

Legal Aid: What's in scope?



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Contents

Overview of the legal aid scheme	1
Scope	3
Exceptional case funding	6
Eligibility for civil legal aid – means and merits	7
Additional resources.....	10
Scope table	11

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 Officeⁱ, the LAA actually exceeded its cuts targets by £32m.

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

* For further information on legal aid scope please see the table towards the bottom of this guidance.

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 2013-14.ⁱⁱ

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

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 and 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 gov.uk](#).

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 on gov.uk.

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. 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:ⁱⁱⁱ

- 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](#).

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.^{iv}

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.^v

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.^{vi}

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

(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 help^{vii}.*

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 on gov.uk](https://www.gov.uk/find-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
- 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

Additional resources

Below is a selection of some of the key freely available resources:

- **Government guidance** on eligibility and exceptional funding:
www.gov.uk/guidance/funding-and-costs-assessment-for-civil-and-crime-matters
- **Advicenow**
www.advicenow.org.uk/tags/legal-aid-and-advice
- **Citizens Advice**
www.citizensadvice.org.uk/law-and-courts/legal-system/finding-free-or-affordable-legal-help/

Scope table

*extract from [The Legal Aid Handbook 2018-19](#), published by Legal Action Group

The following table gives a summary of the areas of law in scope in each category.

Category	Type of work	Comments
Claims against public authorities	<ul style="list-style-type: none"> Where the defendant is a public authority with the power to detain, imprison or prosecute: <ul style="list-style-type: none"> abuse of a child or vulnerable adult abuse of position or power by a public authority where the alleged abuse was deliberate or dishonest and resulted in foreseeable harm significant breach of human rights advice to victims of sexual offences Allegations of deliberate abuse of a person in the care of a public authority or institution Exceptional funding in claims against a public authority with the power to detain, imprison or prosecute Exceptional funding on: <ul style="list-style-type: none"> applications for compensation following wrongful conviction applications for criminal injuries compensation claims for damages for professional negligence in bringing a claim in this category 	<p>In each of these causes of action, the Part 2 exclusions around personal injury and death, negligence, assault, etc are dis-applied.</p> <p>See <i>Director of Legal Aid Casework v R (Sunita Sisangia)</i> [2016] EWCA Civ 24⁷ for the proper interpretation of LASPO Sch 1 Pt 1 para 21(4) (deliberate or dishonest abuse of position or power by a public authority) – something more than an intentional tort is necessary to amount to ‘deliberate or dishonest’ but whether that threshold is reached in the individual case will be fact specific</p>
Clinical negligence	<ul style="list-style-type: none"> Neurological injury to infants causing severe disablement and which happened in the womb, during birth or up to eight weeks after birth Exceptional funding on any matter claiming damages or making a complaint to a professional body alleging breach of duty in the course of clinical or medical services, or claiming damages for professional negligence in the making of such a claim 	

Community care	<ul style="list-style-type: none"> • The provision of community care services and of facilities for disabled persons 	LASPO Sch 1 Pt 1 paras 6 and 7 contain an exhaustive list of statutes and statutory provisions that are in scope; if it is not on the list, it is not in. Para 6(n) was added to include Part 1 of the Care Act 2014
Debt	<ul style="list-style-type: none"> • Mortgage arrears and possession • Orders for sale of the home • Involuntary bankruptcy where the home is included in the estate • Exceptional funding on any matter relating to proceedings for the payment of monies due or enforcement of orders made in such proceedings • Exceptional funding for matters arising out of personal insolvency 	Debt is a mandatory gateway category.
Discrimination	<ul style="list-style-type: none"> • Contravention of the Equality Act 2010 or a previous discrimination statute (a prescribed list is given at LASPO Sch 1 Pt 1 para 43(3), including (but not limited to) cases alleging discrimination before the employment tribunal 	This category is not limited to employment cases and includes any matter where discrimination can be pleaded. If it overlaps with another category – for example, alleging discrimination in the provision of community care, housing or education services – work can be done in each category; though discrimination is a mandatory gateway category work done in another category in the alternative does not need to go through the gateway.
Education	<ul style="list-style-type: none"> • Special educational needs • Discrimination in education provision 	All other education work is out of scope. Education is a mandatory gateway category.
Family	<ul style="list-style-type: none"> • Public law children work: • Child care and supervision • Secure accommodation orders 	In general, child protection work and work required by the UK's international obligations is in scope but private law work

	<ul style="list-style-type: none"> • Adoption • Child abduction and international child abduction • Inherent jurisdiction • Forced marriage protection and protection from female genital mutilation • Domestic abuse and protection from harassment arising out of a family relationship • Enforcement of international child maintenance • Private law children work and financial provision on relationship breakdown, but only where there is domestic abuse or risk of child abuse – see chapter 7 • Child safety orders and parenting orders following conviction of a child 	is out of scope. It can be brought back where there is domestic or child abuse, but only where particular prescribed evidence is available. See chapter 7 for more details.
Housing	<ul style="list-style-type: none"> • Possession of a rented home (including most counter-claims in possession proceedings even if they would be out of scope as a stand-alone claim) • Unlawful eviction – both injunction and damages • Homelessness • Allocations where the client is or is threatened with homelessness • Provision of accommodation by way of community care services to an individual who is homeless or threatened with homelessness (overlap with the community care category) • Disrepair, but only to require carrying out of repairs (solely damages claims are out of scope) and only where the disrepair causes a serious risk of harm • Protection from harassment • Accommodation and support for asylum seekers 	<p>Damages only unlawful eviction claims may however be caught by the ‘suitability for a conditional fee agreement’ test – see para 7.16 of the Lord Chancellor’s Guidance on Civil Legal Aid and para 11.25 of this book.</p> <p>See chapter 12 of the Guidance for how applications for funding for disrepair will be dealt with.</p>
Immigration and asylum	<ul style="list-style-type: none"> • Asylum • Detention (but only advice on the detention and bail, not on the substantive issue unless independently in scope) and residence 	<p>Most mainstream non-asylum immigration work is out of scope.</p> <p>LASPO Sch 1 Pt 1 para 19, which brings</p>

	<ul style="list-style-type: none"> restrictions pending deportation Applications for leave to remain under the domestic violence rule Applications for leave by victims of trafficking, slavery, servitude or forced labour Terrorism prevention and investigation measures Proceedings before the Special Immigration Appeals Commission Judicial review, but not <ul style="list-style-type: none"> <i>where the same issue has been the subject of a previous JR or appeal within the last year,</i> <i>of removal directions where the substantive decision or appeal was made in the last year</i> <i>of a negative decision on an asylum application where there is no right of appeal to the tribunal</i> Exceptional funding of any immigration or asylum matter 	JR into scope, contains a number of specific restrictions limiting the circumstances in which a judicial review can be brought in an immigration case.
Mental health	<ul style="list-style-type: none"> Services in relation to the Mental Health Act 1983, the Mental Capacity Act 2005 and the Repatriation of Prisoners Act 1984 Sch para 5(2) 	This includes claims for breaches of the Human Rights Act brought within Court of Protection proceedings. ⁸
Miscellaneous	<ul style="list-style-type: none"> Working with children and vulnerable adults Protection from harassment where not arising from a family or housing relationship Proceeds of crime Environmental pollution Advice to victims of sexual offences Abuse of child or vulnerable adult except where in the actions against the police etc category Damages claims by victims of trafficking Gang-related violence injunctions Anti-social behaviour injunctions 	<p>This is work that does not fit into any other category. Since all categories became 'exclusive' in 2013 (ie tolerance work is not allowed), you can only take on miscellaneous cases if specifically authorised to do so by your schedule.</p> <p>Some – but not all – contracts include an allocation of miscellaneous matter starts.</p>

Public law	<ul style="list-style-type: none"> Human rights and public law challenges 	Many cases will also be in another category. For example, judicial review of a housing decision falls within both the public law and housing categories.
Welfare benefits	<ul style="list-style-type: none"> Welfare benefit appeals – but only upper tier tribunal cases, cases in the Court of Appeal, Supreme Court and judicial review only Appeals on a point of law relating to council tax reduction schemes to the High Court and above Exceptional funding on any welfare benefits or council tax reduction scheme matter 	Legal Help only for Upper Tribunal cases, and for High Court appeals in council tax reduction scheme cases. Representation including advocacy in all other High Court and above cases.

ⁱ Implementing reforms to civil legal aid, NAO, November 2014, p.6.

ⁱⁱ Legal Aid Statistics in England and Wales 2013-14, MOJ June 2014.

ⁱⁱⁱ Reg 5.

^{iv} Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013. reg 2.

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

^{vi} Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 reg 26

^{vii} Civil Legal Aid (Merits Criteria) Regulations 2013 - Reg 32