order to satisfy the prospects of success test, but that the test can also be satisfied in certain cases with borderline or marginal prospects. In some borderline or marginal cases satisfying the prospect of success test is subject to meeting additional specified criteria, in others this is without qualification.
- 4.1.11 In assessing prospects of success it is necessary to consider all the hurdles an applicant must clear in order to reach a successful outcome and to reach a composite view; it is not sufficient that there may be at least moderate prospects of success in respect of each stage or issue considered on its own.
- 4.1.12 Where a case has to pass a permission stage, such as with judicial review or appeals on a point of law, there are no separate criteria for the pre and post permission stage. At all points the relevant prospects are those of being successful at a substantive final hearing, and not the likelihood of permission being granted.

## 4.2 Cost Benefit

### **Cost Benefit Criteria**

4.2.1 There are effectively three separate cost benefit criteria for full representation that might be applied depending on the type of case concerned:

- (a) **a matrix of likely damages (or other sums) to likely costs ratios which vary according to prospects of success.** This applies to claims subject to the general merits criteria which are primarily for damages or other sums of money (MR 42(2)). This test is strictly applied for such claims, such that full representation will not be made available for applications failing to satisfy the relevant ratio;
- (b) **the reasonable private paying individual test:** (MR 7); this applies to cases considered under the general merits criteria which are neither primarily claims for damages or other sums and nor are of significant wider public interest (MR 6; 42(3) – see 4.2.16) and to certain private law family cases;
- (c) **proportionality test** (MR 8): this is the cost benefit test which is applied to cases under the general merits criteria with significant wider public interest (MR 42(4)) and is the test usually applied to cases under the specific merits criteria.

4.2.2 In deciding whether a case is primarily a claim for damages or other sums of money, the case should be looked at objectively, in terms of what a client would reasonably consider the primary remedy being sought. Since MR 42(2) is concerned with the prospects of a claim for damages or other money, it applies only to applications for legal representation to bring the claim. Further, the test does not apply to cases with overwhelming importance to the applicant (MR 2, see 4.2.10), the definition of which excludes claims for primarily claims for damages or other sums of money.

### **Likely Damages (MR 9)**

4.2.3 Regulation 9 of the merits regulation sets out the definition of likely damages in similar terms to that previously set out under the funding code criteria. Matters to be taken into account in making a realistic estimate of damages the applicant is likely to gain by pursuing the claim, and which were previously addressed in the funding code guidance, are now set out in regulation 32(2) of the Procedures Regulations.

### **Likely Costs (MR 10)**

4.2.4 “Likely costs” means an estimate of the likely total costs likely to be incurred on behalf of the applicant to the disposal of the proceedings. For an onward appeal, this will include all previous expenditure on the case at earlier stages. Unlike the assessment of prospects of success, this consideration of likely



costs must take into account the likelihood of early settlement. However, such estimates must be revised upwards if an anticipated settlement does not take place.

### ***The Reasonable Private Paying Individual test (MR 7)***

- 4.2.5 This test is applied objectively according to whether a reasonable person would be prepared to risk his or her own money and bear the risk of having to pay the costs of the other side. The test takes into account all the circumstances of the case including the prospects of success, likely benefits to be gained and likely costs incurred. The fact that the individual may feel very strongly about the case or be determined to go to court, however, is not in itself relevant.
- 4.2.6 The notional individual being considered under this test is, in general, a person with reasonable but not super-abundant means, such that he or she could afford to litigate privately but to do so would be something of a sacrifice. However, in assessing the potential benefits to be gained from the proceedings from the applicant's standpoint it may be important to have regard to the actual circumstances of the applicant. For instance, establishing an individual's entitlement to welfare benefits may be justifiable even if the sums involved appear on their face modest in relation to the likely costs required.

### ***The Proportionality Test (MR 8)***

- 4.2.7 In assessing the test of whether the proportionality test is met in relation to the likely costs particular regard will be had to those matters set out as regards proportionality in CPR 44.3(5) (as in force from 1 April 2013) relevant to a before the event funding decision as opposed to costs assessment, in particular whether the likely costs bear a reasonable relationship to:
- (a) The sums in issue in the proceedings
  - (b) The value of any non-monetary relief issue in the proceedings
  - (c) Any wider factors involved in the proceedings, such as reputation or public importance
- 4.2.8 For cases not possessing Significant Wider Public Interest, the proportionality test is, however, intended as a less stringent test than the prospects of success, damages, costs matrix or the reasonable private paying individual test because of the higher priority of the proceedings to which it is applied. Accordingly, for any claim that is primarily for damages or other sums of money, the proportionality test will be considered to be satisfied pursuant to CPR 44.3(5)(a) if the appropriate damages (or other sums) to costs ratio is met. For other claims, the test will be considered satisfied having regard to CPR 44.3(5)(b), if the reasonable private individual test is met.
- 4.2.9 Otherwise in considering "all the circumstances of the case" in regulation 8 of the merits regulations, it will be necessary to consider
- (i) the importance of the issues raised by the case pursuant to CPR

44.3(5)(e), for example how serious is the abuse of power alleged in a claim against a public authority?

- (ii) how far short of the appropriate damages/costs ratio or the reasonable private paying individual the case falls. The less cost effective the case appears to be, the more serious must be the issues raised by the case to justify the provision of services.

### ***Cases with Overwhelming Importance to the Individual (MR 2)***

4.2.10 In certain 'borderline' or 'marginal' cases, it also needs to be considered whether the case is of overwhelming importance to the individual when determining whether the prospects of success test is met. Where this applies, a case can only be regarded as of overwhelming importance to the individual if one or more of the matters listed in the definition is at issue in the proceedings and will be affected by the outcome of the proceedings. For example, a tortious claim for false imprisonment brought some time after the detention took place would not satisfy this test. Such a case arises from an alleged deprivation of liberty, but liberty of the individual would not be affected by the outcome of the later tort proceedings.

4.2.11 By contrast, an onward appeal against a decision in an asylum case might allege that, unless the decision was quashed, the individual would face imprisonment, torture or death in the other country. Assuming the allegation was plausible given knowledge of the circumstances in the country concerned, such a case would satisfy the criterion of overwhelming importance to the individual.

4.2.12 In relation to the immediate risk of homelessness, it is again necessary for the individual's occupation of his or her home itself to be at issue, whatever form that accommodation takes, or for case to concern the provision of accommodation to an individual who is currently homeless. Proceedings the outcome of which would leave the individual in financial difficulties, so that the home may then be at risk, would not meet the "immediate risk of homelessness" test. Nor would an application for a charging order (as opposed to an order for sale) meet the requirement of an immediate risk of homelessness. In this context, homelessness has its natural meaning of lack of physical occupation of property, rather than the extended definition under Part 7 Housing Act 1996; it is thus narrower in scope than the services described by Paragraph 34 of Part 1 Schedule 1 to the Act.

### ***Sufficient Benefit***

4.2.13 Regulations 32(b) and 33(b) of the merits regulations contain a test as to whether there is sufficient benefit to the individual to justify the provision of, respectively, legal Help and help at court. This is primarily a test of whether a reasonable private paying individual of moderate means would pay for the legal advice and assistance; the guidance on the reasonable privately paying individual test at paragraph 4.2.5 will therefore be relevant in considering the application of the test.

4.2.14 The emphasis of the test, however, is on whether to continue work, rather than making an assessment at the start of the case. In particular, the test recognises that, at these levels of service, even in a matter with poor prospects of success, it may well be considered worthwhile for an individual to pay for initial advice, including the advice that the case is not worth pursuing further. The more legal help is provided, however, the more that the benefits deriving from the costs incurred will need to be taken into account. For a purely financial matter, the test would require that the amount in issue must exceed the likely cost of Legal Help.

4.2.15 Whether the Legal Help or Help at Court matter is paid by way of hourly rates or by a fixed or standard fee, the costs to be considered under the sufficient benefit test are calculated as the time spent at the appropriate Legal Help hourly rates, plus any disbursements to be incurred.

### ***Significant Wider Public Interest (MR 6)***

4.2.16 Under the merits regulations, as under the Funding Code, there is a distinction between two separate forms of potential public interest:

- (a) there are certain **types of case** which by their nature may exhibit some degree of public interest. In particular, it can be said to be in the general public interest for public authorities to act lawfully. Hence claims against public authorities alleging abuse of power or significant breach of human rights and applications for judicial review are subject to less strict criteria than the general merits criteria;
- (b) there are also **individual cases** which, on their own particular facts, can be said to deliver, in addition to the benefits for the individual, specific benefits to a section of the public, i.e. persons other than the individual bringing the proceedings

4.2.17 It is the latter type of case that regulation 6 of the merits regulations is concerned with. This concept allows cases to qualify for funding where the benefits to the individual alone might not allow them to qualify. Note that, unlike under the funding code criteria, “significant wider public interest” has a self-contained definition within regulation 6, rather than depending on guidance. However, a number of aspects of the funding code guidance remain relevant.

4.2.18 The definition requires that a case must have the potential to produce, in addition to benefit for the claimant, “real benefits” for the public at large in addition to the applicant for funding. Such benefits may include:

- protection of life or other basic human rights—such rights can include, for example a challenge to a Government immigration policy concerning a class of asylum seekers, who allege that they face persecution if not allowed to remain in the country;
- direct financial benefit—for example where a challenge to welfare benefit entitlements has the potential to lead the

Government to make higher payments to a whole class of claimant;

- potential financial benefit—this is usually the situation for most test cases or group actions or other cases seeking to establish a legal precedent. Success in such litigation will not usually guarantee compensation for those outside the litigation, who may still need to bring their own claims and prove their own issues on liability, causation and quantum;
- cases concerning intangible benefits such as health, safety and quality of life—for example judicial review cases concerning education policy or healthcare provision.

4.2.19 Under regulation 6(1)(b) there will need to be an identifiable group of the public likely to benefit from a successful outcome. The regulation does not specify a minimum size of such a group. In general, the less substantial the benefit concerned the greater number of people required to experience that benefit in order for the test as a whole to be met. However, it would be unusual to regard a case as having a significant wider public interest if fewer than 100 people would benefit from its outcome.

4.2.20 The application of the test does not involve consideration of competing interests. The fact that the outcome of the case also has the potential negatively to impact on a different section of the public will not prevent a case from having significant wider public interest.

4.2.21 It is also necessary, however, for the individual case on its facts is an appropriate case to realise the potential benefits. For example, a case might not be regarded as having a wider public interest if:

- (a) the case is likely to be determined by the court on grounds which do not determine the public interest issue one way or another;
- (b) the case is unlikely to reach a level where a determination of the issue will set a precedent that will influence or bind other cases;
- (c) the case has particular facts or features which make it less likely that the court will determine the issue in the way contended, compared to other potential cases raising similar issues.

4.2.22 The implications of a case having significant wider public interest are now, however, very much less than under the Access to Justice Act 1999. Under the LASPO Act scheme significant wider public interest has no role in whether the case is described by Part 1 of Schedule 1 to the Act. As of the 22 July 2016 it will however apply in the assessment of prospects of success to allow certain cases to satisfy the appropriate prospects of success criterion where prospects have been assessed as 'borderline' or 'marginal', or in some cases 'unclear'.

4.2.23 Decisions as to whether a case has significant wider public interest will not be delegated by the Director to providers.

## 5 Convention Rights

- 5.1 The Specific Merits Criteria contain provisions regarding whether “the substance of the case relates to a breach of Convention rights. “Convention rights” has the same meaning as section 1 of the Human Rights Act 1998. From 27 January 2014, this test is relevant only to applications for full representation in those immigration cases referred to in MR 60(2) and in certain family cases (MR 69). In these applications, where the test is met the prospects of success criterion can be satisfied with ‘unclear’ prospects.
- 5.2 In order for the substance of the case to relate to a breach of Convention rights the Convention rights issues must be integral to the case and at least as important a part as any common law or statutory claim arising from the same facts, and the allegation of the breach must not, on its own, have poor prospects of success.
- 5.3 The phrase “the substance of the case relates to a breach of Convention rights” is to be distinguished from the test within paragraph 22 of Part 1 of Schedule 1 of the Act of whether an act or omission by a public authority involves a significant breach of Convention rights by the authority. Separate guidance on whether a case falls under paragraph 22 is included at section 11.
- 5.4 Determining whether the substance of a case relates to a breach of Convention rights is entirely separate from the question of whether a refusal to provide or continue legal aid would itself constitute a breach of the applicant’s Convention rights, in particular Article 6 of the Convention. An argument to that effect would only be relevant to a judicial review of the refusal to provide legal aid rather than the merits criteria to be applied. However, where the Director is given discretion under the regulations, such as whether, under the Procedure Regulations, to withdraw a determination that the applicant qualifies for civil legal services, such discretion must be exercised compatibly with the applicant’s Convention rights.

## 6. Forms of Civil Legal Services

- 6.1 Part 2 of the Merits Regulations describes the forms of civil legal service which may be granted to an individual following an application for legal aid. The forms of civil legal service are defined and each has its own merits criteria which will be applied in order to determine whether legal aid should be granted. All applications for legal aid must therefore (under the procedure regulations) specify the form of civil legal service that is required. However, if having considered the application, the Director considers that another form of civil legal service would be more appropriate then this may be granted in accordance with regulation 20 of the merits regulations.

6.2 There are seven forms of civil legal service. These are:

- (i) **legal help** – this form of civil legal service does not include issuing or conducting court proceedings, instructing an advocate or providing advocacy.
- (ii) **help at court** - this allows the provision of advocacy at a particular hearing but not generally in the proceedings. It is not available in family cases or certain immigration cases (see Regulations 22 to 24 of the merits regulations).
- (iii) **family help (lower)** – is available in family cases and allows negotiation prior to the issue of proceedings. It is also available for the issuing of proceedings in order to obtain a consent order following settlement.
- (iv) **family help (higher)** – is available in family cases except for public law children cases (MR 26). It is most appropriate in private law children cases and cases considered under Regulations 69, 70 and 71 of those Regulations. It includes those services which are available under legal representation other than preparation for and representation at a contested final hearing.
- (v) **family mediation** – is always funded as other grant or contract work through the Agency’s family mediation contract with mediators. This form of civil legal service includes an assessment of whether mediation is suitable and acting as a mediator.
- (vi) **help with family mediation** – this is a new form of civil legal service available from April 2013 in family cases. It allows civil legal services to be provided in relation to ongoing or recently completed family mediation and also to obtain a consent order following the settlement of a dispute within family mediation.
- (vii) **legal representation** – this may be provided either as investigative representation or full representation. It is the provision of civil legal services to a party to proceedings or someone who wishes to be a party or is contemplating issuing proceedings. It cannot be granted to a person who considers that proceedings may be brought against them or who might be involved in some other way. Investigative representation is legal representation which is limited to the investigation of the strength of the contemplated proceedings.

***How forms of civil legal service are provided and delegated authority.***

6.1 Part 1 of the Procedure Regulations defines the different levels of service that may be provided. The levels of service may be provided as Controlled Work (Part 3 of the Procedure Regulations) or Licensed Work (Part 4).

- 6.2 The way in which the form of civil legal service is provided is important as this affects who may determine the application (see section 2 for delegated functions). The power to determine most applications for controlled work will, for example, be delegated to the provider. In the majority of cases, however, applications for licensed work must be made to the Director and will only be delegated where emergency representation is required. Once a determination has been made by the Director a certificate will be issued.

### ***Connection between forms of civil legal service***

- 6.5 Each form of civil legal service is separate in that an individual will apply for a specific level of service and the Director or the provider will consider the relevant criteria and either grant or refuse the application. There are however, two exceptions to this:
- (i) Legal representation may take the form of either investigative representation or full representation. This depends on whether it is possible to estimate the prospects of success of the claim. Therefore, a person applying for full representation could be refused that but granted investigative representation instead, if the prospects of success were unclear and further investigation was required. Although it is unlikely, an application for investigative representation could be granted as a certificate for full representation if the relevant criteria were satisfied.
  - (ii) In family disputes, legal representation only takes the form of full representation, Investigative representation is not available. Instead there is a separate form of civil legal service called family help (higher) to cover resolution of a family dispute excluding representation at a final court hearing. An application for Legal Representation in family proceedings could result in the grant of a certificate covering only family help (higher) where appropriate or vice versa (MR 20).
- 6.6 The above two examples are also the only circumstances in which two different forms of civil legal service may be provided successively on a single certificate. That is, if a client is in receipt of investigative representation or family help (higher) and it is appropriate to issue or continue proceedings not covered by those levels, this can be done by way of an application to amend the certificate to cover full representation (PR 37(4)).
- 6.7 In controlled work there are two forms of civil legal service which are solely available for cases falling within the family category of work. These are family help (lower) and help with family mediation. Family help (lower) includes the work that may be done at legal help but also allows the issue of court proceedings in order to obtain a consent order. The issue of court proceedings is work which is excluded from the definition of legal help.

- 6.8 In addition, there is considerable overlap between the work that can be carried out under legal help, family help (lower) and help with family mediation. All these levels of service allow advice and assistance to be provided to the client in family matters and where the client is engaged in mediation. Family help (lower) and help with family mediation also allow work to be carried out in preparing the consent order for the court. However, the criteria for these forms of civil legal service differ. For example, help with family mediation may only be provided where the client is participating in family mediation or has participated in mediation within the last 3 months. In addition, applications for help with family mediation do not require the domestic violence evidence set out in regulations 33 and 34 of the Procedure Regulations to be provided.

### ***Division between legal help and legal representation***

- 6.9 In non-family cases the most important interface between the forms of civil legal service is between legal help/help at court on the one hand, and legal representation on the other. There is a significant overlap between the work which can be carried out at either of these levels. The important points are as follows:
- (a) Legal representation is only available for actual or contemplated proceedings before the courts and tribunals specified in Part 3 to Schedule 1 of the Act. These include the main civil courts, the Mental Health Tribunal (see Procedure Regulation 21((e)(i) and(ii)), Immigration Chamber of the First Tier and Upper Tribunals and the family court. Cases before other tribunals or where no proceedings are contemplated or in existence can be dealt with only by means of legal help (MR 29).
  - (b) Legal help cannot cover advocacy before any court and neither legal help nor help at court cover the issue and conduct of court proceedings (though legal help can cover the issue of tribunal proceedings). Help at court covers only informal advocacy, usually by way of mitigation at individual court hearings (typically this will be in possession proceedings where the client has no defence to possession but seeks to influence the discretion of the court in relation to postponing possession or suspending eviction). Therefore, if an individual wishes to be formally represented in court proceedings, the application must be for legal representation.
  - (c) Legal representation includes representation for a person who is contemplating taking proceedings, but not for a person who is likely to be a defendant or other party in future proceedings. Such a person may only receive legal help until the proceedings are actually started;
  - (d) Investigation of a potential claim, including work under a pre-action protocol, is an area of overlap in that such work can be



carried out either as legal help or as legal representation. The Director may consider the following factors:

- (i) If the prospects of success of the potential claim are clear and all other criteria for full representation are satisfied, a certificate covering full representation may be granted, but this will usually be limited to the early stages of proceedings, further enquiries and research and settlement negotiations with the potential opponent;
- (ii) If the prospects of success are unclear, full representation is not available and the issue is whether the investigations should be carried out under legal help or under a certificate for investigative representation. This depends primarily on the extent of the investigative work required, as discussed in the following section.

6.10 The fact that remuneration for legal help is by way of Standard Fees does not affect the above principles. Legal representation cannot be granted simply on the basis that the amount of work which needs to be carried out under legal help is substantial compared to the fixed fee. It is in the nature of any fixed fee regime that the fee will cover a range of cases.

### ***Boundary between legal help and investigative representation***

6.11 In accordance with Regulation 40 (1) of the Merits Regulations, investigative representation may only be granted where substantial investigative work is required before prospects can be determined. In deciding whether substantial investigative work is required, it is appropriate to consider disbursements (including for this purpose any counsel's fees) separately from profit costs. For these purposes substantial investigative work will be where:

- (i) the solicitor will reasonably need to carry out at least six hours of fee earner investigative work; or
- (ii) disbursements together with any counsel's fees would cost £400 or more excluding VAT.

6.12 In cases which are shown to require this extent of investigative work, an application for investigative representation can be made at the outset; it is not necessary to carry out work up to the threshold at the legal help level (MR 20). Where, however, investigative work below these thresholds is required, it will be more appropriate for such work to be carried out at the form of legal help.

6.13 When considering the amount of investigative work necessary for this purpose it is only costs necessary to investigate the prospects of success (MR 40(1)(a)) that should be taken into account. The cost of an expert report or legal opinion about the amount of the claim should not

be taken into account, although if investigative representation is granted such work could in principle be covered.

- 6.14 However, regardless of the costs or time required for investigations, investigative representation can, of course, be provided only if all applicable standard criteria for legal representation and other criteria for investigative representation are met.

### ***Division between investigative representation and full representation***

- 6.15 Investigative representation is only available where prospects of success are unclear. It covers only the cost of investigating a potential claim. It is not available in certain types of cases e.g. family disputes, mental health and immigration. By contrast, full representation is available where prospects of success are very good, good, moderate, or where prospects of success are borderline or marginal and the case satisfies any specified additional criteria that apply.
- 6.16 Under investigative representation, once sufficient work has been carried out to determine the prospects of success criterion then the provider should report this to the Director who will consider whether investigative representation should be withdrawn or whether the certificate should be extended to full representation. Work should therefore cease on reaching the conclusion that the criteria for full representation will not be met.

### ***Full representation***

- 6.17 Full representation is legal representation other than investigative representation. Once granted, a determination can cover all elements of civil legal services including both representation and advocacy. A solicitor or counsel acting under a certificate for full representation cannot themselves provide mediation or arbitration services in the same case, but the fees of a mediator or arbitrator can be claimed under such a certificate as a disbursement except in family cases.

### ***Certificate Limitations***

- 6.18 Under Regulation 37(2)(g) of the Procedure Regulations any legal aid certificate may contain such limitations on the work to be carried out as are appropriate to the circumstances and type of case. Typically, limitations on the scope of work covered by a certificate will take one of the following three forms:
- (a) investigative limitations—even where the prospects of success of the case are such that a determination for full representation rather than Investigative Representation is justified, it may still be the case that it is appropriate for further enquiries or investigation of the strength of the case to take place before litigation proceeds. Therefore similar limitations as for investigative representation may be appropriate. For example there may be cases where the merits of the claim as a whole appear sound, but where it is

appropriate first to seek counsel's opinion on a particular legal issue requiring specialist expertise before proceeding further;

- (b) limitation for negotiations—except where urgent court action is needed or the other side has already been contacted and refused to negotiate, certificates will often be limited to allow negotiations about the claim to take place. A limitation may therefore allow such work as is necessary to obtain disclosure of information from the other side, to negotiate a settlement directly or through use of ADR and to pursue any pre-action protocol which is applicable to the case in question. The opponent will know that the certificate covers full representation rather than Investigative Representation (following a notification to the other party under PR 38(2)), but should not be informed of any limitations on the certificate. If suitable proposals for settlement are not made by the opponent, the determination may be extended to cover substantive court proceedings;
- (c) proceedings limitations—where a certificate for full representation allows proceedings to be issued and pursued, the certificate will usually state the point in the proceedings to which work can be carried out, after which an extension to the certificate will be required. Different approaches are appropriate for fast and multitrack cases:
  - (i) for fast track cases, the court timetable makes it inappropriate for numerous successive amendments to be given. Therefore, most fast track certificates will cover all work up to the exchange of witness statements, and filing of the listing questionnaire prior to the final hearing;
  - (ii) cases in the multi-track will need to be kept more closely under review. Usually work will be initially limited to all steps up to disclosure and inspection and possibly counsel's opinion. Thereafter, the certificate could be extended to all steps up to filing the listing questionnaire prior to final hearing;
  - (iii) more substantial multi-track cases may require a greater number of successive limitations. It may be appropriate to review the merits of the claim after each case management conference and the pre-trial review, if any.

## 7 Qualifying for Legal Services (MR 11)

- 7.1 Merits Regulation 11 provides the framework for the determination of whether the applicant qualifies for legal services in relation to the merits criteria.
- 7.2 Regulation 11(5) requires the Director to apply the merits criteria which are appropriate for the form of legal service listed in Part 2 of the regulations most appropriate to the application having regard to the provisions of Part 3 (regulations 20 to 31). Regulations 21 to 31 set out restrictions on the forms of service available for particular types of case, reflecting the previous position under the funding code; for instance help at court and investigative representation are prescribed as not appropriate for family disputes. Regulation 20 provides that where more than one form of service is in principle available the Director must choose the most appropriate. For example, if the nature and complexity of the issues concerned do not justify the provision of legal representation but it is appropriate to provide advocacy for the applicant, help at court should be chosen; if advocacy is not required at all, legal help may be the appropriate form.
- 7.3 Regulation 11(2) provides that the general merits criteria, set out in Part 4 of the merits regulations, are applied, other than to the extent that specific merits criteria set out in Part 6 are appropriate to the case and disapply, modify or supplement the general merits criteria. In order to see whether specific merits criteria are applicable to a case, however, it is necessary to see whether the Paragraph or Paragraphs of Part 1 Schedule 1 to the Act that describe(s) the case are referred to in any regulations within Part 6.
- 7.4 Regulation 11(4) provides that in addition to the relevant general and specific merits criteria, two further criteria, set out at 11(6) and 11(8), have to be satisfied before an applicant can qualify for legal services. Regulation 11(6) provides that the Director must decide, for all applications, if it is reasonable to provide civil legal services in the light of the conduct of the individual or legal person. Such conduct can relate to:
- (a) any civil legal services made available under Part 1 of the Act. This could include unreasonable behaviour in relation to proceedings for which legal aid has previously been provided or in relation to the provision of legal aid itself, such as the failure to report a change of financial circumstances;
  - (b) any application for civil legal services under Part 1 of the Act. This could involve attempted abuse of the legal aid scheme through misleading information in an application for legal services or repeated unmeritorious applications;
  - (c) any civil proceedings for resolving disputes about legal rights or duties. This would include applications from a vexatious litigant or an applicant who had intentionally provoked proceedings (for instance by withholding rent in order to provoke possession

proceedings in which a disrepair claim could be brought as a counterclaim).

- 7.5 Regulation 11(8) creates an affordability criterion having regard to the present and future likely demands for civil legal aid. Under 11(7) this criterion does not apply to cases relating to the life or liberty of the individual or his/her family or to Public Law Children cases. 11(7)(c) sets out the thresholds of likely costs of the case that for all other cases will require consideration of the affordability criterion.
- 7.6 Regulation 11(9) lists civil legal services to which no merits criteria apply. Note, however, that the definition of “merits criteria” (general and specific merits criteria) in regulation 2 does not include the conduct and affordability criteria created by 11(6) and 11(8) which, in principle, could therefore apply to the services listed.

### ***Application of the Merits Criteria (MR 47 – 50)***

- 7.7 Regulation 11(3) refers to Part 5 of the merits regulations. This part is concerned with four specific types of applications.
- 7.8 Regulation 47 addresses applications described by more than one Paragraph of Part 1 Schedule 1 to the Act, and requires that the Director apply the criteria (whether general or specific) that s/he considers to be the most appropriate in all the circumstances of the case. This will involve a judgement as to which Paragraph describes the main substance of the case. Note that judicial review cases can only be described by Paragraph 19 and so only the criteria in Chapter 2 of Part 6 can be applied.
- 7.9 Regulation 48 provides that the criterion to be applied in relation to exceptional funding applications under section 10 of the Act for advocacy at inquests is that in respect of “other legal services” under regulation 45.
- 7.10 Regulations 49 and 50 address other applications for exceptional funding. Regulation 49 is concerned with cases that would have fallen within a Paragraph of Part 1 Schedule 1 to the Act but for an exclusion under Part 2 or Part 3. Such cases are assessed under the criteria applicable to the Paragraph of Part 1 Schedule 1 that would have described the case had it not been for the Part 2 or Part 3 exclusion. For example, a judicial review that is not described by Paragraph 19 of Part 1 because it arises from the applicant’s business activity (and therefore excluded by virtue of paragraph 14 of Part 2 of Schedule 1) will be assessed under the criteria applicable to cases described by Paragraph 19, those for public law claims at Chapter 2 of Part 6 of the merits regulations. An application for legal representation in the Employment Tribunal in a discrimination claim will be assessed under the general merits criteria for legal representation.
- 7.11 Regulation 50 governs cases not falling within the general description of services in Part 1 Schedule 1, for instance a claim for damages for housing disrepair. For such cases, the Director has to choose the criteria that appear most appropriate. In general, these are likely to be the

general merits criteria relevant to the form of service appropriate for the application. For the avoidance of doubt applications for legal aid under section 10 of the Act (exceptional funding) in family proceedings which are listed in Part 1, Schedule 1, but where there is no evidence of domestic abuse or child abuse as required by paragraphs 12 and 13, will be considered by reference to the family criteria contained in Chapter 6.

### **General Merits Criteria (Part 4 MR)**

- 7.12 Regulations 32 to 46 of the merits regulations set out the general merits criteria. As previously stated, these apply to all applications for services other than to the extent that specific criteria state otherwise. Hence they apply in full to cases not referred to in any chapter of Part 6 of the merits regulations. The general merits criteria cover all forms of service under Part 2 of the regulations.
- 7.13 The General Merits Criteria for legal representation are at regulations 39 to 44. Regulation 39 sets out standard criteria for legal representation, which apply to both applications for investigative representation and full representation. These correspond in substance to the standard criteria for legal representation previously applicable under the funding code, other than that (i) suitability for a conditional fee agreement is now included as a standard criterion and (ii) whether a different form of service is more appropriate is addressed under regulations 11(5) and 20.

#### *Other sources of funding (MR 39(a)):*

- 7.14 Other sources of funding could include:
- insurance, where an individual's household or motor policy covers the (proposed) proceedings
  - membership of a trade union which provides legal services to its members. The test in the criterion is whether it would be reasonable to fund the case from the other potential source of funding, so that a refusal by the union to fund the case that appeared unreasonable would not allow the criterion to be met;
  - where another body, such as the Equalities and Human Rights Commission or special interest group might be expected to fund a particular case. In the area of public law children cases the most likely sources of alternative funding are local authorities in adoption proceedings and special guardianship applications;
  - whether another person or persons who would benefit from a successful outcome should fund the case. There is potential overlap with 39(c). However, even where an applicant may be considered an appropriate, or even the most appropriate, party to proceedings, it may still be the case that it will be another person who stands primarily to benefit, for example where a benefit or allowance in a child's name will in reality reimburse the expenses of a person looking after the child. This provision may also cover

the situation were an identifiable group stand to benefit that potentially could form a fighting fund for the litigation;

- where the applicant is the beneficiary under a discretionary trust and under the terms of that trust the trustees would have power to fund litigation on behalf of the individual. Again, a simple refusal by the trustees to intervene would not meet the criterion
- where the applicant could obtain an order for payment in respect of legal services in accordance with section 22ZA of the Matrimonial

Causes Act 1973 or paragraph 38, Part 8, Schedule 5 to the Civil Partnership Act 2004 (as introduced by sections 49 to 54 of the Act).

- 7.15 Where another body or other persons have an interest in the applicant's proceedings it may, having regard to the interests and resources of those concerned, be more appropriate to request a contribution towards the costs than to determine that the applicant does not qualify for the legal services at all. Such contributions are assessed under the *Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013* and are outside of the scope of the merits and procedure regulations.

*The case is unsuitable for a conditional fee agreement (CFA) (MR 39(b)).*

- 7.16 "Conditional fee agreement" is defined by regulation 2 to include damages based agreements and litigation funding agreements. This criterion has to be considered in the light of the amendments to the CFA regime for agreements signed after 1 April 2013, under which neither a success fee nor after-the event insurance premium can be recovered from the opponent. Any success fee and/or premium now has to be paid from damages or other money recovered by the successful client (if there is recovery of a sum of money but not costs the representatives base costs will also have to be paid from that sum. Not all CFAs will require a success fee to be paid to the representative (see 7.19 below).

- 7.17 The test of unsuitability for a CFA is an objective one, rather than a question of whether an individual provider is willing to act under a CFA (although the test cannot be met if there is evidence of a CFA in fact having been offered or put in place for the applicant). In principle, a nonfamily case may be considered suitable for a conditional fee agreement if:

- Prospects of success are considered at least at 60%
- The opponent is considered able to meet any costs and/or damages (or other sum of money) that might be awarded
- After-the-event insurance can be obtained by the applicant

- 7.18 An applicant without after-the-event insurance seeking services otherwise considered suitable for a CFA will be expected to provide evidence of attempts to secure such insurance. Even where evidence is provided of refusals of insurance, the Director him/herself may make enquiries of insurers to see if they would support a CFA in the individual

circumstances. Moreover, it will not always be sufficient for the applicant to allege that s/he cannot afford the after-the-event premium. If the proposed claim is for damages then the applicant would need to demonstrate that it has not been possible to defer payment of the premium from any damages recovered.

7.19 If the proposed proceedings do not include a claim for damages or other money, however, particular considerations apply. An applicant for legal aid is unlikely to be able to pay an after-the-event premium or success fee from his/her own resources, and the case should not generally be considered as suitable for a CFA unless both:

- the prospects of success are at least 80%, (otherwise it would be unreasonable to expect the legal representative to act at risk in relation to costs without the prospect of a success fee or for the applicant to risk an adverse costs order); and
- the case will not involve significant expenditure on disbursements (in particular experts' fees).

Of course, if there is no likelihood of either damages or costs being awarded (for instance in seeking an injunction against an impecunious opponent) then there is no basis on which the case could be pursued under a CFA.

7.20 The fact that the applicant may wish to obtain legal aid rather than a CFA because of the potential deduction from damages in respect of a success premium or damages agreement and/or after-the-event insurance premium, will not of itself prevent a case being suitable for a CFA. The test is not whether the applicant or provider would prefer legal aid to a CFA, but is, in essence, whether the case could realistically be brought under a CFA in the absence of legal aid. It will be a question of fact on the individual circumstances of the case whether the need to meet an insurance payment from the likely damages would render the proceedings futile.

*No person other than the individual who can reasonably be expected to bring the proceedings. (MR 39(c)).*

7.21 This criterion is concerned with the situation where another person is a more appropriate party to proceedings, and will be particularly relevant where the applicant for funding has been selected as a (proposed) party on the basis of their financial eligibility for legal services or status as an individual rather than legal person. This may be the case where a child is put forward as applicant in certain judicial reviews which could more appropriately be brought by the parents, for example challenges concerning allocation of school places (*R v. Richmond LBC Appeal Committee Ex p. JC (A Child)* [2001] B.L.G.R. 146 2001 E.L.R. 21 CA (Crim Div)).



*Alternatives to Litigation (MR 39(d)).*

7.22 This provision is largely self-explanatory. Whether it is reasonable for a complaint or other procedure to be exhausted as an alternative to litigation will depend in part on the speed and nature of the remedy that can be obtained as compared with the proposed litigation. However, regard should be had to how a private paying client would reasonably proceed and, in particular, whether, subject to time constraints, pursuing a complaints scheme in the first instance would be a cost-effective way of obtaining information and ascertaining the position of the proposed opponent.

*Need for Representation (MR 39(e))*

7.23 This is not a test as to whether failure to make legally aided representation would breach an applicant's enforceable Convention or EU or rights, but a substantially lower test of whether legal representation as a form of service is appropriate in all the circumstances of the proceedings, having regard again to whether a reasonable client paying privately would wish to fund representation. For example:

- (i) The straightforward nature of some proceedings, such as an undefended divorce, may make representation unnecessary;
- (ii) If other proceedings are being pursued that are likely to resolve an issue of principle relevant to the applicant's case, a reasonable private paying client would wish to wait for the outcome of the test case before deciding whether to litigate with his or her own money, unless it was necessary to issue proceedings for limitation purposes;
- (iii) It should not be necessary for there to be more parties legally represented than there are positions to be argued. This may be particularly relevant in a welfare case in the Court of Protection where an additional member of the family of the subject of the proceedings seeks representation. Where, more generally, a number of applicants seek to establish the same principle, for instance in relation to the liability of the proposed opponent or the lawfulness of a decision, an act or omission, it may be most cost effective to proceed on the basis of a test case. Similarly, it may not be necessary for all the parties involved in first instance proceedings to be represented on an appeal on a point of law.

*The proceedings are not likely to be allocated to the small claims track (MR 39(f)).*

7.24 The Director is required to consider the likely allocation of the proceedings or proposed proceedings in the event they are contested (if they are unlikely to be contested legal representation would not normally be the appropriate form of service in any event). For example, even where a claimant proposes to commence, or has commenced, a claim under the Civil Procedure Rules Part 8 Procedure, regard must be had to

the likelihood of the court determining that the case should instead proceed under Part 7 following the Defendant's Acknowledgement of Service, and the likely allocation to track thereafter.

### ***Other general merits criteria for legal representation***

- 7.25 Regulations 40 to 44 of the merits regulations describe additional criteria for applications respectively for investigative representation and full representation under the general merits criteria. Broadly, these criteria relate to the prospects of success and cost benefit of the proposed proceedings, by reference to categories of prospects of success, likely damages, likely costs and significant wider public interest, defined earlier. There are also provisions relating to minimum damages levels, and specific provisions in relation to multi-party actions.

### ***Other legal services***

- 7.26 Regulation 45 of the merits regulations sets out a criterion for other legal services. Applications for such services (in particular regarding inquests, pursuant to regulation 48) will require an exceptional case determination under section 10(3) or section 10(4), as appropriate to the case, of the Act. In some cases, however, the application may be considered not even to meet the reasonableness test in regulation 45, for example where another body has offered to indemnify the applicant's costs.

### ***Emergency representation (MR 46)***

- 7.27 Emergency representation is primarily addressed within the procedures regulations. It is not in itself a form of service but a way in which certain forms of service are made available to an applicant. Note that the definition under regulation 2 of the procedures regulations now formally includes family help (higher) provided following an urgent application.
- 7.28 The interests of justice test at regulation 46(b), in the context of emergency representation, essentially involves consideration of two questions:
- (i) Whether the services sought need to need to be provided before there would be time for the Director to make a determination in relation to a substantive application (i.e. non-emergency) in order for those services to be effective; and
  - (ii) the seriousness of the consequences of those services not being made available on an emergency basis, having regard to the fact that emergency representation is provided before the applicant has been determined as qualifying for services under financial regulations; for example, whether:
    - a) there will be a risk to the life, liberty or physical safety of the applicant or his or her family or the roof over their heads; or

- b) the delay will cause a significant risk of miscarriage of justice, or unreasonable hardship to the applicant, or irretrievable problems in handling the case; and
- c) in either case ((a) and (b)) there are no other appropriate options available to deal with the risk

7.29 It may, however, be considered not to be appropriate, pursuant to regulation 11(6) of the merits regulations, to provide emergency representation where it is the conduct of the applicant that has created the alleged urgency, and in particular where it would have been reasonable to have made an earlier substantive application.

### ***Specific Merits Criteria***

7.30 Part 6 of the merits regulations set out criteria for specific categories of case. These categories, contained in the eight chapters of Part 6, are based on Paragraphs or sets of Paragraphs in Part 1 Schedule 1 to the Act.

7.31 Broadly, they correspond to the case categories under the funding code, having regard to the more limited range of proceedings now available under the Act. However:

- (i) there is no longer a specific category for clinical negligence cases; since these cases are now subject to a criterion of not being suitable for a CFA (and the previously more favourable damages to costs ratios had already been removed under the funding code), the general merits criteria apply in full;
- (ii) there is no longer a category of quasi-criminal proceedings; (see Paragraph 3.2 above);
- (iii) there is no longer a section of criteria concerning withdrawal of services; this is addressed by the procedure regulations

7.32 There are two additional categories relating to cases described in Paragraph 44 of Part 1 of Schedule 1 to the Act (cross border disputes) (reflecting the provisions of the Council Directive concerned) and applications by legal persons.

7.33 Other than in relation to determinations in relation to the EU Maintenance Regulation, the 2007 Hague Convention, cross-border disputes and legal persons, the specific criteria apply solely in relation to applications for legal representation. The scheme of the specific criteria is that the provisions of the general merits criteria apply other than to extent that the relevant specific criteria disapply, modify or supplement the general criteria.

## **Public Law claims (chapter 2, Part 6 MR)**

- 7.34 By virtue of the definition at regulation 2 merits regulations, chapter 2 Part 6 (Public law) of the regulations covers:
- (i) Judicial review (as described in Paragraph 19, Part 1, Schedule 1 to the Act
  - (ii) Habeas corpus (as described in Paragraph 20)
  - (iii) Homelessness cases (as described in Paragraph 34).
- 7.35 Notwithstanding the scope of this category, it is primarily judicial review claims for which the additional criteria within this chapter will be most relevant. The criteria are intended to reproduce the position under the funding code, with the exception of the inclusion of an additional criterion for investigative representation. The effect of the standard and specific merits criteria are that legal representation for judicial review can only be provided where there is an immediate right and intention to bring a challenge to an identifiable act, omission or other matter, subject only, in respect of investigative representation, to the need to confirm that the prospects of success test for full representation is met.
- 7.36 Regulation 53 sets out criteria to be applied to applications both for investigative and full representation:
- (a) In principle the question of whether the act, omission or other matter is susceptible to challenge might be viewed simply as an aspect of the prospects of success. However, it may be important to focus attention independently on the question of whether there does exist a matter capable of giving rise to a public law challenge particularly in the context of the 'unclear' prospects that apply for investigative representation. Regulation 53(a) requires, for example, that there must be an arguable case that the proposed defendant was carrying out a public law function in relation to the matter complained of.  
  
Further, it is essential that the act, omission or other matter must exist and be capable of challenge at the point of the legal aid application; an application for legal representation cannot be made in relation to the position an authority might adopt in response to work that is proposed to be carried out, such as assistance with an application for re-housing or a community care assessment.
  - (b) The regulation 53(b) criterion is additional to the general provision regarding the exhausting of reasonable alternatives to litigation at regulation 39(d). In general, where there are court or tribunal proceedings available to challenge the act, omission or decision of the authority, that route should be followed. There may, however, be exceptional reasons why that route would not be effective in providing the remedy the applicant needs.

- 7.37 To meet this criterion it will not be sufficient that the applicant may consider judicial review more convenient, or otherwise preferable to the alternative proceedings. The circumstances where the Director may consider that the usual appeal/proceedings will not be effective in providing the remedy that the individual needs will broadly be:
- (i) where alternative court or tribunal proceedings will not provide the full remedy potentially available through judicial review. This will only apply, however, where the alternative procedure is unable to address a substantive part of the client's challenge. The alternative procedure will not be considered ineffective simply because it is unable to provide an ancillary remedy, such as the award of damages.
  - (ii) Where the speed of the alternative proceedings prevents those proceedings being effective in providing the remedy that the individual needs. This may be as compared with the timescale of a substantive application for judicial review or more probably the availability of injunctive relief under judicial review. The consequences of instead having to wait for the outcome of the alternative proceedings, however, would have to be serious, going beyond mere convenience of the applicant, to matters akin to those described under overwhelming importance to the individual.
- 7.38 In relation to investigation representation, regulation 54(b) creates a new requirement regarding notification to the proposed opponent of the potential challenge. This is distinct from the requirement for full representation for judicial review applications to have followed the pre-action protocol, and involves notification only of the potential for a challenge rather than an exposition of the legal grounds for that challenge. This work could have been completed under legal help.
- 7.39 This provision is most relevant in relation to alleged omissions by an authority, such as failure to carry out a community care assessment. Notification of authority may prevent the need for substantive investigation, for example through resolving a misunderstanding with the applicant as to whether the authority has in fact already carried out the required action or where the relevant section of the authority had not been aware of the applicant's position.
- 7.40 In a proposed challenge to an act or omission it is important that the timescale provided for response by the authority does not create a significant risk of prejudice to the prospects of ultimately bringing a successful challenge, having regard to the requirement to bring any judicial review challenge promptly. However, early notification of potential proceedings may still be of benefit in preventing or curtailing the need for investigations.
- 7.41 In respect of all potential challenges, however, early notification is not required if it would be impracticable. For a judicial review application, this may arise in two types of circumstance:

- (i) Where the applicant's position is one of such urgency that the pre-action protocol itself need not be followed; or
  - (ii) Where any delay would create a significant risk of prejudice to the applicant's prospects of a successful claim, either through being unable effectively to follow the pre-action protocol within the judicial review time limit or to meet that time limit at all.
  - (iii) For appeals under section 204 Housing Act 1996 the time limits, and potential circumstances of the applicant, are such that early notification will generally be considered impracticable
- 7.42 Regulation 56(2)(a) sets out the requirement in relation to applications for full representation for judicial review that the judicial review pre-action protocol should be followed in all cases unless this is impracticable. This work can have been carried out under legal help or investigative representation. In order for the Director to be satisfied of this requirement the application for full representation must enclose the letter before claim and proposed defendant's response under the protocol or, where no response has been received, be made after the reasonable period given in the letter before claim for a response has passed. The circumstances in which it is impracticable to follow the pre-action protocol will be where, under the terms of the protocol itself, proceedings may be issued without having followed its procedures. It is therefore never appropriate for the judicial review pre-action protocol to be conducted under full representation itself.
- 7.43 Legal Proceedings in relation to homelessness provisions will fall within this chapter whether they take the form of a judicial review in relation to the provision of interim accommodation or a challenge on a point of law against a decision of the local authority under sections 204 or 204A Housing Act 1996.
- 7.44 Where a local authority has failed to notify the result of a review under section 202 Housing Act 1996, the decision as to whether to bring a judicial review to compel a section 202 decision or to challenge the decision under section 184 in the county court remains on the basis of what is in the best interests of the applicant. Nothing in 39(d) or 53(b) of the regulations prevents either course of action: the section 202 review has properly been pursued as required, whilst the section 204 appeal and judicial review will be challenges to separate matters: the authority's underlying homelessness decision as against its failure to notify a section 202 decision.

## 8 Procedure Regulations

- 8.1 The procedure regulations generally reproduce the scheme under the Funding Code Procedures. In principle, they are self-contained and self-explanatory, with limited discretion available to the Director as compared with his or her function in making determinations under the merits regulations. The Act does, however, require significantly different terminology compared to that used in the Administration of Justice Act 1999, and there are some differences in substance, highlighted below.

- 8.2 The scope of procedure regulations has increased to include applications for Gateway Work (Part 2; see Paragraphs 8.7 to 8.12 below).

However, applications for assistance under a Housing Possession Court Duty Scheme are not governed by the procedure regulations (regulation 14).

- 8.3 Under both Controlled and Licensed Work there is a duty for providers to report to the Director where the client has failed without good reason to comply with the requirement to provide information or documents in accordance with the regulations or has provided a statement or representation knowing or believing it to be false, overriding any privilege between the provider and that person (24, 41).
- 8.4 There are references to “determinations” rather than “decisions”, and in particular the determination that a person qualifies for services replaces the notion of a grant of funding. Withdrawal of a determination means that the person will no longer receive services rather than that the original determination is deemed never to have been made. The latter effect is described by the determination being “disregarded”. This occurs where the conditions on which a conditional determination in relation to emergency representation was made are not fulfilled (52(2)(b)). The decision to withdraw a determination is itself a form of determination.
- 8.5 The decision as to whether the services applied for are described in Part 1 of Schedule 1 to the Act (i.e. whether they are within the scope of the scheme) is also described as a “determination” by the Director. There is a right to request a review by the Director of a determination that the services are not so described in relation to an application for Licensed Work (44(1)(a), but no onward right of appeal to an Independent Funding Adjudicator (45(1)(b)).
- 8.6 The terms of powers delegated to providers are no longer described by guidance in relation to the procedural provisions but are contained in separate authorisations under the Act.

### **Gateway work**

- 8.7 In accordance with Part 2 of the Procedure Regulations any individual intending to apply for legal help in certain categories of law (defined as “Gateway Work” in the Regulations) must, in most circumstances, do so through the Gateway (the Civil Legal Advice (“CLA”) advice line acts as the Gateway). The Regulations make provision for how to contact the Gateway, including by telephone and other electronic means. An application for legal help in Gateway Work cannot be made to a provider with a face to face contract in the first instance and providers cannot make determinations in these matters except in the circumstances set out below. The areas of work to which this Part applies are applications for legal help in the discrimination, education and debt categories and are described in Regulation 20 of the Procedure Regulations.

- 8.8 Although advice is available through CLA in two other areas of law (family and housing), clients in these non-Gateway areas will have a choice as to whether to access advice over the telephone/email/post or by attending at a face to face provider. Part 2 of the Procedure Regulations do not therefore apply to these housing and family cases.
- 8.9 Certain clients will also be exempt from the requirement to seek advice through the Gateway and may choose either to contact the Gateway or to seek face to face advice. These clients are described as “exempted persons”. They are:
- (a) Clients who have been deprived of their liberty;
  - (b) Children under the age of 18; and
  - (c) Clients who have been previously assessed by the Gateway as being eligible for face to face advice and who now have a linked problem. The client must have been previously assessed by the Gateway as being eligible for face to face advice in the preceding 12 months and the current matter on which the client requires assistance must arise out of the first matter or be related to that matter. In those circumstances, the client does not need to first contact the Gateway. However, the provider should obtain the unique reference allocated to the client (the “CLA Reference number”) which may be obtained either from CLA or the client to show that the initial face to face advice was appropriate.
- 8.10 Unless the client is an exempted person, as described above, a provider cannot provide legal help unless the matter has been assessed by the Gateway as requiring face to face advice. In most cases it is anticipated that the Gateway will be able to provide the client with legal help over the telephone/email/post. However, in certain cases the Gateway may determine that the case is such that it is not suitable for advice by telephone/email/post and that face to face advice may be required. In these circumstances, the Gateway will inform the client that they may seek advice from a face to face provider and will allocate the client a CLA Reference Number confirming that they have been assessed and are eligible for face to face advice.
- 8.11 Any provider making a determination following an application for legal help to which Part 2 applies should therefore ensure that either the client is an exempted person or that they have a CLA Reference Number for the client confirming that they have sought advice through the Gateway but that face to face advice is required.
- 8.12 Part 2 of the Procedure Regulations do not apply to applications for licensed work. A provider will therefore be able to make an application for licensed work in Gateway areas of law on behalf of a client. However, an application for licensed work should not be made until all work which could have been carried out under legal help has been completed. Unless, therefore, the matter is urgent and legal representation is immediately required it would usually be expected that an application for



the initial legal help should be made through the Gateway. If not, the application for licensed work may be premature.

### ***Controlled Work***

- 8.13 In relation to Controlled Work (Part 3) the regulations are expressed in relation to applications to the Director rather than the Provider; however, these functions of the Director are delegated by separate authorisation to providers to create the same position in practice as under the funding code (including a limited role for the Director in relation to Controlled Legal Representation).
- 8.14 The Act (section 12(5)) requires that the procedure regulations make provision for a right of review in relation to all determinations and so the regulation 27 provides a right of review for the applicant in respect of adverse decisions in relation to all Controlled Work applications, including legal help. No specific requirements are imposed on providers, however, in relation to such reviews.

### ***Licensed Work***

- 8.15 The structure of the regulations is different from the Funding Code Procedures in relation to work carried out under the authority of a certificate. Instead of a specific Part of the regulations concerning certificated work as a whole, the regulations have separate Parts for Licensed Work (Part 4), emergency representation (Part 5) and Special Case Work (Part 6 - cases referred to the Agency's Special Cases Unit). Regulations in the latter two Parts refer back to the procedures described in Part 4 in relation to Licensed Work, including the issue of certificates, as appropriate.
- 8.16 A distinction is made between the determination that an applicant qualifies for services under regulation 35, and the certificate recording that determination (regulation 37). The determination may be made subject to conditions or limitations (35(1)), which may be cost limitation (35(1)(a)) or scope limitation (35(1)(b)). The certificate recording the determination must reflect the relevant condition or limitation (37(2)(g)).
- 8.17 Formally, any application to amend or remove a limitation is an application to amend the determination itself (35(2)(b)), which will then require the Director to amend the certificate (37(5) and (6)).
- 8.18 The concept of withdrawal of a determination in relation to certificated work generically replaces the concepts of both discharge and revocation of the certificate. Revocation is defined in regulation 2 as the withdrawal of a determination having the consequences set out in regulations under sections 23 and 26 of the Act. The equivalent of a discharge of a certificate under the Funding code would be a withdrawal of a determination that is not a revocation.

## ***Evidence requirements***

- 8.19 There is now more detailed provision (regulation 32) in relation to evidence required in support of an estimate of likely damages to be considered under the merits criteria for legal representation.
- 8.20 Legal aid for certain family proceedings will only be in scope under paragraphs 12 and 13 of Part 1, Schedule 1 to the Act where there has been, or there is a risk of, domestic violence or child abuse and where evidence is provided in respect of this. Although the evidence which will satisfy these requirements is set out in Part 4 (licensed work) of the Procedure Regulations, these requirements apply to all forms of civil legal service provided in relation to these proceedings including legal help and Family Help (Lower) (Procedure Regulation 23(2) and (3)).
- 8.21 Legal help cannot, therefore be provided in order to assist the client in obtaining the evidence listed in Schedule 1 to the Procedure Regulations. The client must provide this evidence before an application for legal help can be determined.
- 8.22 These requirements will broadly apply to private law children and finance cases. Schedules 1 and 2 to the Procedure Regulations list the forms of evidence required to demonstrate the risk of domestic violence and child abuse.
- 8.23 It should be noted that Schedules 1 and 2 to the Procedure Regulations do not apply to all family proceedings. They do not apply to public law proceedings (listed in paragraph 1 of Part 1, Schedule 1 to the Act), proceedings under the inherent jurisdiction (paragraph 9), proceedings to prevent the unlawful removal of children from the UK (paragraph 10), applications for proceedings for domestic violence injunctions (paragraph 11) and applications for forced marriage protection orders (paragraph 16). Regulations 33 and 34 also do not apply to the provision of help with family mediation or mediation in Family Disputes which are described under paragraph 14 of Part 1, Schedule 1 to the Act.
- 8.24 Civil legal services may be provided in the family proceedings described in paragraph 12 of Part 1, Schedule 1 to the Act where the client has been or is at risk of domestic violence from the other party to the proceedings. Legal aid may be granted for civil cases where evidence is provided by the client that the individual has been, or is at risk of being, the victim of domestic violence in the form of abuse which relates to financial matters.
- 8.25 The evidence of domestic violence or the risk of domestic violence must be provided in one of the forms listed in Schedule 1 to the Procedure Regulations. The fact that one party has evidence to show they are, or have been, at risk of domestic violence will not qualify other parties to proceedings for legal aid – the intention is that only the victim or potential victim of domestic violence can qualify for legal aid. Each applicant for legal aid must provide one piece of evidence showing that they have suffered, or are at risk of suffering, domestic abuse.

- 8.26 In accordance with paragraphs 1 to 4 of Schedule 1 to the Procedure Regulations evidence of arrest, conviction, police caution or criminal proceedings for a domestic violence offence will be accepted as relevant evidence. The definition of a domestic violence offence for these purposes will be set out in a document published by the Lord Chancellor under section 2 of the Act.
- 8.27 Civil legal services may be provided for the matters listed in paragraph 13 (concerning child abuse) of Part 1, Schedule 1 to the Act where the child who is, or will be, the subject of proceedings is at risk of abuse from someone other than the client and the order will provide protection against that abuse. As with the requirements under paragraph 12, legal aid would therefore not be available to a client who is accused of the abuse and against whom the child is to be protected by any application.
- 8.28 The evidence that will be required for any application for civil legal services (both licensed and controlled work) is listed in Schedule 2 to the Procedure Regulations. It should be noted that Schedule 2 is similar but not identical to Schedule 1. For example, evidence of a relevant conviction, police caution or ongoing criminal proceedings for a child abuse offence must be provided (rather than a domestic violence offence). These offences are also set out in a document published by the Lord Chancellor under section 2 of the Act.
- 8.29 A client may therefore qualify for legal aid in certain Children Act 1989 matters by providing evidence of child abuse, as the matter will be within the scope of paragraph 13, Part 1, Schedule 1 to the Act.
- 8.30 There is no time limit on the forms of evidence under regulations 33 or 34. The previous time limit of five years (introduced in February 2016 following a Court of Appeal judgement) was removed with effect from 8 January 2018.
- 8.31 Additionally, Schedules 1 and 2 to the Procedure Regulations list certain forms of evidence concerning abuse by the alleged abuser against current or previous partners or other family members of the alleged abuser.

### ***Other applications for legal aid***

- 8.32 If a provider does not hold an appropriate standard contract with the Lord Chancellor, and wants to conduct a special case work legal aid case that requires an individual case contract, the effective administration of justice test must be met. The factors to be taken into account in assessing whether the effective administration of justice test is met are now set out in the regulations (31(5)) rather than, as previously described in guidance.
- 8.33 Applications for exceptional case determinations (Part 8) are now governed by the procedures that would apply to applications for the same level of service under section 9 of the Act; applications for other

legal services are governed by the procedures governing licensed work. Successful applications under section 10 of the Act for family help (higher), legal representation and other legal services will be governed by the issue of certificates; this includes advocacy services made available for inquests.

- 8.34 In relation to applications under section 10 of the Act, a review by the Director can be requested in relation to either a determination that the applicant does not qualify for services, or a refusal to make an exceptional case determination or significant wider public interest determination (regulation 69), but no further appeal is available.
- 8.35 Applications for family mediation (Part 7) remain outside the scope of licensed work provisions.
- 8.36 Under Regulation 67, where an exceptional case application is for services within a category of law defined in the standard civil contracts, the provider must either hold the relevant civil contract permitting work in that category or satisfy the effective administration of justice test in order to act under an individual case contract. All other successful exceptional case applications will be conducted under an individual case contract without the effective administration of justice test being required.

### ***Withdrawal of Determinations***

- 8.37 Regulation 42 addresses the ground and procedures for withdrawal of determinations. The grounds for withdrawal are set out at 42(1). These are expanded in comparison with those under the funding code. They include at 42(1)(k), the provisions in relation to the domestic violence 'gateway' to civil legal services in family proceedings no longer being satisfied. This allows for determinations to be withdrawn in such circumstances where the forms of evidence supplied are no longer valid or successfully challenged and no longer stand. It includes, for example, evidence of a protective injunction for domestic violence, obtained without notice to the respondent and subsequently set aside by the Court.
- 8.38 Regulation 42(3) provides for an equivalent of the 'show cause' procedure under the funding code procedures through notification of an intention to withdraw a determination. The scheme is different in that, if the determination is withdrawn as a result of this procedure, the withdrawal takes place with effect from the initial notification of intention (42(3)). That represents a difference from the position under the funding code in that:
- (a) The client will not have cost protection, under the Civil Legal Aid (Costs) Regulations 2013, in the period from when the Director first notified an intention to withdraw the determination;

- (b) The provider can carry out work at risk in relation to whether the withdrawal does occur, whereas no work could be carried out within the show cause period under the funding code without express permission irrespective of the ultimate outcome of the show cause.
- 8.39 The grounds for withdrawal for which no notification is required remain as under the funding code: financial eligibility; services provided or consent of the individual.
- 8.40 Regulation 42(2) provides a power to revoke the determination on the basis of specified grounds: the individual's failure to provide information or documents; attend a meeting with the Director; making false statements or representations; or conducting proceedings unreasonably.
- 8.41 Under Regulation 42(6) a withdrawal of a determination that had not been by way of revocation may be converted into a revocation where relevant circumstances come to light which were present at the time of or before the withdrawal.
- 8.42 All the grounds of withdrawal of determinations are expressed as being discretionary under Regulation 42. Some guidance on the exercise of the Director's discretion is included below.

### ***Specific Withdrawal Grounds***

#### **Where the individual has died Regulation 42(1)(f)**

- 8.43 Regard must first be had to whether it is possible for any person other than the relevant individual to receive relevant services under the appropriate paragraph of Part 1 Schedule 1 to the Act. Some paragraphs, for instance paragraph 36 (anti-social behaviour) are clearly specific to the individual receiving services. Others (e.g. 21 to 22 relating to claims against public authorities) do not create a requirement that services are provided to a specific individual. Some paragraphs e.g. paragraph 3 (abuse of child or vulnerable adult), paragraph 23 (clinical negligence) and paragraph 39 (sexual offences) expressly provide that services may be provided to a personal representation of an individual or victim. For the purposes of both financial eligibility and applying the cost benefit test it is the individuals who will benefit from the continuing action whose interests must be taken into account, rather than the personal representative.

#### **Where a bankruptcy order is made against the client.**

- 8.44 Where the cause of action transfers to the trustee in bankruptcy, the paragraphs under Part 1 Schedule 1 under which services could continue would be more restricted than in relation to death of the individual. More generally, services would not be continued if this would benefit the client the creditors of the estate and not the individual him/herself, unless the case were accepted to have significant wider public interest.

## Where the individual no longer qualifies for services under the merits criteria

- 8.45 The individual's rights under Article 6 of the European Convention on Human Rights must be considered, especially if withdrawal is being considered at a very late stage in the proceedings. For example, it would not be appropriate to withdraw a determination on cost benefit grounds alone if:
- (a) The case was approaching trial;
  - (b) It would be impossible for the client to have effective access to the court if proceeding in person (taking into account the level of representation and funding of the client's opponent);
  - (c) The prospects of success of the case were better than 50 per cent; and
  - (d) There had been no significant change of circumstances since funding was last approved. (See *Alliss v. Legal Services Commission*, CO/3348/02, 25<sup>th</sup> September 2002).
- 8.46 However, withdrawal of funding may be more justified if a certificate has been specifically limited to a stage before trial in order to take stock of the merits at that point.
- 8.47 The definition of "likely costs" requires the total costs likely to have been incurred at the conclusion of the case to be applied to any consideration of cost benefit. A cost benefit criterion may cease to be satisfied because the projected total of costs now appears higher than originally estimated, because the likely benefits, such as the quantum of damages, now appears lower than originally estimated or the assessment of prospects of success has been downgraded.
- 8.48 Where the relevant cost benefit criterion is no longer met it may, however, be appropriate additionally to consider costs incurred to date as a separate sum. A reasonable private paying client is likely to take into account the possibility of recovering costs already expended in considering whether to continue to trial. Hence, in considering the discretion whether to withdraw the determination, it may be appropriate to consider the effect on the cost benefit criterion of including the costs to date (at Contract rates) as part of the damages or other benefit to be obtained if successful, which may lead to a conclusion that services should be continued.
- 8.49 Even where the relevant prospects of success criterion are no longer met, the Director should take into account the interests of public finances in exercising his or her discretion as to whether to withdraw the determination. For example, if at a late stage in proceedings the prospects of success are assessed by the Director at 40 per cent, but over 80 per cent of the total costs to trial have already been incurred, it may be appropriate for the certificate to be continued. A 60 per cent risk of incurring full costs to trial is better for public funds than the certain loss of 80 per cent of the costs.
- 8.50 Further, whilst not a factor in relation to the merits criteria, in considering the benefits to public funds the possibility of recovery via the statutory charge under section 25 of the Act may be considered when the Director is exercising his/her discretion under PR 42. However, the risk, if any, of a costs order

against the Lord Chancellor under regulation 10 of the Civil Legal Aid (Costs) Regulations 2013 must also be taken into account.

- 8.51 When a determination is to be withdrawn, it may be appropriate to delay doing so for a limited period if there are reasons for believing that it may be possible to settle the action.
- 8.52 Where services have been provided on the basis that a case has significant wider public interest, if the case is close to trial it may be appropriate to fund the case to a conclusion even where prospects have become poor; there may be a public benefit in having a legal issue resolved one way or the other.

### **Withdrawal of legal aid in Terrorism Prevention and Investigation Measure cases**

- 8.53 A person's legal aid may be withdrawn on the grounds of unreasonable conduct. Regulation 11(6) of the merits Regulations provides that the Director must be satisfied that it is reasonable to provide legal aid in light of the conduct of the individual. Under regulation 42(1)(a)(i) of the procedure Regulations, legal aid may be withdrawn if an individual no longer meets the merits criteria which includes regulation 11(6).
- 8.54 Examples of conduct that may result in legal aid being withdrawn from an individual subject to a Terrorism Prevention and Investigation Measure ("TPIM") would include:
- (i) where the individual has failed to make contact with the provider within a reasonable timeframe,
  - (ii) the provider is either without instructions or does not have the ability to obtain further instructions, whether they are required or not,
  - (iii) where the individual has acted dishonestly or in bad faith,
  - (iv) where the individual has not complied with the individual's (or a) TPIM (including absconding)
- 8.55 This is in addition to the grounds for withdrawal of legal aid expressly set out at Regulation 42 Civil Legal Aid (Procedure) Regulations 2012, and in particular Regulation 42(1)(h) and 42(1)(j) concerning the individual's conduct.
- 8.56 The Director may decide it is appropriate to review other cases for which the individual is receiving legal aid to decide whether it may be appropriate to remove legal aid for those other cases on the grounds of the individual's behaviour.

## 9. Mental Health Guidance (Merits Regulation 51)

### General

- 9.1 The mental health proceedings criteria (Regulation 51 of the Merits Regulations) apply to applications for Legal Representation before the First Tier Tribunal and Mental Health Review Tribunal for Wales under the Mental Health Act 1983. Legal Representation before the Tribunal may only be granted as Controlled Legal Representation under the Standard Civil Contract (Regulation 21(2) of the Procedure Regulations).
- 9.2 Judicial review applications in the mental health Contract category will be dealt with under the public law criteria (Part 6, Chapter 2 Merits Regulations). Examples include applications to enforce the obligation contained in s.117 of the Mental Health Act 1983 on the health authority and local authority social services authority to provide after-care services to those discharged following admission under ss.3, 37, 47 or 48 of the Mental Health Act 1983.
- 9.3 Other applications for Legal Representation in mental health cases (including for applications to the Upper Tribunal) will be dealt with under the General Merits Criteria (Part 4 of the Merits Regulations). These include applications under s.29 of the Mental Health Act 1983 to displace a nearest relative. The applicant for Legal Representation may be the nearest relative opposing the application to the court, or may be, another relative of the patient or a person with whom the patient is living or was living before admission to hospital and who is to apply to the court.

In either case the following additional guidance should be applied:

### Forms of civil legal service

- 9.4 Legal Representation may be refused if, in accordance with Regulation 39(d) of the Merits Regulations, the application appears premature, or if, in accordance with Regulation 20, it appears more appropriate for the client to be assisted by some other form of service under the Regulations.
- 9.5 This will be particularly relevant to s.117 applications. legal help or legal representation provided as controlled work may be more appropriate to be used in relation to issues concerning after-care, for example to pursue correspondence or a complaint to obtain appropriate care or, in relation to a tribunal case, to ensure that the provision of such care is considered. In any event, Legal representation is unlikely to be granted until any available and effective review or complaint processes have been exhausted unless, in the particular circumstances of the case, it would not be appropriate, e.g. due to the excessive delay in pursuing such processes as against the time in which an outcome could be likely to be obtained in court proceedings. Further, it is likely to be appropriate to obtain information regarding the need for facilities and a letter before



action should be written before an application for Legal Representation will be considered.

### **Proceedings and limitations**

- 9.6 In s.29 cases, as the reasonableness of the nearest relative's objections to admission to hospital for treatment, guardianship or discharge are considered objectively, it is likely to be appropriate to limit a determination (Procedure Regulation 35) which covers defending proceedings to obtaining an independent psychiatric and/or social worker's report to consider that issue at the earliest opportunity. This will only be justified where the other circumstances of the case, including the history of the patient and the previous conduct of the relatives justify the grant of legal representation in accordance with Regulation 51 of the Merits Regulations.

### **Mental Capacity Act (Merits Regulation 52) General**

- 9.7 Where legal services are required for eligible clients in relation to issues under the Mental Capacity Act 2005, legal help will be the normal vehicle for funding such advice and assistance as the client requires. Legal help in relation to the 2005 Act is funded as Mental Health Non-Tribunal work under the rules contained in the 2010 Standard Civil Contract Specification.
- 9.8 For cases where an application to the Court of Protection may be necessary, the relative accessibility of the Court in reaching a decision in many cases will make a grant of Legal Representation unnecessary as support will be available when needed through legal help. Similarly, legal help may be used to settle potential disputes through negotiation, mediation or other settlement (Merits Regulation 52(2)).
- 9.9 However there will be some cases before the Court of Protection that raise fundamental issues for the client which will require legal representation at an oral hearing. For example, important cases concerning decisions over the giving or withholding of medical treatment in respect of people who lack capacity to consent to that treatment. The criteria for funding legal representation in these circumstances are set out in regulation 52 of the Merits Regulations. Legal aid for advocacy is only permitted for proceedings in the Court of Protection which are set out in paragraph 4 of Part 3 of Schedule 1 to the Act.
- 9.10 If legal representation is required for an individual case before the Court of Protection where proceedings do not fall within paragraph 4, Part 3, Schedule 1 to the Act, an application can be made for Exceptional Case Funding.

### **Merits Criteria**

- 9.11 There are two important considerations when determining applications under Regulation 52 in order that legal representation before the Court of

Protection can be made available. The first is to consider whether the case falls within the ambit of Regulation 52(3) in relation to the person (referred to in the guidance below as “P”) who is the subject of the proceedings. This will be the person who lacks or is alleged to lack capacity to make important decisions on their own behalf. The second test is whether the Court of Protection has ordered, or is likely to order, an oral hearing.

- 9.12 Many welfare cases concern accommodation issues for which advocacy may not be available in accordance with Part 3 of Schedule 1 to the Act. However, accommodation cases will be within scope if they concern P’s family life (Merits Regulation 52(3)(e)). This is likely to be the case where either the issue is whether or not P should remain with his or her family or where a change of accommodation would have a serious impact on contact between P and his or her family. However, the cost benefit criteria will of course need to be applied (Merits Regulation 52(1)(a)).
- 9.13 The second consideration is that it is necessary for the individual to be provided with full representation in the proceedings (Merits Regulation 52(2)). The Court has the discretion as to whether to hold an oral hearing to decide the application before it and will give directions on whether an oral hearing is required during proceedings. In the most urgent and important cases Legal Representation may be granted before the Court has made any determination on whether to direct an oral hearing, whilst in other cases it may be appropriate to await what directions the Court makes before a decision on the need for representation is made. However, in practice many cases will be those for which an oral hearing is likely to be directed by the Court. If legal representation was granted but the Court subsequently directed that an oral hearing was not required consideration would be given to withdrawal of the determination
- 9.14 In general the Legal Aid Agency will only grant legal representation if the applicant wishes to put forward a new and significant argument which would not otherwise be advanced. Generally, there should not be more parties separately represented before the Court than there are either cases to put or desired outcomes (Merits Regulation 39 (e)).
- 9.15 Cases that fall to be considered under Regulation 52 must still satisfy all relevant merits criteria in Regulations 39, 41 (a) and (b), 42 and 43. In particular, the applicant for legal aid must be seeking a defined outcome for which prospects of success are assessed as at least 50% or; borderline or marginal and the case is either of significant wider public interest, or overwhelming importance to the individual. The reasonable private paying client test must be satisfied in relation to cost benefit (regulation 7).

### **Lasting Power of Attorney/Advance Decisions**

- 9.16 The Legal Aid Sentencing and Punishment of Offenders Act 2012 makes it clear at paragraph 5 (3) of Part 1, Schedule 1 that the creation of lasting powers of attorney (LPAs) and the making of advance decisions (ADs) under the Mental Capacity Act 2005 are not within the scope of

Civil Legal Aid. However, services provided in relation to determinations and declarations by a court as to the validity, effect or applicability of LPAs and ADs are within the scope of the scheme (paragraph 5(1) of Part 1, Schedule 1).

- 9.17 Legal help may be appropriate in some circumstances in relation to an application or proposed application to the Court of Protection under ss.22 or 23 of the 2005 Act concerning questions about the validity or operation of LPAs. Similarly, it may in some cases be appropriate to provide legal help concerning questions under s.25 of the 2005 Act about the validity and applicability of ADs. Legal help should only be provided, however, where there is sufficient benefit to the client in terms of their financial circumstances or potential decisions concerning medical treatment or other welfare matters (MR 32).

## 10. Family

### Family Dispute and Family Relationships

- 10.1 Under Part 1 of Schedule 1 to the Act there is a “family relationship” between two people if they are associated with each other. In this context “associated” has the same meaning as in Part 4 of the Family Law Act 1996. Ancillary relief and other divorce proceedings, statutory or common law proceedings concerning the welfare of children, or disputes between unmarried couples under s.14 of the Trusts of Land and Appointment of Trustees Act 1996 all arise out of family relationships. Injunction proceedings against former partners and partners of former partners are also family proceedings provided they arise out of the family relationship rather than, for example, a business dispute.
- 10.2 However, family relationship cannot be considered in isolation. The dispute must arise out of the family relationship. There are many proceedings in which the parties to the case are family members, but the proceedings are not family proceedings. For example, proceedings arising out of a car accident caused by a driver which injures other members of his or her family who are passengers in the car will not count as family proceedings. Nor would a claim for possession by a landlord of premises let on a commercial basis to a family member or an application under s.14 Trusts of Land and Appointment of Trustees Act 1996 between family members in relation to a commercial agreement be classified as family proceedings. In these examples, the proceedings would arise irrespective of the family relationships involved.
- 10.3 “Family Dispute” is also defined in Regulation 2 of the Merits Criteria. The main purpose of the definition is to identify those cases which fall to be determined under the specific merits criteria for family cases in Chapter 6 of the Merits Regulations. There are different criteria which will be applied depending on the type of case for which the application for legal aid is being made. For example, public law children cases will have different criteria to applications for private law children or finance matters.

### Family Mediation

- 10.4 Family Mediation authorises mediation of a family dispute and an assessment of whether a case is suitable for mediation. Family Mediation is provided by contracted mediators under the a Standard Civil Contract. A family mediator’s fees are not recoverable as a disbursement but are remunerated directly under the mediator’s contract.
- 10.5 All Family Mediation requires an assessment of whether mediation is suitable in all the circumstances of the case. This assessment will be carried out by the mediator, and may only be provided if the criteria in regulation 37 of the Merits Regulations are satisfied.

- 10.6 If the mediator determines that in all the circumstances of the case, the case is suitable for mediation the client may have access to Family Mediation. Where mediation is suitable for some issues but not others, e.g. for children issues but not financial ones, then it is appropriate for some elements of the case to continue to be mediated whilst other aspects of the case are dealt with through negotiations or, if it is unavoidable, in court proceedings.

### **Reporting considerations**

- 10.7 Family disputes often concern a number of different issues. It is not necessary to report every exchange in ongoing negotiations under Regulation 40 of the Procedure Regulations but once an offer to settle has been made on all the issues between the parties (sufficient to constitute a settlement package to resolve the case) then this should, if declined, be reported with sufficient information to enable the Director to review the case.

### **Multiple Proceedings**

- 10.8 It is possible for more than one set of family proceedings to be covered on one certificate, for example, where ancillary relief proceedings under the Matrimonial Causes Act 1973 and/or Children Act 1989 proceedings follow injunction proceedings under the Family Law Act 1996. Where more than one set of private law family proceedings arise out of the same family relationship these proceedings will be contained on the same, single certificate (Procedures Regulation 37(3)(b)). A single certificate can also cover an application under the 1996 Act and also proceedings under the Children Act 1989 including Sch.1.
- 10.9 However, it is appropriate for a separate application for legal aid to be made for private law proceedings and for funding in respect of any Special Children Act 1989 cases involving the same children. The same rule would apply to other applications for which no financial eligibility test is applied e.g. The Hague Convention child abduction cases. An existing certificate for a special Children Act 1989 case will not be amended to cover an appeal against a final order. A new application should be made, rather than an application to amend the existing non-means, non-merits tested certificate.

### **Applications by children**

- 10.10 A certificate will also not be amended or a fresh certificate granted in circumstances where a child wishes to instruct a new solicitor direct unless the court has already considered this in accordance with Rule 16.6 of the Family Procedure Rules 2010 as amended (Procedure Regulation 30(2)).
- 10.11 Where a legally aided client wishes to apply to the court for a child to be joined in the proceedings no specific amendment to the certificate will be required to cover the application. An amendment is also not needed if

another party other than a child is added to the proceedings, although the usual reporting obligations apply under Procedure Regulation 40.

- 10.12 If an application for legal aid is made by a child to be represented in proceedings and the court must first consider whether leave should be granted, the application for legal aid must justify the reasons for the child being joined and deal with the likelihood of leave being granted. Consideration must also be given generally to the role and possible involvement of CAFCASS or, in the appropriate cases, the Official Solicitor.
- 10.13 Providing guardian services is a core function of CAFCASS. It should not be necessary for the solicitor to be appointed and act as guardian except in purely specialist cases. Given this, solicitors considering accepting appointment as guardian should ascertain the availability of legal aid prior to acceptance of appointment. In any event any certificate issued will not cover work or expenses incurred as guardian (rather than as solicitor).

### **Implementation and enforcement of orders made in family proceedings**

- 10.14 The cost of conveyancing work necessary to give effect to the terms of a court order can be covered by the determination (LASPO, Schedule 1, Part 1, paragraph 12 (4)). However, the scope of the certificate, including the limitation applied in the particular case, must allow for such conveyancing and implementation work.
- 10.15 If work is required to enforce an order an application must be made to amend the determination specifying the type of enforcement proceedings which are proposed although an amendment is not required when asking for a penal notice to be endorsed on the order. The appropriate merits criteria will be applied and any order, settlement made and assets which are no longer in dispute will be relevant in relation to this amendment application. A determination that the individual qualifies for legal aid in proceedings for committal will include representation on the respondent's production before the court following the exercise of a power of arrest.

### **Specific Merits Criteria**

Set out below are some of the main considerations for applications for legal aid in different types of family cases.

### **Public law proceedings Special Children Act 1989 cases**

- 10.16 These cases are defined in Regulation 2 of the Merits Regulations and the criteria set out in Regulation 65 will apply. Children, parents and those with parental responsibility in certain proceedings will be granted funding without reference to means or prospects of success. However, Merits Regulations 39(e) (the need for representation) applies. This is particularly relevant to ensure that parties are not unnecessarily separately represented. It would usually be expected that children who

are the subject of the proceedings would each be represented by the same solicitor. In addition, in section 25 (secure accommodation order proceedings) if the application for civil legal services is by a child and the child is already represented in criminal proceedings to which the s.25 application relates, then criminal legal aid will cover those s.25 proceedings making the grant of civil legal services unnecessary (Merits Regulations 39(e) as applied by regulation 65).

### **Withdrawal of legal aid**

10.17 In special Children Act 1989 cases withdrawal of legal aid will not usually be appropriate on the basis of Regulation 42(j) of the Procedure Regulations (where the client is requiring proceedings to be continued unreasonably) because of the nature of such cases and of the safeguards contained in the Children Act itself against repeated applications to the court.

10.18 However, legal aid may be withdrawn, following the procedure in Procedure Regulation 42(3) where the solicitor is without instructions. Even in special Children Act 1989 cases, there may be proceedings where there is no need for legal aid to continue, for example where the client has failed to engage over a period of time or has disappeared (MR 39(e)). The solicitor should therefore report where the client is not engaging as the case cannot be conducted on behalf of the client in the absence of clear, continuing instructions (PR 40(3)(b)).

### **Related Proceedings**

10.19 In accordance with paragraph 1(2) of Part 1 to Schedule 1 of LASPO, civil legal services may be provided in cases which are being heard as an alternative to, or together with, proceedings in paragraph 1(1). Where these services are being provided with special Children Act 1989 cases these civil legal services will also be non-means tested and an application for an amendment should be made to the special Children Act 1989 certificate where civil legal services are required in these proceedings.

10.20 Proceedings will be “heard together” where they are dealt with together or immediately after the outcome of the principal proceedings as part of the same hearing, including any adjournment (paragraph 1(2)(b) of Part 1 of Schedule 1). An order will be “sought as an alternative” when it is intended to make an order under ss.31, 43, 44 or 45 unnecessary – this will extend to, for example, an application for a s.8 order in care or supervision proceedings but will not extend to, for example, a domestic violence injunction order or a financial order between parties.

### **Public Law Children Cases (Merits Regulation 66)**

10.21 As defined in regulation 2 of the Merits Regulations, these are public law cases other than Special Children Act 1989 cases. These include applications for legal aid in placement, adoption and proceedings under the inherent jurisdiction in relation to children. It also includes appeals

from final orders made in special Children Act 1989 cases and care and supervision cases where the case is not a special Children Act 1989 case. Also included are applications for child arrangement orders which would, if successful, have the effect of discharging care order.

- 10.22 Applications for legal representation by parents to be represented in proceedings for secure accommodation orders under section 25 of the Children Act 1989 may be refused on the basis that it is not reasonable for full representation to be provided as representations will be made by both the local authority and on behalf of the child.
- 10.23 In the case of discharging a care order there are cases where the purpose of the application is to refer the case back to the court for further consideration, in particular because an important element or elements of the care plan, have not been followed through. In those cases, the Independent Reporting Officer (IRO) can, as a last resort, refer the matter to CAFCASS Legal or CAFCASS Cymru who can take proceedings against the local authority on behalf of the child. Adults with sufficient interest (or children capable of giving instructions direct) would need to show that the case has been considered by the IRO and the issues have not been resolved before the criteria for legal representation in Regulation 66(3) and (4) of the Merits Regulations will be met.
- 10.24 In adoption cases, the natural parent may be opposing a placement order or, where there has been no placement order, adoption proceedings. As far as the birth parents are concerned once the placement order has been determined it is unlikely that they will have any further involvement, save possibly in relation to continuing contact. The nature of adoption proceedings and the desirability of a birth parent being represented may therefore be sufficient to satisfy the merits criteria and justify the provision of representation to a parent, particularly having regard to the Human Rights Act 1998 (MR 66(3) and (4)).
- 10.25 In relation to an application with regard to proceedings under the inherent jurisdiction, consideration should be given as to whether this is the most appropriate jurisdiction. Proceedings for example under the 1989 Act, the Family Law Act 1986 or the Child Abduction and Custody Act 1985 may well provide an appropriate remedy rather than an application under the inherent jurisdiction. The use of inherent jurisdiction for “seek and find” orders may, for example, be unreasonable in the light of the range of orders available under the Children Act 1989 and the Family Law Act 1986 (Merits Regulation 66(2)).
- 10.26 Even where an order is likely to be obtained the criteria may not be met for legal representation if any such order is likely to be ineffective, for example, if the child is abroad and any order obtained cannot be enforced effectively for example, if there is no reciprocal judicial protocol (Merits Regulation 66(2)).



## Private law Domestic Violence and Forced Marriage (MR 2)

### ***Merits Criteria***

- 10.27 The criteria set out in Merits Regulations 64 and 67 will be applied. The likelihood of obtaining an order is likely to be poor if, for example:
- (a) the incidents complained of are of a trivial nature. However, where there has been a history of incidents, the cumulative effect of those incidents may be taken into account; or
  - (b) the conduct complained of is not likely to be repeated. If the conduct complained of took place more than three weeks prior to the application it will be necessary to set out in the application for legal aid why it is considered that repetition is likely, for example, if there has been a history of violent conduct.
- 10.28 The application should also show that consideration has been given as to whether assistance might be given under legal help and whether a warning letter should be sent, or if instead this is inappropriate because it might endanger the client. A warning letter may often be inappropriate for example if the applicant and respondent are still living under the same roof, if the threat to the applicant is serious and imminent or if receipt of a warning letter by the respondent may trigger further violence to the applicant or any relevant child before a protective order can be obtained.
- 10.29 Where the incidents complained of constitute an assault or other crime against the applicant the police should normally be notified and given an opportunity to deal with the respondent. However, there may be good reason not to pursue criminal proceedings, for example where this might jeopardise the long term financial or other interests of the family. If so, or if there is reason to believe that the police will not be able to assist or cannot provide adequate assistance then a grant of legal representation may be appropriate.
- 10.30 If the proposed respondent is subject to a criminal investigation or proceedings in relation to the facts which give rise to the application for legal aid, and has been remanded in custody or is subject to bail conditions, it will not generally be appropriate to commence separate civil proceedings for an injunction. However, the extent of protection afforded to the applicant by the criminal proceedings must be considered in each case. If a prosecution and the protection of bail conditions are likely to finish shortly but the incidents complained of are continuing or are likely to continue then a grant of legal representation may be justified. Where bail conditions or a remand in custody or a restraining order are likely to remain in force for some time it may not be necessary to grant Legal Representation for a civil injunction.

## **Respondents**

- 10.31 The prospects of success criteria (Merits Regulation 67(2)) and the proportionality test (Merits Regulation 67(3)) are unlikely to be satisfied by a respondent to non-molestation proceedings or a forced marriage protection order only, unless there are very serious allegations which are plausibly denied wholly or substantially. An exception is where there is any question of inability to defend, for example because of mental incapacity or age, in which case a grant is likely to be justified. When considering the proportionality test, the impact on the client of the order sought will be taken into account, including any impact on contact or other related family proceedings.
- 10.32 In cases where the allegations are less serious or are admitted to a significant extent the main issue may well be whether the respondent should give an undertaking to the court and what form that undertaking should take. Legal help will usually be more appropriate in such cases (Regulation 20 of the Merits Regulations).

## ***Occupation Orders***

- 10.33 Legal representation is most likely to be appropriate where the applicant is in a refuge or other temporary accommodation having recently been excluded from a property, or where there is otherwise a significant likelihood of risk in remaining in or returning to the property without the protection of an order. Legal representation may not be appropriate if the respondent has already left voluntarily and does not appear likely to return (MR 67(2) and (3)).
- 10.34 If there has been a without notice order made, the respondent has had no opportunity to contest the issues and it would be unreasonable for the occupation order to continue this will be relevant in any application. Legal representation is less likely to be justified if the respondent is no longer in occupation of the property and has no good reason to return, unless there are other relevant issues in the proceedings (e.g. the order will have a significant impact on s.8 proceedings) (Merits Regulation 67(2)).

## ***Enforcement Proceedings***

- 10.35 Breach of a non-molestation order is a criminal offence and consideration should be given as to whether any breach should be reported to the police so that it can be dealt with through criminal rather than civil proceedings. Breach of a non-molestation order is a criminal offence and in accordance with section 42A(3) of the Family Law Act 1996, where a person is convicted of an offence then the same conduct is not punishable as a contempt of court.

10.36 When considering legal representation to defend committal proceedings, bearing in mind the likelihood of loss of liberty would usually be sufficient to meet the proportionality test (MR 8 as applied by regulation 67(3)).

### **Private law children cases (matters considered under MR 68)**

#### ***Cost benefit (Merits Regulation 68(2)(b))***

10.37 In cases regarding the welfare of children where the claim is not quantifiable in monetary terms cost benefit must be in terms of a significant improvement in the arrangements for that child or children viewed objectively. This will not, however, justify the grant of representation to apply for a child arrangements order in respect of where the child will live which would have the effect of varying the residence of the child where the client is unlikely to obtain such an order and the likely significant improvement would be in arrangements in relation to spending time with the child. In those circumstances, an application to be represented on an application for child arrangements order in respect of who the child will spend time with would be more appropriate. Issues of detail (e.g. frequency and extent of contact including whether the child should stay overnight with the parent) rather than principle (e.g. no direct contact) are unlikely to justify a grant, in particular as a reasonable private paying client would be unlikely to continue contested proceedings but would rather seek to compromise the issue(s). The fact that the parties cannot agree at the outset does not of itself justify the grant or continuation of public funding.

#### ***Scope of certificate – forum and generally***

10.38 A certificate will only cover representation on those s.8 orders which are specified on the certificate or which are made by the court of its own motion. Only one substantive child arrangements order (either as to where the child will live or who the child will spend time with) or other s.8 orders as specified is within the scope of the determination that the client qualifies for legal aid under the merits criteria. A specific determination is needed for any further application to the court. The first determination includes any review or further consideration of the matter by the court which, in the particular circumstances of the case, constitutes a restoration of the matter on the court's own motion – but not any fresh application made to the court in that context (Procedure Regulations 37(2)(e)).

10.39 An application for a further determination is also required if representation is required as applicant or respondent for the making, revocation, amendment or breach of an enforcement order under s.11J and Sch.A1 of the Children Act 1989 or an application for compensation for financial loss under s.11O Children Act 1989 (Merits Regulations 64 and 68).

***Applications for Leave for Removal from the Jurisdiction (Regulations 64 and 68 of the Merits Regulations)***

10.40 Legal representation is unlikely to be justified for a purely temporary removal, in particular a holiday, unless, very unusually, the reasonable private paying individual test is met, e.g. to enable contact with family members abroad, and in the particular circumstances it is reasonable for the application to the court to be have legal aid despite the fact that the client must obtain other funding for the removal itself.

***Special Guardianship Orders (Regulation 64 and 68 of the Merits Regulations)***

10.41 Regard must be had to the report of the local authority prepared in accordance with s.14A of the Children Act 1989 when considering an application for legal aid (MR68(2)). When making a special guardianship order the court must consider whether a child arrangements order containing contact provisions should be made. No separate amendment is required to the legal aid certificate in relation to this as it will be part of the consideration of the Special Guardianship Order. However, if legal aid is refused to oppose an application for a special guardianship order, legal aid can nonetheless be granted to consider the issue of contact provision only, if this is justified in the circumstances of the particular case.

***Financial and Other Proceedings – (case dealt with under MR 69(4))***

10.42 Legal Representation for ancillary relief or other maintenance (paragraph 12 of Part 1 of Schedule 1 to the Act) will only be justified in relation to child maintenance where the court rather than the Child Support Agency has jurisdiction, or in other circumstances where this is specifically stated (MR 39(d)). In any event, cover only extends to securing one substantive order.

***Divorce, judicial separation, nullity and dissolution of civil partnership (Merits Regulations 64 and 69(4)(a) to (d))***

10.43 Uncontested proceedings will usually be dealt with under legal help. For Legal representation to be granted the reasonable private paying individual test must be met (Regulation 69(2)) including whether it is reasonable for the client to continue to prosecute a suit to which an answer has been filed as a contested suit. Where there have, for example, been offers of compromise which a reasonable private paying individual would accept, having regard to the likely costs involved in proceeding with such a petition, the benefit to be obtained and the risk of litigation generally then legal representation will not be justified.

10.44 Legal representation will only be granted to defend a suit (without cross-praying) and where there is a substantial defence with sufficient prospects of success and there are substantial practical benefits to be gained by avoiding the decree. Objecting to the pronouncement of a decree in itself will not be sufficient to justify legal representation including objecting to the pronouncement on religious grounds.

The criteria for legal representation are not likely to be met where:

- (a) the matter could reasonably be compromised by way of undefended cross-decrees or on the respondent's cross-petition; or
- (b) the matter could be dealt with by way of a two year or a five year separation petition (i.e. having regard to the period of separation and, where needed, likelihood of consent); or
- (c) the contents of the petition could be amended without prejudice to its prospects of success but so as to remove the contentious issues (MR 69(2)(a)).

10.45 There must be some potential benefit to the client which outweighs the cost of cross-praying or continuing to prosecute the petition for legal representation to be granted. Unless a determination has been made that the client qualifies, and the certificate has been amended it will not cover filing an answer to a separate cross-petition by the respondent or a second petition or on the part of the respondent, filing a separate cross-petition (PR 37).

10.46 If the proceedings at any time become undefended the client may then be assisted by legal help (MR 20) Any certificate will cover the decree proceedings so long only as the cause remains defended (Regulation 42(1)(a) of Procedure Regulations).

#### ***Nullity (Merits Regulations 64 and 69)***

10.47 Even where the prospects of success criteria in Merits Regulation 69(3) are met in terms of obtaining a decree of nullity the reasonable private paying individual test must be applied and legal representation will not be granted to prosecute a suit unless divorce/dissolution is not appropriate and the time and costs involved in obtaining the necessary evidence and pursuing the proceedings to a conclusion do not make divorce/dissolution proceedings (e.g. on the grounds of 2 years separation with consent) a reasonable alternative. For example, divorce would not be a reasonable alternative in a marriage void *ab initio* (Merits Regulation 69(2)).

#### ***Periodical Payments Order (Merits Regulations 64 and 69)***

10.48 Registration of an order is a simple procedure and therefore legal representation will usually not be appropriate to cover the making of an application alone. Advice and assistance may be provided where appropriate under legal help (Regulation 20 of the Merits Regulations). Where the relevant order was itself obtained under an existing certificate, registration is treated as part of the obtaining of the order and no amendment to the certificate would therefore be required.

10.49 Legal representation will not usually be justified to defend enforcement proceedings given the likely prospects of success (MR 69(3) and in the absence of very exceptional circumstances, e.g. there is a substantial legal argument sufficient to justify the grant of representation.

***Lump Sum and Property Adjustment Orders including Section 14 Trusts of Land and Appointment of Trustees Act 1996/Declaration as to Trusts Affecting Property/Declaration as to Rights of Occupation (Merits Regulations 64 and 69) – see also the Civil Legal Services (Family Relationship) Regulations 2012***

- 10.50 Litigating over the sale of a property with no, low or negative equity is very unlikely to be justified (MR 69(2)(a), unless exceptionally, having regard to the relative financial positions of the parties and all the circumstances, there is a very real prospect of achieving the sale of a property subject to a mortgage, from which the client would be released as a consequence of an order for sale, or in the circumstances of the particular case the client has a real prospect of preserving a home especially if there are children involved (Merits Regulation 69(2)).
- 10.51 Legal representation will therefore not be appropriate in ancillary relief proceedings for an order relating to debts unless responsibility for them may be significantly adjusted by a court order (i.e. where there are other financial resources which can be used for their payment). The likely level of any lump sum order made for the payment of debts must justify the costs of proceedings generally having regard to the operation of the statutory charge and the respondent must have the means to meet the order within a reasonable time (MR 69(2)(a)).
- 10.52 Married couples seeking an application under the Trusts of Land and Appointment of Trustees Act will not be granted legal aid for family help (higher) or legal representation to make an application to court unless no divorce or judicial separation is intended and one of the parties wants a jointly owned property to be sold or seeks a declaration as to rights of occupation (MR 69(2)(a)).

***Inheritance (Provision for Family and Dependents) Act 1975 (Regulation 64 and 69 of the Merits Regulations)***

- 10.53 In most cases it will be appropriate for the costs of defending the case to be met out of the assets of the estate. Where the costs of proceedings can be met from the estate Legal Representation to apply for an order may be limited to seek a Beddoes order confirming this may be justified where no agreement on this issue can be reached. Legal representation may be granted having regard to the prospects of success, issues, value of the claim, likely costs and attempts to compromise the case and subject to an appropriate contribution from the estate or the beneficiaries or both (MR39(a)) .

***Parentage declarations (paragraph 12 of Part 1, Schedule 1 of the Act)***

- 10.54 The applicant must have sufficient interest to take the proceedings and the evidence available (including any blood or DNA tests) and the personal benefit must justify any grant of representation. Establishing parentage alone may justify a grant but usually the applicant will also wish to obtain a child arrangements order or financial provision.
- 10.55 Legal representation will be refused if the purpose of the proceedings is to establish parentage for the purposes of the Child Support Agency or Child Maintenance Commission and where the benefit to the mother or alleged father does not meet the reasonable private paying individual test (Regulation 7) taking into account whether the client or other party is in receipt of state benefits. The personal benefit to be obtained must be sufficient to justify the grant. A request by the Agency/Commission for her to take proceedings will be insufficient.

***Child Abduction and Custody Act 1985 (Paragraph 17(1)(b) of Part 1 of Schedule 1 to the Act)***

- 10.56 Non-means, non-merits tested legal representation is available to an applicant who has applied under the Hague Convention 1980 to the central authority (the International Child Abduction and Contact Unit – part of the Official Solicitor’s Office) pursuant to s.3(2) or s.14(2) of the Child Abduction and Custody Act 1985 i.e. an application made under the Convention by a person outside England and Wales for the return of or contact with an abducted child who has been brought to England and Wales. Any application for legal representation (which should be to the Agency’s London Regional Office) should include the letter of instruction from the International Child Abduction and Contact Unit to the applicant’s solicitor. An emergency application is not appropriate in these circumstances.
- 10.57 Otherwise the criteria set out in Merits Regulations 64 and 68 will apply. This means that:
- (a) there must be a need for representation in all the circumstances of the case including the nature and complexity of the issues, the existence of other proceedings and the interests of other parties to the proceedings (given that there will be a breach of rights of custody in favour of the other party) Merits Regulation 39(e); and
  - (b) the grant of legal representation to take proceedings, e.g. for a declaration to produce to a foreign court, will depend on the ultimate prospects of successful enforcement, having regard to all the circumstances of the case including the foreign country involved (Merits Regulation 68(2)).
- 10.58 Respondents to applications under the Child Abduction and Custody Act 1985 have to satisfy the prospects of success criteria in accordance with Merits Regulation 68(2). However, “success” does not necessarily mean ensuring that an order for the return of the child is not made (Merits

Regulation 4(4)). A successful outcome may involve an order for the return of the child but one made with safeguards dealing with, for example, housing and maintenance for the respondent while the welfare of the child is determined in the country of origin.

10.59 It would be unusual for a respondent who was not the caring parent (the parent with whom the child was living in the country of origin) to meet the criteria for funding unless there was a strong defence under art.13 of the Child Abduction and Custody Act 1985 Act to prevent the return of the child.

10.60 The preparation of an application made to the Child Abduction Unit for transmission to another jurisdiction can be supported by way of Legal Help but legal aid is not available for proceedings outside the jurisdiction of England and Wales.

### **Unlawful removal of a child – (paragraph 10, Part 1 Schedule 1 to the Act)**

10.62 Under paragraph 10 of Part 1 to Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the “Act”) civil legal services provided in relation to certain applications are in scope where this relates to the “unlawful removal” of a child.

#### *Paragraph 10(1) – Removals from the UK*

10.63 There are two parts to Paragraph 10. Paragraph 10(1) deals with applications relating to international child abduction i.e. removal or potential removals from the UK. It states that legal aid may be provided for the following:

*“Civil legal services provided to an individual in relation to the following orders and requirements where the individual is seeking to prevent the unlawful removal of a related child from the United Kingdom or to secure the return of a related child who has been unlawfully removed from the United Kingdom –*

- a) A prohibited steps order or specific issue order (as defined in section 8(1) of the Children Act 1989);*
- b) An order under section 33 of the Family Law Act 1986 for disclosure of the child’s whereabouts;*
- c) An order under section 34 of that Act for the child’s return;*
- d) A requirement under section 37 of that Act to surrender a passport issued to, or containing particulars of, the child.”*

10.64 There are a number of elements to this test:

- a) The client must be seeking to prevent the unlawful removal of a child from the UK or be seeking to secure the return of a child who has been unlawfully removed from the UK. Applications in relation to ongoing arrangements as to where the child will live or who they will spend time with are not therefore within the scope of this paragraph, nor would the respondent to an application under paragraph 10 be within scope for legal aid.



- b) The child must be a “related” child i.e. the client must be the parent or person with parental responsibility for the child (paragraph 10(4)).
- c) There are only certain proceedings which are in scope under this paragraph and for which civil legal services may be provided. It does not apply generally to all Children Act applications (e.g. applications for a child arrangements order).

10.65 Where a child has been unlawfully removed from the UK then in many instances an application to the Central Authority of the other country under The Hague Convention may be required to secure the return of that child. Under section 32 of LASPO civil legal services may not be provided which relate to any law other than the law of England and Wales except in certain prescribed circumstances. If it is therefore necessary to take proceedings in the jurisdiction to which the child has been taken in order to secure the return in accordance with the provisions of The Hague Convention then these proceedings cannot be funded under legal aid in England and Wales.

10.66 There is no definition in the Act as to what constitutes unlawful removal. The Child Abduction Act 1984 creates an offence of abduction and a concept of whether lawful consent was obtained for the removal. Under section 1 an offence is committed if the child is removed out of the UK by a person connected with the child without the consent of anyone with parental responsibility, any person named in a child arrangements order as a person with whom the child is to live or custody unless the court has made an order allowing removal. An offence would not be committed if the person removing the child has the benefit of a child arrangements order that the child should live with them and the removal is for less than one month (for a special guardian the limit is three months). However, it would be a defence if consent has been unreasonably refused or the person removing the child has been unable to communicate with the other person despite having taken all reasonable steps to do so. Considering some of these issues may be helpful when looking at whether there may be unlawful removal but the concept of unlawful removal in paragraph 10(1) is freestanding and there is no requirement for an offence to be committed for a removal to amount to an unlawful removal for the purposes of paragraph 10(1).

*Paragraph 10(2) – unlawful removal within the UK*

10.67 The second part of the paragraph 10(2) relates to the unlawful removal of a child within the UK. Legal aid is available in these circumstances where:

*“Civil legal services provided to an individual in relation to the following orders and applications where the individual is seeking to secure the return of a related child who has been unlawfully removed to a place in the United Kingdom –*

- a) *A prohibited steps order or specific issue order (as defined in section 8(1) of the Children Act 1989);*

- b) *An application under section 27 of the Family Law Act 1986 for registration of an order relating to a child;*
- c) *An order under section 33 of that Act for disclosure of the child's whereabouts;*
- d) *An order under section 34 of that Act for the child's return.*

10.68 Again there are a number of elements to this:

- (a) The client must be seeking to secure the return of a child who has been unlawfully removed to a place in the UK. Applications to secure a child arrangements order in respect of where the child should live with or longer term arrangements as to who the child will spend time with do not therefore fall within this paragraph, nor would the respondent to any application be within scope for legal aid;
- (b) Paragraph 10(2) does not cover applications to prevent the removal of a child. It deals solely with applications to secure the return of a child who has been unlawfully removed;
- (c) The child must be a "related" child i.e. the client must be the parent or person with parental responsibility for the child (paragraph 10(4));
- (d) There are only certain proceedings which are in scope under this paragraph and for which civil legal services may be provided. These are similar (but not identical) to the applications in paragraph 10(1). It does not apply generally to all Children Act applications.
- (e) There is no definition in the Act as to what constitutes "unlawful removal". Whether a removal (or retention) is unlawful for these purposes will be dependent upon the specific facts and circumstances of an individual case. However, the following should be borne in mind:
  - (i) In general, as a starting point, the exercise of one parent of their parental responsibility will not constitute unlawful removal, nor in general will the removal of a child within the UK by a parent be "unlawful". However, the full facts of the case should be considered as discussed below.
  - (ii) Whether the removal or retention is unlawful may depend on whether there is an existing court order. Section 2(8) of the Children Act 1989 states that the fact that a person has parental responsibility for a child does not entitle him to act in any way which would be incompatible with any order made with respect to the child under the Act. If there is therefore a child arrangements order in respect of where the child will live or a prohibited steps order in force then any removal of, or failure to return, a child that breaches this will be unlawful for the purposes of this paragraph.

- (iii) Whether the action breaches an existing child arrangements order will depend on the terms of the order. However, an order requiring the person with whom a child lives to allow the child to spend time with or stay with the person named in the order will not necessarily be breached if the child is not returned at the agreed time. For example, if there is a child arrangements order which says that the parent with whom the child usually lives will make the children available to spend time with the other parent from 5pm on Friday to 5pm on Sunday and that parent does not return the children on Sunday night, this would not be unlawful removal for these purposes. However, if the order was injunctive in its terms i.e. it said that the parent must return the children at a specified time (and s/he did not), then any removal may be unlawful.
- (iv) Whether the client has parental responsibility for the child may also be relevant in determining whether the removal has been unlawful, particularly where no court order is in place. If the person who has removed the child does not have parental responsibility or does not usually care for the child then any removal without the consent of the person with parental responsibility may be unlawful. However, again this may depend on the circumstances. If the child, for example, usually resides with a parent who does not have parental responsibility then that parent would not be unlawfully removing the child if the child continued to reside with them even if the other parent had parental responsibility.

## **11. Significant breach of Convention rights (paragraph 22 of Part 1 of Schedule 1 to the Act)**

- 11.1 Paragraph 22 of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 allows for legal aid to be provided in relation to claims in tort and other claims for damages in respect of an act or omission by a public authority which involved “a significant breach of Convention rights”. This is intended to focus legal aid on the most serious cases.
- 11.2 The phrase “significant breach of Convention rights” is not defined in the Act and the intention is for “significant” to bear its natural meaning. Factors which might be relevant in considering whether there is a significant breach of a Convention right by a public authority include the severity of the violation and:
  - (i) whether the breach was deliberate; and
  - (ii) whether the individual has suffered a significant disadvantage taking account of both the applicant’s subjective perceptions and what is objectively at stake in a particular case.

- 11.3 The previous Funding Code guidance on the meaning and effect of “Significant Human Rights Issues” is no longer in force and it should not be followed when determining whether a breach of Convention rights is significant under paragraph 22 of Part 1 of Schedule 1 to the LASPO Act.

## **12. Risk to health or safety in rented home - paragraph 35 of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012**

### **Introduction**

- 12.1 The Director must have regard to this guidance in determining whether civil legal services under paragraph 35 of Part 1 of Schedule 1 to the Act are to be made available to an individual.
- 12.2 Paragraph 35 of the Act brings within the scope of legal aid “civil legal services provided to an individual in relation to the removal or reduction of a serious risk of harm to the health or safety of the individual or relevant member of the individual’s family where –
- a) the risk arises from the deficiency in the individual’s home,
  - b) the individual’s home is rented or leased from another person, and
  - c) the services are provided with a view to securing that the other person makes arrangements to remove or reduce the risk.
- 12.3 “Deficiency” is defined in paragraph 35(4) of the Act as “any deficiency, whether arising as a result of the construction of a building, an absence of maintenance or repair, or otherwise”. This definition, as well as covering deficiencies in the home arising from lack of maintenance and lack of repair will also for example include poor design of a home that leads to a risk to health, such as condensation dampness.
- 12.4 For those applying for civil legal services under paragraph 35 of the Act (referred to as “disrepair cases” below), merits and financial eligibility criteria will apply as set out in Regulations made under the Act. In addition to the general merits criteria under the Regulations, the Civil Legal Aid (Merits) Regulations 2012 include specific merits criteria in respect of applications for legal representation in disrepair cases.
- 12.5 This document provides guidance to Director of Legal Aid Casework on relevant factors which may be taken into account in determining whether “a serious risk of harm to the health or safety of the individual or relevant member of the individual’s family” (“serious risk requirement”) exists in a disrepair case. The serious risk requirement in paragraph 35 of the Act is intended to focus resources on cases of the highest importance and to avoid directing limited public funds towards cases which are, relatively speaking, trivial.

## **The process**

- 12.6 Civil legal services will be granted where there is a credible allegation that the disrepair poses a serious risk to the health or safety of the client or a relevant member of their family. All applications for civil legal services in disrepair cases should include adequate information on the case which explains the nature of the alleged disrepair and the risk to the client's health.
- 12.7 This means that civil legal services will be available for the early stages of the case to fund expert reports so that the merits of the claim can be investigated. This will be in the form of legal help. In keeping with the Housing Disrepair Pre-Action Protocol, a joint expert should be instructed by the landlord and the tenant in circumstances where the protocol applies. Where there is an urgent need to seek an injunction due to the disrepair the Housing Pre-Action Protocol may not be appropriate.
- 12.8 At this point, any funding will be granted in the form of legal help to investigate the merits of the case. Where the Director of Legal Aid Casework concludes, as a result of information obtained in that investigation, that the serious risk requirement is not met (for example, after an expert report has been received) funding will cease at that stage.

## **Factors which may be taken into account by the Director of Legal Aid Casework**

- 12.9 In some cases, for example, those involving a deficiency such as a leaky gas boiler or dangerous electrical wiring the seriousness of the risk to the health of the client may appear a relatively clear-cut issue. In other cases, the seriousness of the risk of harm that the deficiency poses to health or safety will vary depending on the individual circumstances of the case. For example, the risk of harm to the health of a tenant who has a respiratory illness from damp may be greater than the risk to a tenant who does not.
- 12.10 In order to determine whether the serious risk requirement is met, the Director will need to take into account all relevant factors. By way of guidance, these factors may include the following:
- a) Whether the deficiency has already resulted in harm to the applicant or a relevant of their family;
  - b) Whether, as a result of the deficiency, an existing health condition is exacerbated (for example, where an applicant who has asthma is living in a damp home, or where an applicant who has rheumatism is living in a home with no heating);
  - c) Whether the applicant or relevant family members affected by the deficiency are in a high-risk age group, such as the elderly and very young children, and therefore more susceptible to any deficiency;

- d) Whether the applicant is vulnerable due to a disability. For example, a leaking roof which causes flooring to be damp may be viewed as significantly more serious if the applicant has particular mobility problems, or where important medical equipment was placed in jeopardy as a result of the deficiency;
- e) Whether there are relevant environmental conditions. For example, broken heating may be a much more serious deficiency during the winter.
- f) Whether there are multiple deficiencies which could, taken cumulatively, be of greater seriousness than individually. For example, damp conditions combined with a broken window could exacerbate the health risks associated with excess cold;
- g) Whether a single deficiency poses multiple risks. For example, a roof in a state of disrepair could lead to hazards of excess cold, structural collapse, damp and mould, etc.;
- h) Whether a deficiency affects rooms or areas that are shared. This may be a relevant factor if, for example, risks of infection could be increased in shared areas where disrepair is not dealt with;
- i) Whether the expert instructed under the Housing Pre-Action Protocol reports that the deficiency is likely to deteriorate further in the near future;
- j) Whether the Local Authority has already identified hazards which arise from deficiencies in the home. For example, under the Housing Health and Safety Rating System.

12.11 This is not an exhaustive list and the Director of Legal Aid Casework, when considering applications, will be able to take into account any other matters which, on the particular facts of the case, are relevant to the question of whether the deficiency poses a serious risk of harm to health or safety.