



Legal Aid – What’s in scope?

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Vicky was a founder member of the Civil Justice Council and served two terms. She was also a member of the Low Commission on legal advice and support.

Vicky writes extensively on legal aid, for Resolution and Legal Action Group amongst others. Her latest book (with Simon Pugh and Anthony Edwards) is ‘The LAG Legal Aid Handbook 2017-18’. The new edition, covering the new civil contract, will be published this summer.

Programme

12.45 - Welcome and introductions

An over-view of the legal aid scheme

Scope

Housing, Consumer/contract, Employment and Family law

Exceptional case funding

Means and merits

Making referrals

13.45 – Evaluation and close

Overview of the legal aid scheme

Legal Aid was first created as part of the development of the welfare state, following World War 2. It was administered by the Law Society until the Legal Aid Board was created in the late 1980s. From 2000 to April 2013, legal aid was administered by the Legal Services Commission (LSC). It was replaced by the Legal Aid Agency (LAA), an executive agency of the Ministry of Justice on 1 April 2013.

This date marked the greatest change to legal aid in a generation, when the Legal Aid Sentencing and Punishment of Offenders Act 2012 (generally referred to as LASPO) came into force. The initial proposals aimed to reduce legal aid spending by £350 million a year. The government stated that its aim was also to deter litigation, encourage mediation, and reduce demand on the justice system.

The proposals aimed to achieve the following cuts:

- All welfare benefit issues (£25m)
- Debt issues (£20m)
- Consumer issues (£5m)
- Employment (non-discrimination) issues (£4m)
- Housing issues (not involving immediate loss of home) (£7m)
- Immigration issues not involving asylum or detention (£20m)
- Education issues (£1m)
- Clinical negligence (£17m)
- Family law not involving domestic violence/child protection (£188m)

According to the National Audit Office¹, the LAA actually exceeded its cuts targets by £32m.

¹ *Implementing reforms to civil legal aid* – NAO November 2014, p.6

Scope of legal aid

Prior to April 2013, under the Access to Justice Act 1999, legal aid was available in any matter of English/Welsh law unless specifically excluded, such as in business related cases.

However, under LASPO only that which is included in Schedule 1 of the Act is in scope. If your case doesn't fit into Schedule 1, you may be eligible for 'exceptional; case funding' under section 10 – of which more later.....

Schedule 1 is not easy to understand as it requires a certain amount of cross-referencing and navigation of double negatives in order to understand whether a case is in fact in or out of scope. No wonder there is widespread misunderstanding, even amongst trained lawyers!

Most regrettably, many people whose cases are still within scope are being told that they are not, and are being denied access to mediation, advice and representation, simply because the LASPO legal aid scheme is so complicated; but there is an online diagnostic tool which you can use: www.gov.uk/check-legal-aid

LASPO was designed to focus civil legal aid on the following areas:

- Judicial review and public law
- Homelessness, i.e. eviction/possession proceedings, statutory applications
- Discrimination (both workplace and consumer) and equality law
- Public law family, child care/protection cases
- Domestic violence/abuse and related cases
- Family mediation
- Human Rights
- Civil Liberties
- Mental health detention and related cases
- Community Care
- Asylum, and legal aid for those in immigration detention facilities

Legal aid statistics

The number of organisations providing civil legal aid services continues to decline. In 2012 there were over 2,500, today there are about 1,800. Spending on crime and civil legal aid has dropped from a high of about £2.1 billion a year to around £1.6 billion. Most of that goes on Crime.

Before the LASPO scope changes, the LSC reported that it funded 925,200 'acts of assistance', this dropped by nearly half, to 441,500 in 2013-14².

There was a two thirds decrease in Legal Help (that is advice and assistance not involving the issue of legal proceedings) across all civil categories following the implementation of LASPO.

Family legal aid

Most legal aid expenditure is in Family law – mainly in relation to child care cases initiated by local authorities where the parent's and child's case is funded by legal aid.

Civil legal aid

The top three civil areas of law are:

1. Mental health - £40m a year
2. Immigration/asylum - £40m a year
3. Housing - £30m a year. Housing cases have halved post LASPO.

Telephone gateway

Where they remain in scope, those seeking advice in debt, discrimination and education (special educational needs) cases must go through the Civil Legal Advice Telephone 'gateway'.

Advice is also available on in-scope housing and family matters; but it is not compulsory to go through the telephone service.

0345 345 4 345

This provides free and confidential advice for people who are financially eligible on the following subjects:

- debt, if the home is at risk
- housing, e.g. homelessness or at risk of being evicted
- domestic abuse
- family issues, e.g. family mediation or if a child's being taken into care
- special education needs
- discrimination

² *Legal Aid Statistics in England and Wales 2013-14* - MOJ June 2014

Scope

The first thing you need to consider is whether legal aid might be available for someone's problem.

If it is, you then need to consider whether legal aid is available to them on the basis of their means.

Green list – legal aid is available for the following

Clinical Negligence

The only type of clinical negligence cases eligible are where a child suffers a neurological injury resulting in them being severely disabled during pregnancy, child birth or the postnatal period (8 weeks).

Debt

Must be referred to the telephone service:

- Mortgage possession of the home
- Orders for sale of the home
- Involuntary bankruptcy (including dealing with a statutory demand) where the person's estate includes their home

Discrimination

Breaches of the Equality Act 2010. Must be referred to the telephone service.

Education (Special Educational Needs)

Special educational needs (matters arising under Part 4 of the Education Act 1996), and assessments relating to learning difficulties for young people under the Learning and Skills Act 2000. Must be referred to the telephone service.

Family

- Domestic abuse cases
- Public family law regarding the protection of children from abuse, eg Care and Supervision Orders, Emergency Protection orders etc.
 - Legal aid is available to children and parents/those with parental responsibility – non-means and merits tested in the above cases
- Adoption
- Child abduction

- Note that legal aid is available to recover a child who has been removed 'unlawfully' but is only available to **prevent** unlawful removal if that would be outside the jurisdiction of England and Wales
- Wardship cases
- Representation for child parties in private family cases
- Legal advice in support of mediation.
- Forced marriage protection order cases
- EU and international agreements concerning children and finances
- Mediation to resolve family law disputes.

Housing

- Possession of the home (other than mortgage possession which is classified as 'Debt')
- Eviction from the home (including unlawful eviction)
- Seeking repairs to rented accommodation where the disrepairs pose a serious risk of harm to health or safety
- Homelessness assistance for persons who are homeless or threatened with homelessness
- Injunctions under the Protection from Harassment Act 1997 in the context of housing and ASBO matters in the county court
- Provision of housing by way of community care (overlaps with Community Care)
- Accommodation and support for asylum seekers
- Advice and representation under Housing Possession Court Duty Schemes

Immigration & Asylum

- Asylum cases
- Detention, bail and residence restrictions pending deportation
- Immigration (non-Asylum) – very restricted:
 - Applications to remain under domestic violence provisions
 - Applications for leave to enter or remain in the UK by victims of human trafficking
 - Terrorism prevention and investigation measures
 - Special Immigration Appeals Commission proceedings

Welfare Benefits

- Appeals on a point of law in the Upper Tribunal (Administrative Chamber); and
- Onwards appeals on a point of law to the Court of Appeal and Supreme Court.

Other

- Mental Health – Mental Health Act 1983 and Mental Capacity Act 2005 cases. Repatriation of Prisoners Act 1984 Sch para 5(2)
- Community Care – provision of community care services and facilities for disabled persons
- Actions Against Public Authorities – abuse of children or vulnerable adults, victims of sexual offences, significant breaches of human rights
- Protection from harassment where not arising from a Family or Housing relationship
- Environmental pollution
- Gang related violence injunctions
- Damages claims by victims of trafficking
- Public Law (e.g. judicial review cases)

Amber list – legal aid may be available subject to conditions

Family

- Divorce, financial and child arrangements matters
 - Needs specified forms of evidence of domestic abuse. These cases are often called ‘private family law’ cases.
- Child arrangement matters where there is specified forms of evidence of child abuse.

A significant problem is that Legal Help is not available to assist the client to obtain the evidence or to pay the costs, e.g. GP’s report fees, of obtaining it. However, the LAA has issued some standard letters, which clients can ask the relevant agency to complete.

It is advisable that they are used wherever possible as the regulations are tightly drafted and unless the wording precisely covers all elements of the regulation, the LAA cannot accept it. The letters can be downloaded from <https://www.gov.uk/government/collections/legal-aid-cases-of-domestic-violence-and-child-abuse-letters-for-professionals>

The most common evidence of domestic abuse is:

- A letter from a refuge
- An injunction
- A letter from the GP or other health professional

Guidance on the full list of acceptable evidence of being at risk of domestic abuse/child abuse can be found at <https://www.gov.uk/legal-aid/domestic-abuse-or-violence>

Red list – legal aid is generally not available (note exceptions)

- Asylum support (except where accommodation is claimed)
- Consumer and general contract (unless there is discrimination)
- Criminal Injuries Compensation Authority cases
- Debt (except where there is an immediate risk to the home, see above)
- Employment cases (unless there is discrimination)
- Education cases (except for Special Educational Needs, see above)
- Housing, except those where the home is at immediate risk, homelessness, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the county court)
- Immigration cases (unless in detention or victims of trafficking/domestic abuse)
- Legal advice in relation to a change of name
- Contentious probate or land law,
- Wills
- Private family law (other than cases where criteria are met regarding domestic violence or child abuse);
- Tort and other general claims (unless covered above (e.g. Actions Against Public Authorities)
- Welfare benefits (except for appeals in the Upper Tribunal; onward appeals to the Court of Appeal and Supreme Court).

Exceptional case funding

If legal aid is not available under Schedule 1 of the LASPO Act, it may in some circumstances be possible to apply for funding under LASPO 2012 s.10. The test for exceptional case funding under s.10 of LASPO is:

- (a) *that it is necessary to make the services available to the individual because failure to do so would be a breach of—*
 - (i) *the individual's Convention rights (within the meaning of the Human Rights Act 1998), or*
 - (ii) *any rights of the individual to the provision of legal services that are enforceable EU rights, or*
- (b) *That it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.*

The client must still meet financial eligibility criteria and their case must meet the merits criteria to qualify for exceptional case funding.

Use of exceptional case funding

During the passage of LASPO, the government said that it expected 5,000 to 7,000 applications per year, of which around 3,700 would be granted. Frequent reference to exceptional funding was made to reassure MPs and peers concerned about the impact of the cuts. But it turned out that those figures were wildly inflated. Currently just under 2,000 applications are made a year and just under half are successful.

Public Law Project – help and support

One of the problems with exceptional case funding from a practitioner's point of view that you only get paid for making the application if it is successful.

The Public Law Project has some useful resources to assist in making applications www.publiclawproject.org.uk/exceptional-funding-project. They also run a helpline to assist with queries on exceptional case funding and civil legal aid more generally – 0808 165 0170. It is open from 10 am to 11 am every weekday except Thursday.

Exceptional case funding – example

The application was made by the mother in a private law children case. The children were living with their father, and she had not had any contact for some time. There were ongoing care proceedings in respect of her two other children with another father. There were concerns surrounding mental health and neglect.

The mother wanted some form of contact with her children but the father was not allowing any contact. During the care proceedings, Communicourt, the intermediary service for vulnerable defendants, assessed the mother as having difficulty in understanding and coping with the court process. They also said that any time spent in court would place stress upon the mother.

The solicitors applied for exceptional case funding for a Child Arrangement Order for contact under Section 8 of the Children Act 1989. ECF was granted after an appeal against the original decision. It took approximately 1-1½ hours to make the application.

Eligibility for civil legal aid – means and merits

Legal aid for the following types of case is not means tested:³

Special Children Act cases and related proceedings.

Family Help (Lower) in cases where Children Act 1989 s31 proceedings are contemplated and the client is a parent or person with parental responsibility.

Mental Health Tribunal cases.

Certificates in Mental Capacity Act 2005 s21A cases before the Court of Protection where the client is deprived of their liberty.

Terrorism Prevention and Investigation Measure applications, notices and proceedings.

Hague Convention and European Convention on Child Custody cases.

Various cases concerning international enforcement of child maintenance etc. under the United Kingdom's international treaties and obligations.

Mediation Information and Assessment meetings and mediation in Hague Convention cases.

In family cases concerning injunctions for domestic violence and forced marriage the eligibility limits – but not contributions – can be waived.

In inquests (where exceptional funding is granted) multi-party actions and cross-border disputes, eligibility limits and contributions can be waived.

Other civil cases

There are two significant barriers to taking on cases: the means test and the merits test. Every client must qualify financially before their case can be taken on (with very limited exceptions in the family and mental health categories), and the case must pass the relevant merits test.

Financial eligibility is assessed on three separate criteria, all of which the client must satisfy, by being below the threshold on capital, gross income and disposable income.

The limits on each of these are set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 which are amended periodically, usually at least once per year as benefit levels are updated. Up to date limits can be found on the LAA website: <https://www.gov.uk/civil-legal-aid-means-testing>

³Reg 5.

In the case of controlled work, you should ascertain the client's resources and calculate eligibility; the decision on whether the means test is met is delegated to the lawyer. For licensed work, however, the decision is made by the LAA.

Partners

Where the client has a partner with whom he or she is living as a couple, you should always aggregate the means of both the client and the partner. Partner means: spouse or civil partner; person with whom the client lives or ordinarily lives as a couple, but not where they are separated because of a relationship breakdown likely to be permanent.⁴

Passporting benefits

Prior to 1 April 2013, clients directly or indirectly in receipt of income support, income-based jobseeker's allowance, income-based employment and support allowance or guarantee state pension credit were automatically eligible for all types of legal aid without the need for further assessment of either capital or income.⁵

These benefits were therefore referred to as passporting benefits. A client in receipt of support under sections 4 or 95 of the Immigration and Asylum Act 1999 was similarly passported, but only for Legal Help and Controlled Legal Representation in the immigration category.⁶

For all cases started on or after 1 April 2013, passporting benefits only passport clients through the income test; you must assess capital in all cases. Universal Credit is currently a passporting benefit; but this could change in future.

Merits tests

Each case must satisfy, and continue to satisfy, the merits test. There are a number of different tests, depending on the nature of the case and the type of funding sought. Each merits test should be passed at the start of the case, and should continue to be passed throughout its life.

The merits test for Legal Help is not a very high hurdle:

'An individual may qualify for legal help only if the Director is satisfied that the following criteria are met—

(a) it is reasonable for the individual to be provided with legal help, having regard to any potential sources of funding for the individual other than under Part 1 of the Act;

and

⁴ Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 reg 2.

⁵ Community Legal Service (Financial) Regulations 2000 reg 4(2).

⁶ Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 reg 26.

(b) there is likely to be sufficient benefit to the individual, having regard to all the circumstances of the case, including the circumstances of the individual, to justify the cost of provision of legal help⁷.

Merits tests for legal aid representation certificates are more complex; but if someone seems to be eligible for legal aid, the organisation you signpost or refer to should be able to get paid for initial advice on Legal Help.

Signposting and Referral

If you identify that an individual may be eligible for legal aid, you will need to signpost or refer them to an appropriate agency or firm of solicitors which holds a contract with the LAA. You can find them at <https://www.gov.uk/check-legal-aid>

Signposting is when you provide the contact details to the person and they make contact by themselves. Referral is where you contact the organisation on their behalf.

Most people can contact another organisation for themselves, but you may wish to use criteria which indicate that more help is needed. These could include:

- characteristics of the client, such as language needs or mental health problems
- characteristics of the problem - you may be needed to explain the issues if they are complex
- to explain anything you have done

Guidelines for successful signpost/referral

- If there is a choice, ask the person if he/she has any preferences
- Ensure that the person is provided with the name and contact details of the organisation
- As far as you can, explain to the person what will happen next and what you expect the referral organisation to do
- Explain any time constraints
- Discuss any cost implications
- Ensure the person takes documentary evidence of their means with them – the last three months bank statements is best
- Also evidence of being at risk of domestic abuse/child abuse if applicable

⁷ Civil Legal Aid (Merits Criteria) Regulations 2013 - Reg 32

Legal aid quiz

Can you get legal aid for the following?

1. Advice on rent/mortgage arrears
2. Court action on disrepair
3. Domestic violence injunctions
4. Divorce
5. Preventing your ex-partner from removing your child
6. Challenging the local authority which wants to take your child into care
7. Consumer problems
8. Discrimination at work
9. Illegal deductions from wages
10. Judicial review of a welfare benefits decision