



Legal aid: an overview of the recent changes 2013-2014

Young Legal Aid Lawyers Meeting 11 June 2014

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1. This part of the seminar is intended to provide a broad overview of the changes to legal aid that have taken place over the last year and to place in context the cuts and changes which the other speakers will be discussing in more detail.

Round 1: The Legal Aid Sentencing and Punishment of Offenders Act 2012

2. The coalition Government took office in May 2010. Later that year, on 15 November 2010, they published the green paper “Proposals for the Reform of Legal Aid in England and Wales”¹. The stated aim of the green paper was to produce savings of £350 million, through cuts to legal aid. Following a consultation period, during which the Government received an overwhelmingly negative response to its proposals, and then a heavily contested period of Parliamentary debate, the large part of the proposals became law in the form of the Legal Aid Sentencing and Punishment of Offenders Act 2012² (LASPO). LASPO came into force on 1 April 2013 and replaced the Access to Justice Act 1999 as the primary legislation governing legal aid – both criminal and civil – in England and Wales.
3. In broad terms, the effect of LASPO (in so far as it relates to legal aid) is as follows.

(1) Cuts to the scope of legal aid:

4. Legal aid is no longer available for large areas of social welfare law, immigration (aside from asylum claims and immigration detention) and private family work. Section 9 LASPO allows for civil legal aid to be provided (subject to a means and merits test) only in those cases which are listed in Part 1 Schedule 1, subject to the exclusions in Part 2

¹Ministry of Justice [Proposals for the Reform of Legal Aid in England and Wales](#) CP12/10 November 2010

² <http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>

Schedule 1. So, if it is not listed in Part 1, legal aid is not available. If in doubt, check. Tables setting out what has been removed from legal aid, and what remains within scope are set out in Appendix 1.

5. According to Government figures published at the time of the response to the Green Paper, the cuts to scope were expected to impact disproportionately on disabled people, women and black and ethnic minority clients³. Meanwhile, 80% of those affected by the cuts were anticipated to be in the poorest fifth of society.⁴ This led the Justice Select Committee to warn that the impact of the Bill would “sit uneasily with the Government’s commitment to protect the most vulnerable in society”⁵.
6. In terms of the financial impact of the changes Citizens Advice endeavoured to quantify the “knock-on” costs of removing legal aid, estimating that for every £1 spent on housing advice, debt advice, employment advice and benefits advice the State saves between £2.34 and £8.80.⁶ Research conducted by Kings College London during the Parliamentary debates on LASPO pointed to similar conclusions⁷. The Kings College report identified knock-on costs of £139 million per annum meaning the Government would realise approximately 42 per cent of its predicted savings. These unintended costs, the report concluded, would largely be borne by other Government departments, such as the NHS. Meanwhile, research conducted by YLAL in MPs surgeries in 2011-12 indicated that the burden on MPs would increase when the cuts come into force meaning that their ability to help their constituents will be reduced⁸.
7. Have these concerns been born out? In relation to the impact on MPs surgeries, follow-up research carried out by YLAL in 2013 following the implementation of LASPO indicated that many MPs (86% of respondents) had noticed an increase in demand for advice in those areas where legal aid had been removed since 1 April 2013⁹. More widely, however the impact of LASPO has not been well documented. For this reason the Justice Select Committee ran an inquiry into the impact of the Act from 17 December 2013 to 30 April 2014. The report of the inquiry is due imminently. While we cannot pre-

³ Ministry of Justice, [Legal Aid Reform – EIA](#) June 2011 [98]

⁴ Ministry of Justice [Impact Assessment – Annex A – Scope](#) June 2011 [19]

⁵ Justice Select Committee [Government’s proposed reforms of legal aid](#) HC 681 March 2011 p32 [69]

⁶ Citizens Advice [Towards a business case for legal aid](#) July 2010 p2

⁷ Dr G. Cookson [Unintended Consequences: the cost of the Government’s Legal Aid Reforms](#), November 2011

⁸ YLAL [Nowhere else to turn: The impact of legal aid cuts on MPs’ ability to help their constituents](#) March 2012

⁹ YLAL [Nowhere else to turn: one year on](#) August 2013

empt the outcome of the inquiry it is notable that the Judiciary in their submission to the inquiry stated that

Where legal aid has been removed and individuals have become self-represented the adverse impact upon courts' administration and efficiency has therefore been considerable. The apparent saving of cost by a reduction in the legal aid budget needs to be viewed in context: often it simply leads to increased cost elsewhere in the court system as, for example, anecdotally cases take longer.¹⁰

(2) Changes to financial eligibility:

8. The financial eligibility criteria are more restrictive than previously. Individuals who are in receipt of income based benefits such as JSA and ESA are no longer “passported” on to legal aid. And individuals on low incomes may have to pay a higher contribution (up to 30% of disposable income) toward their legal costs than previously.

(3) Introduction of a mandatory telephone gateway:

9. A mandatory telephone gateway has been introduced for discrimination, debt and special educational needs. The statutory basis for the gateway is s27 LASPO and the operation of the gateway is governed by Part II of the Civil Legal Aid (Procedure) Regulations 2012, regulations 16-20. The gateway does not need to be used where the client is a child, where the client has been deprived of their liberty or if they are a person in respect of whom a determination has been made within the previous twelve months that they qualify for face-to-face advice and who is applying for advice from the same face-to-face provider in relation to a linked problem.¹¹

(4) Exceptional funding:

10. A new, more restrictive, exceptional funding scheme has been introduced, ostensibly, to provide funding for certain inquests and (for those cases where legal aid is no longer available) in order to avoid a breach of an individual applicant's rights under the ECHR or under EU law. See s10 LASPO and the Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)¹². The guidance provides that legal aid should be provided in

¹⁰ Judicial Executive Board *Written Evidence from the Judicial Executive Board* MSC 84 April 2014

¹¹ <http://www.legislation.gov.uk/uksi/2012/3098/contents/made>

¹² Ministry of Justice *Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)*. This is statutory guidance issued by the Lord Chancellor to the Director of Legal Aid Casework under section 4(3) LASPO.

exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to obvious unfairness in proceedings. This broadly reflects the principles enunciated by the ECtHR as to when legal aid will be necessary in order to avoid a breach of Art.6¹³.

11. Many practitioners have expressed concern that the scheme is operating inadequately. In particular the Government statistics on exceptional funding show: (a) that very few applications are being made; and (b) of these, very few are successful. Both trends are concerning. By way of example, in the context of housing law:

- i. The Impact Assessments that accompanied the green paper that preceded LASPO¹⁴ anticipated that 53,200 housing cases per year would be removed from the scope of legal aid as a result of LASPO. This figure consisted of 52,000 cases funded at the level of legal help and 1,200 funded at the level of legal representation.
- ii. The same Impact Assessments anticipated that 25% of the housing cases removed from scope of legal aid which had been funded at the level of legal representation would receive funding through the exceptional funding gateway. This would equate to 300 cases per year.
- iii. This figure of 300 successful exceptional funding applications per year presupposes that more than 300 applications would be received, on the basis that not all applications would be successful.
- iv. In contrast the statistics on exceptional funding indicate that from April 2013 to March 2014, only 81 applications for exceptional funding were received in the area of housing/land law.
- v. Of these only one application was granted. Three of the 81 are yet to be considered. This is a success rate of 1.2%.
- vi. In addition, nine applications for exceptional funding for welfare benefits have been considered. None have been granted: a 0% success rate.
- vii. The success rates for housing and welfare benefits are lower than the overall success rate for exceptional funding applications which is 3.8% consisting of 57 successful applications out of 1,519.

¹³ *Pine v The Law Society* [2001] EWCA Civ 1574, [11] per the Vice Chancellor citing *X v United Kingdom* (1984) 6 EHRR 136, [3]-[4] and *Steel and Morris v United Kingdom* (2005) 41 EHRR 22 [59]-[72].

¹⁴ Ministry of Justice [Impact Assessment – Annex A – Scope](#) June 2011

12. In view of this it is perhaps no surprise that the new scheme has given rise to a number of legal challenges. In *M v Director of Legal Aid Casework* [2014] EWHC 1354¹⁵ the applicant was an Afghan national who had experienced violence and abuse in her home country, and rape while in the UK. Her ex-partner was subsequently prosecuted in relation to this latter offence. In the course of criminal proceedings an application was made by the CPS for access to her counseling records. M was refused legal aid to resist the application. The High Court found that the LAA's refusal was unlawful. In the course of judgment Coulson J held that there was "no wider meaning (and certainly no magic) in the term 'exceptional case' ", the term imply refers to a case which falls outside of Part 1 Schedule 1 LASPO and does not mean "highly unusual or very much out of the ordinary", see [58]. However, exceptional cases will be limited and funding will only be warranted where either it could definitely be said that a refusal of legal aid would give rise to a breach of the ECHR or where there is a "significant risk or a very high risk" of such a breach: a "very high threshold", see [71].
13. Several wider challenges to the scheme brought by the Public Law Project are currently under consideration by the High Court.

Round 2: Transforming Legal Aid

14. Just over a week after LASPO came into force, on 9 April 2013, the Government announced its second round of cuts to legal aid, in its consultation paper *Transforming Legal Aid: Delivering a More Fair and Efficient System*¹⁶. This was followed by a further two consultations launched in September 2013, *Transforming Legal Aid: Next Steps*¹⁷ and *Judicial Review: Proposals for further reform*¹⁸. There is a degree of overlap between the proposals in these three consultations.
15. The Government has elected to proceed with a large part of the changes contained within these papers, and many have been brought into force already via secondary legislation. Since these changes form the basis of the talks given by our other speakers this evening, I will not go into them in detail. But in outline, the key changes are as follows.

¹⁵ <http://www.bailii.org/ew/cases/EWHC/Admin/2014/1354.html>

¹⁶ Ministry of Justice *Transforming Legal Aid: Delivering a More Fair and Efficient System* CP14/2013 April 2013

¹⁷ Ministry of Justice *Transforming Legal Aid: Next Steps* September 2013

¹⁸ Ministry of Justice *Judicial Review: Proposals for further reform* Cm 8703 September 2013

16. Firstly, dealing with those changes which are in force already, we have:

- i. The Civil Legal Aid (Remuneration) (Amendment) Regulations 2013¹⁹. Cut civil barristers fees by 30%-50%; removed the uplift payable in immigration cases in the Upper Tribunal for immigration work; 20% cut to expert fees in civil cases. In force 2 December 2013.
- ii. The Criminal Legal Aid (General) (Amendment) Regulations 2013²⁰. Removed large swathes of prison law from the scope of legal aid, save for matters directly involving release and certain matters involving the determination of a criminal charge. In force 2 December 2013. The Lord Chancellor Chris Grayling has openly admitted that the cuts affecting prisoners are driven by ideology and not cost-saving. Giving evidence to the Joint Committee on Human Rights on 3 July 2013, when questioned by Jeremy Corbyn on the importance of legal aid in cases involving the treatment of prisoners by the State, Grayling replied that “I suspect that this is simply an ideological difference between us. I do not agree”²¹.
- iii. The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013²². Cut the fees payable to barristers and solicitors in Very High Cost Criminal Cases. Also 20% cut to expert fees in criminal proceedings. In force 2 December 2013. It is these cuts which have led to the impasse between the Criminal Bar and the Lord Chancellor seen in the “Operation Cotton” cases²³
- iv. The Criminal Legal Aid (Financial Resources) (Amendment) Regulations 2013²⁴. Introduced means testing for criminal legal aid in the Crown Court. In force variously on 2 December and 27 January 2014
- v. The Civil Legal Aid (Merits Criteria) Regulations 2013²⁵. Removed funding for cases where merits were assessed as borderline. In force on 27 January 2014.
- vi. The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014²⁶. Introduced an 8.75% cut to criminal solicitors fees. In force on 20 March 2014.
- vii. The Civil Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2014²⁷. Cut the fees payable in family care proceedings. In force 22 April 2014.

¹⁹ <http://www.legislation.gov.uk/uksi/2013/2877/contents/made>

²⁰ <http://www.legislation.gov.uk/uksi/2013/2790/contents/made>

²¹ See <http://www.parliament.uk/documents/commons-committees/Justice/Uncorrected%20Oral%20Transcript%20HC%2091-ii.pdf>

²² <http://www.legislation.gov.uk/uksi/2013/2803/contents/made>

²³ *R v Crawley* [2014] EWCA Crim 1028

²⁴ <http://www.legislation.gov.uk/uksi/2013/2791/contents/made>

²⁵ <http://www.legislation.gov.uk/uksi/2013/9780111106310/contents>

²⁶ <http://www.legislation.gov.uk/uksi/2014/415/contents/made>

- viii. The Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014²⁸. Restricts payment in judicial review cases. In force on 22 April 2014. Again these cuts appear to be ideologically motivated. Writing in the Daily Mail on 6 September 2013 (coinciding with the announcement of the cuts contained in *Judicial Review: Proposals for further reform*) Grayling derided the use of judicial review as “a promotional tool for countless Left-wing campaigners”²⁹

17. Secondly, still to come we have:

- i. Further cuts to fees payable in criminal cases.
- ii. Further changes to judicial review. These changes go above and beyond changes to legal aid and include changes to the rules relating to costs in cases involving interveners and Protective Costs Orders. Contained in the Criminal Justice and Courts Bill³⁰. Currently at the report stage in the House of Commons.
- iii. The Residence Test. Restricting the ability of migrants to access legal aid. Currently under challenge by the Public Law Project. The draft changes are contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014 which is due to come into force on 4 August 2014.

18. It is these latter changes, together with some more detailed discussion of the existing criminal changes, which form the subject of the rest of the seminar.

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²⁷ <http://www.legislation.gov.uk/uksi/2014/586/contents/made>

²⁸ <http://www.legislation.gov.uk/uksi/2014/607/contents/made>

²⁹ Daily Mail *Judicial Review Promotional Tool Left Wing Campaigners* 6 September 2013

³⁰ <http://services.parliament.uk/bills/2013-14/criminaljusticeandcourts.html>

APPENDIX

Cases and proceedings retained within the scope of legal aid.	
1.	asylum;
2.	asylum support where accommodation is claimed;
3.	claims against public authorities (other than judicial review and other similar remedies), concerning a significant breach of human rights, or an abuse of position or power;
4.	claims arising from allegations of abuse and sexual assault;
5.	community care;
6.	debt (where the client's home is at immediate risk), including involuntary bankruptcy and orders for sale of the home;
7.	domestic violence and forced marriage proceedings;
8.	family mediation;
9.	housing matters where the home is at immediate risk (excluding those who are "squatting"), homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the county court;
10.	immigration detention;
11.	appeals to the Special Immigration Appeals Commission
12.	international child abduction (including orders both to recover a child and those to prevent international abduction);
13.	international family maintenance;
14.	mental health, including mental capacity issues currently in scope;
15.	Special Educational Needs cases (currently in scope);
16.	private family law cases involving domestic violence and private law children cases involving child abuse;
17.	public law cases (judicial review and other similar remedies) other than representative actions and certain immigration and asylum judicial reviews);
18.	social security appeals in the Upper Tribunal, Court of Appeal and Supreme Court;
19.	clinical negligence for brain-damaged children injured at or near to birth;
20.	immigration cases for victims of domestic violence and trafficking;
21.	equality and discrimination claims;
22.	public law children cases.

Cases and proceedings to be removed from the scope of legal aid.	
1.	asylum support (except where accommodation is claimed);

2.	clinical negligence, except in near-birth cases;
3.	consumer and general contract;
4.	Criminal Injuries Compensation Authority cases;
5.	debt, except in cases where there is an immediate risk to the home;
6.	employment cases, except equality and discrimination claims;
7.	education cases, except for cases of Special Educational Needs;
8.	housing matters, except those where the home is at immediate risk (excluding those who are “squatting”), homelessness assistance, housing disrepair cases that pose a serious risk of harm and anti-social behaviour cases in the county court;
9.	immigration cases except detention, DV and trafficking;
10.	welfare benefits, except appeals in the Upper Tribunal, Court of Appeal and Supreme Court.