



BRIEFING PAPER

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Civil Legal Aid: England & Wales, Scotland and N Ireland compared

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Contents:

1. Applying for Civil Legal Aid
2. Legislation
3. Means Testing
4. Merits Test
5. Statistics
6. International Comparisons
7. Further Reading



Contents

Summary	3
1. Applying for Civil Legal Aid	4
2. Legislation	5
2.1 The scope of civil legal aid	5
3. Means Testing	6
4. Merits Test	8
4.1 Legal Aid in Exceptional Circumstances	9
5. Statistics	11
5.1 Caseload	11
5.2 Expenditure	14
6. International Comparisons	17
6.1 Europe	17
6.2 Common Law Countries	19
7. Further Reading	20
7.1 Commons Library Briefing Papers	20
7.2 Other	20

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Summary

There are three civil legal aid schemes in operation in the United Kingdom, each regulated by a different body depending on the jurisdiction:

- The Legal Aid Agency (LAA) in England and Wales
- The Scottish Legal Aid Board (SLAB)
- The Legal Services Agency Northern Ireland (LSANI)

In recent years there has been new legislation passed in each jurisdiction which has made changes to the criteria of the legal aid schemes and the eligibility of individuals applying for civil legal aid.

The biggest changes have occurred in England and Wales where the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) made significant changes to the operation of the civil legal aid scheme, both reducing the scope of civil legal aid and changing the financial eligibility criteria.

In Northern Ireland, the Legal Services Agency (LSANI) was created in 2015 under the *Legal Aid and Coroners' Courts Act (Northern Ireland) 2014*, and now serves as an agency of the Department of Justice.

Reforms to legal aid in Scotland have mainly focused on criminal legal aid, but some changes have been made to the financial criteria in relation to civil legal aid.

Means testing is common to all three schemes, and examines the financial eligibility of a person applying for civil legal aid. However, the income and capital limits vary widely between the different schemes, as does the amount an individual can be expected to pay back to the legal aid scheme out of any winnings – sometimes known as the 'statutory charge'. In all jurisdictions there are ways civil legal aid can be granted in exceptional circumstances to those who do not meet the standard eligibility criteria.

This paper examines the differences between the three legal aid schemes, considering their application, key legislation and eligibility criteria. It also provides an overview of the recent data on caseload and expenditure on civil legal aid in each jurisdiction, as well as considering international comparisons of legal aid. Aside from the international comparisons which looks at legal aid schemes as a whole, this paper focuses solely on civil legal aid.

1. Applying for Civil Legal Aid

The awarding of civil legal aid in the United Kingdom is regulated by three difference bodies, representing the three different legal jurisdictions:

- The Legal Aid Agency (LAA) in England and Wales
- The Scottish Legal Aid Board (SLAB)
- The Legal Services Agency Northern Ireland (LSANI)

An application for legal aid in England and Wales or Northern Ireland may be made by the applicant themselves. In Scotland however, the application needs to be made by a solicitor registered for legal aid work with SLAB on behalf of the applicant.

Basic criteria of the schemes:

England & Wales	Scotland	Northern Ireland
<p>To be eligible for legal aid in a civil case, an applicant must pass three tests:</p> <ul style="list-style-type: none"> • the case must be within scope for legal aid; • the applicant must have a 50:50 (or thereabouts) prospect of winning the case (merits test); • the applicant must fulfil the financial eligibility criteria (means test). 	<p>Solicitors need to register before they can give any legal aid assistance. It is the solicitor who makes any application for legal aid on behalf of their client. The Scottish Legal Aid Board (SLAB) decides if an applicant qualifies for civil legal aid. The criteria considered are:</p> <ul style="list-style-type: none"> • whether the applicant has a plausible case; • whether it is reasonable in all circumstances that civil legal aid is made available; • whether the applicant meets the financial eligibility criteria. <p>When considering the reasonableness of the case, the board consider if the applicant has a reasonable chance of winning and, if it involves money or property, if there is a reasonable chance of recovering that money or property.</p>	<p>To qualify for legal aid in Northern Ireland, an application is subject to two tests:</p> <ul style="list-style-type: none"> • financial eligibility • the merits of the case <p>According to the Citizens Advice Bureau NI, the merits test considers that there are reasonable grounds for the case and that it is reasonable for legal aid to be granted in the case.</p>

2. Legislation

Provision for civil legal aid is required by Acts of Parliament, with each scheme being regulated by statute law. There have been recent legislative changes in each jurisdiction which affect the operation of the schemes.

Key legislation and recent changes

England & Wales	Scotland	Northern Ireland
<p>The <i>Legal Aid, Sentencing and Punishment of Offenders Act 2012</i> (LASPO) made significant changes to civil legal aid.</p> <p>The Act not only amended some of the financial eligibility criteria, but also took many areas of civil and family law out of the scope of legal aid.</p>	<p>The key legislation is the <i>Legal Aid (Scotland) Act 1986</i> and <i>The Civil Legal Aid (Scotland) Regulations 2002</i>. There have been many minor amendments made to legal aid through Statutory Instruments, but no significant reform to civil legal aid (more significant reforms were made to criminal legal aid when client contributions were introduced).¹</p>	<p>LSANI was created under the <i>Legal Aid and Coroners' Courts Act (Northern Ireland) 2014</i>, but the key legislation relating to legal aid in NI is the <i>Access to Justice (Northern Ireland) Order 2003</i> as amended and the <i>Legal Aid, Advice and Assistance (Northern Ireland) Order 1981</i>.</p>

2.1 The scope of civil legal aid

Not all areas of civil law qualify for legal aid. Previous to LASPO coming into effect on 1 April 2013, any type of case in England and Wales would be within scope for legal aid, unless it was part of a relatively short list of exclusions. Now, cases are within scope only if they are of a type set out in [Part 1 of Schedule 1 to the Act](#) (and subject to the exclusions in Part 2 of that Schedule). Types of cases in scope include: inquests, welfare benefit appeals to upper tribunals, certain immigration cases, family law in cases of domestic violence or some cases involving children, mental health.

In Scotland, civil legal aid is available for all cases before the courts listed in [Part 1 of Schedule 2 of the 1986 Act](#). This does not include representation at most tribunals. [Part 2 of Schedule 2](#) in the Act lists cases where civil legal aid is not available which includes small claims cases in the Sheriff Courts, simplified divorce applications or proceedings wholly or partly concerned with defamation. However, legal aid for "Advice and Assistance" or "Assistance By Way Of Representation" may be available in these instances.

In Northern Ireland civil legal aid is available for cases in the Supreme Court, Court of Appeal, High Court, Divisional Court, Lands Tribunal and Enforcement of Judgements Office. It is not available for proceedings in the Coroners court and most other tribunals or cases involving defamation.

¹ More information on the Scottish Government's reforms legal aid is available in the 2011 policy paper [A Sustainable Future for Legal Aid](#).

3. Means Testing

Means testing for civil legal aid is a feature common to all three areas of the UK. It investigates whether an applicant is financially eligible to receive civil legal aid by assessing their income and disposable capital. Different criteria apply in each jurisdiction.

England & Wales

In England and Wales, means testing is a longstanding feature of civil legal aid, but LASPO made several changes. The [Civil Legal Aid \(Financial Resources and Payment for Services\) Regulations 2013](#) (as amended) now set out the rules. The [Explanatory Memorandum](#) summarises the main changes from the previous regulations relating to so-called “passport” benefits, the disregard of the value of the subject matter of the dispute and the level of income-based contributions. The Ministry of Justice estimates that 25% of the population in England and Wales are financially eligible for free or contributory civil legal aid.²

Scotland

In Scotland there is means-testing of sorts. Solicitors are required to verify the financial circumstances of a client before making an application for legal aid. This includes disposable income (including passported benefits) and disposable capital. The financial limits are set out clearly on the [SLAB website](#). A change in 2011 increased the limits for an applicant’s disposable income to £25,000, meaning 70-75% of adults in Scotland meet the criteria to receive some legal aid.³

Northern Ireland

In Northern Ireland the test is based on disposable income and capital, with the current rates listed on the [DOJ website](#). Legal aid in Northern Ireland is not always free: a new [Statutory Charge](#) was introduced in 2011 which can require people to reimburse any legal aid grant made in a case from their winnings from a case.

² This figure has been kindly provided to the House of Commons Library by the MoJ. This estimate is based on information from the DWP and the Family Resources Survey. It relies on a number of assumptions and there is a level of uncertainty in this estimate. Previous estimates suggest this figure has dropped from 52% in 1998, to 29% in 2007, before increasing to 36% in 2009 ([HC Deb 20 February 2008 cc779-80W](#) and Lord Jackson, [Review of Civil Litigation Costs: Final Report](#), 2009, p68 para 3.1 and footnote 8).

³ According to SLAB, [Will I qualify financially for civil legal aid?](#), [accessed 24 May 2016] and the Scottish Government, [A Sustainable Future for Legal Aid](#), 5 October 2011

Financial criteria for civil legal aid

Upper Limits	England and Wales	Scotland	Northern Ireland
Disposable Capital	<p>£8,000*</p> <p>*Immigration matters are capped at £3,000</p>	<p>£13,017</p> <p>If an individual has disposable capital of more than £7,853, they may have to pay a contribution towards the cost of their case. If a person's disposable capital is £7,583 or less, they do not have to make any contribution.</p>	<p>£6,750</p> <p>(£8,560 in personal injury cases)</p>
Income	<p>£2,657 gross per month**</p> <p>£733 disposable per month</p> <p>**If applicant has more than 4 child dependants, £222 is added to this figure for the fifth and each subsequent child.</p>	<p>£26,239 disposable per annum</p> <p>In a person's disposable income exceeds £3,521, they may have to make a contribution towards the cost of their case. If an individual's disposable annual income is £3,521 or less, they make no personal contribution.</p>	<p>£9,937 disposable per annum</p> <p>(£10,955 in personal injury cases)</p>

Sources: [Legal Aid Agency](#), [Scottish Legal Aid Board](#), [Department of Justice Northern Ireland](#)

4. Merits Test

The purpose of a merits test is to assess the likelihood of an applicant's case being successful in court. As with the means test, the three different jurisdictions of the United Kingdom have different rules relating to the application of a merits test:

England & Wales

The [Civil Legal Aid \(Merits Criteria\) Regulations 2013](#) provided the merits criteria which the Director of Legal Aid Casework at the Legal Aid Agency must apply when determining whether an applicant qualifies for civil legal aid: Regulation 4 dealt with prospects of success and Regulation 5 with the prospects of success test.⁴

The Ministry of Justice, though, wanted to see further change and in its 2013 consultation paper [Transforming legal aid: delivering a more credible and efficient system](#) argued that the merits test was not stringent enough. The MoJ took the view that, generally, to receive funding cases ought to have at least a 50% prospect of success and so funding should not be available for borderline cases. The [Civil Legal Aid \(Merits Criteria\) \(Amendment\) Regulations 2014](#) removed borderline cases from scope of civil legal aid.

The regulations were again amended in July 2015, following a successful legal challenge. This means that civil legal aid may now be provided in some cases with a "poor" or "borderline" prospect of success, if providing legal aid would prevent a breach of the applicant's rights under the ECHR or EU law.

Scotland

The Scottish Legal Aid Board (SLAB), in considering an applicant's eligibility for civil legal aid, consider the 'reasonableness' of the case. Full details on how they consider reasonableness is set out in [Part IV chapter 3.3 of the Civil Legal Assistance Handbook](#).

Included in the assessment of reasonableness is an assessment of the prospects of success which the solicitor is required to comment upon in the application for legal aid. Cases which are deemed to have a prospect of success of "fair" or "poor", as opposed to "good" or "excellent", must have other significant factors or purpose for the board not to refuse the application. However, there are many other considerations SLAB make as part of the test of reasonableness.

Northern Ireland

The LSANI board determines any grant of legal aid based on the merits of the case. Article 14(2A) of the *Access to Justice (Northern Ireland) Order 2003* requires an individual to show reasonable grounds for taking, defending or being party to the proceedings of a case before legal aid may be granted.

⁴ Further information was also provided in the MoJ [Explanatory Memorandum](#)

Under the requirements of the new 2014 Act, LSANI should publish guidance on the merits test, but at the moment this is not published to the [LSANI guidance website](#).

4.1 Legal Aid in Exceptional Circumstances

In all three jurisdictions, it is possible for an individual to receive civil legal aid even if their circumstances, or the circumstances of the case, fall outwith the normal criteria of the scheme.

England & Wales

In England and Wales, funding outside the scheme's normal criteria is only available in very limited circumstances. For cases outwith the scope, the only way to secure legal aid would be through exceptional funding.

A page on the Government's Justice website, [Legal aid: apply for exceptional cases funding](#), summarises the relevant provisions of the 2012 Act.⁵ Essentially, a client would have to demonstrate that if their case was not granted funding, their rights under the European Convention on Human Rights, or relevant EU law, were at stake.

The [Justice Committee](#) considered whether the exceptional funding scheme had provided an adequate safety net for vulnerable people seeking help with legal problems, concluding that it had not and that the wrongful refusal of exceptional case funding may have resulted in miscarriages of justice.⁶ Responding to the Justice Committee, the Ministry of Justice defended the robust line it takes on exceptional funding, arguing that it should only be available where a lack of legal aid would breach ECHR. The MoJ did not agree that people who had been refused exceptional case funding were at risk of a miscarriage of justice.⁷

Scotland

Separate parts of the legal aid scheme run by SLAB provide legal aid funding for cases which are not within the criteria for civil legal aid. These include:

- Legal aid for children's hearings (a form of tribunal convened to consider criminal and civil aspects of law).
- Advice and assistance schemes (A&A) which provide help for people to pay for written or oral advice from a solicitor on any matter of Scots law.⁸
- Advice by way of representation (ABWOR) which allows for legal aid funding to pay for a solicitor to appear in a court or tribunal not covered by the other legal aid schemes in particular circumstances.

⁵ Information is also available in the [Lord Chancellor's funding guidance](#).

⁶ Justice Committee, [Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), 12 March 2015, HC311 2014-15, paras 33 and 45

⁷ Ministry of Justice, [Government Response to the Justice Committee's Eighth Report of Session 2014-15](#), July 2015, Cm 9096

⁸ The full list of A&A categories is available on the [CABS website](#).

Northern Ireland

Legal aid is provided to people on a low income to get advice and assistance from a solicitor, or any other organisation, through the "green form scheme". Generally this pays for around two hours of legal aid work. There are also limited circumstances in which assistance by way of representation can be funded.

For applications outside the scope of civil legal aid, it may be possible, in specific circumstances, to obtain funding for representation through the [Statutory Exceptional Grant Scheme](#). This scheme allows the Lord Chancellor to specify circumstances where legal aid funding may be provided where the case would otherwise be excluded from the legal aid scheme.

5. Statistics

5.1 Caseload

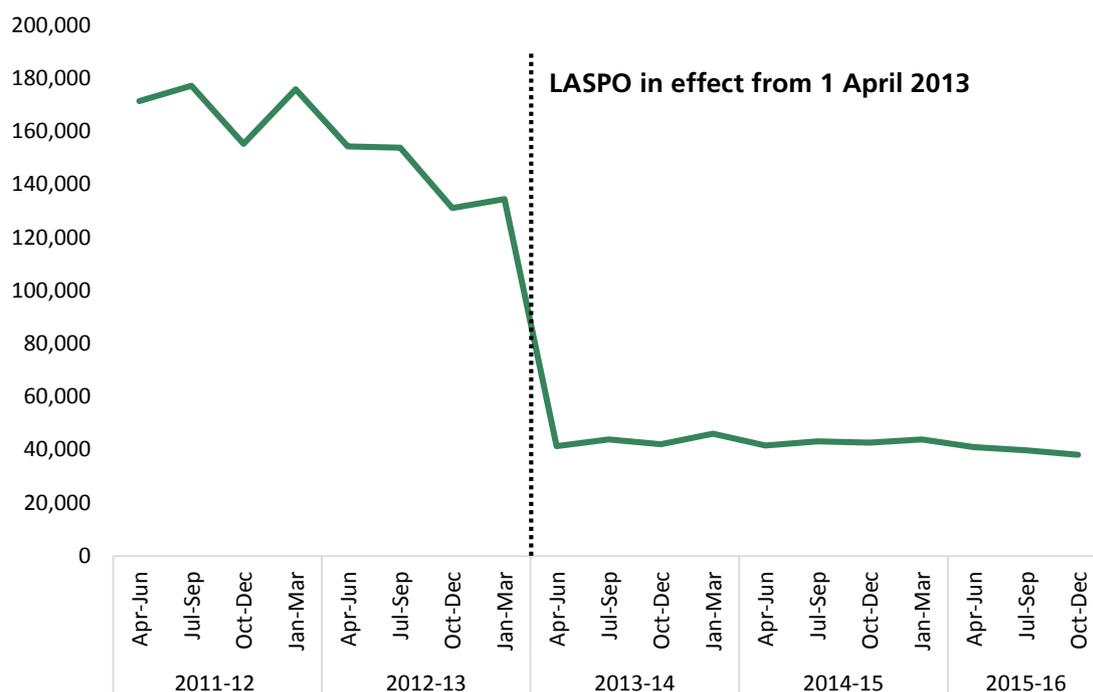
England & Wales

Civil legal aid may be provided at a variety of stages during the legal process. Individuals may receive legal advice or assistance in a matter, but not require advocacy or legal representation in proceedings; or a case may go to court and the client require representation by a solicitor or barrister. The Legal Aid Agency broadly categorise these two requirements into 'Legal Help' and 'Civil Representation'. As a result, the civil legal aid caseload may be measured at different points and in different ways. For legal aid provided as advice or assistance, the number of legal help matters started is counted as the caseload. For civil representation, it is possible to look at the number of applications for legal aid submitted to the Legal Aid Agency, and the number of certificates granted, i.e. where some legal aid funding is provided.

The *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) made significant changes to the civil legal aid scheme in England and Wales, narrowing the scope of cases for which legal aid was available and amending some of the financial eligibility criteria. LASPO came into force on 1 April 2013 and statistics from the Legal Aid Agency suggest that it has had a significant effect on the number of cases which now qualify for civil legal aid.

The implementation of LASPO has resulted in a large reduction in civil legal help workload. The number of matters started has fallen by two thirds compared with its pre-LASPO levels.

Civil legal help provided (number of matters started), April 2011 to December 2015



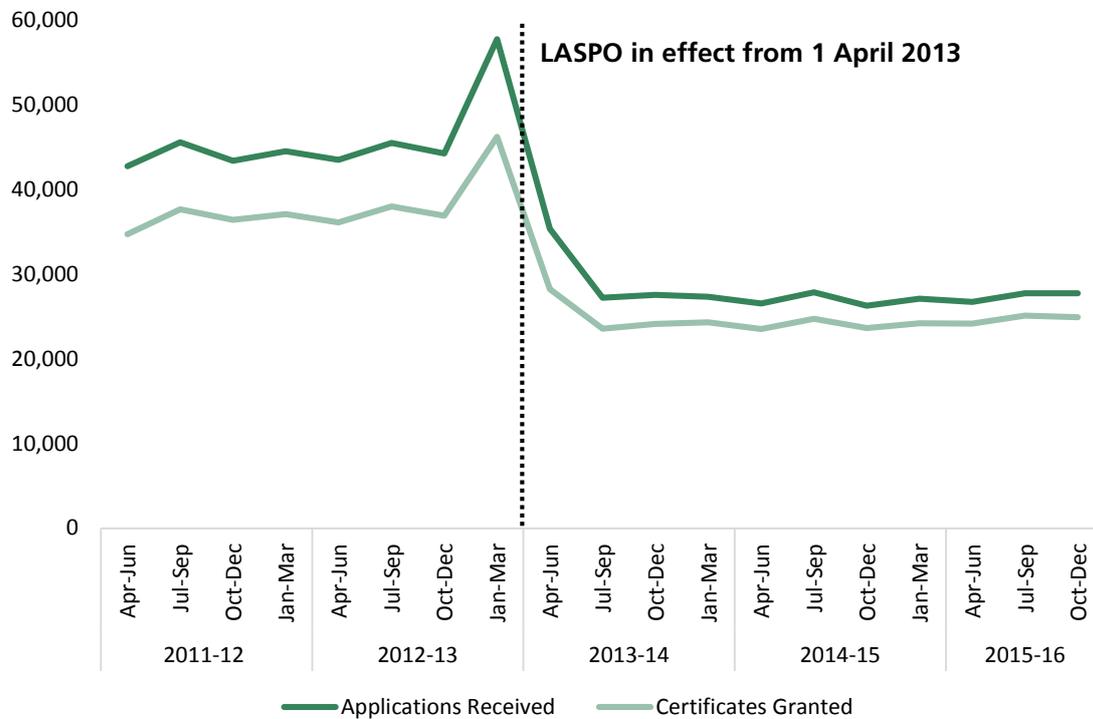
Source: Legal Aid Agency, [Legal aid statistics: October to December 2015](#)

12 Civil Legal Aid: England & Wales, Scotland and N Ireland compared

The number of applications for civil representation received and the number of certificates for civil representation granted has fallen significantly since the passage of LASPO. As the chart below shows, the amount of civil representation funded through legal aid in England and Wales has fallen by about a third of its pre-LASPO level.

What can also be seen from the chart is that the proportion of applications for civil representation approved has increased in the years following the passage of LASPO, from around 83% in January to December 2012, to around 90% between January and December 2015.⁹

Applications received and legal aid certificates granted for civil representation by quarter, April 2011 to December 2015



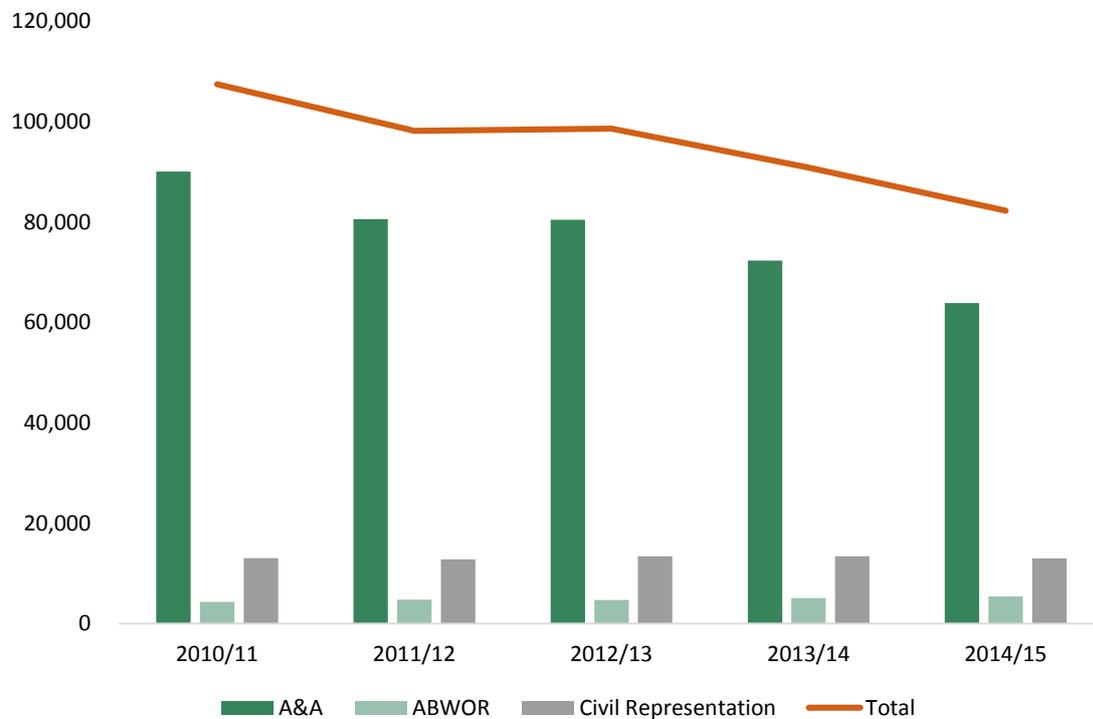
Source: Legal Aid Agency, [Legal aid statistics: October to December 2015](#)

⁹ Ministry of Justice & Legal Aid Agency, [Legal Aid statistics in England and Wales, October to December 2015, statistical bulletin](#), 31 March 2016, p20

Scotland

There has been a general decline in the civil legal assistance caseload in Scotland over the past five years. This is largely due to a reduction in the demand for advice and assistance (A&A). Likewise the number of applications for civil representation through the civil legal aid scheme has fallen. However, there has been an increase in advice by way of representation (ABWOR) where a solicitor may represent people at a tribunal or other hearing. The Scottish Legal Aid Board say this is due to an increase in the number of immigration, asylum and mental health cases, which fall outwith the scope for civil legal aid at tribunal level.¹⁰

Grants of civil legal aid by type of assistance and total case workload, Scotland 2010/11 – 2014/15



Source: SLAB, [Annual Report 2014-15](#), Key Statistics

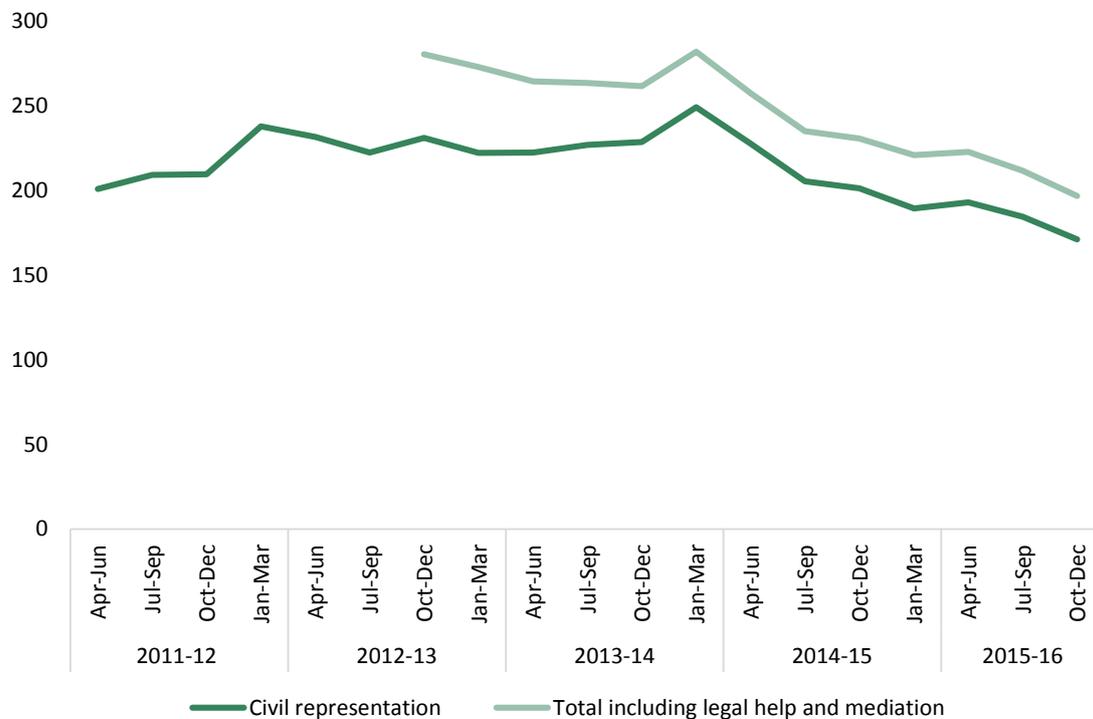
¹⁰ Scottish Legal Aid Board, [Annual Report 2014-15](#), p14

5.2 Expenditure England & Wales

The effects of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) can be seen in the expenditure on civil legal aid. Changes to caseload, fees and the scope of legal aid have resulted in a reduction in the legal aid expenditure on legal help and civil representation.

Total civil legal aid expenditure, including legal help and mediation, was £852 million in 2015. This has fallen by 20% since 2013 when expenditure was £1,063 million.

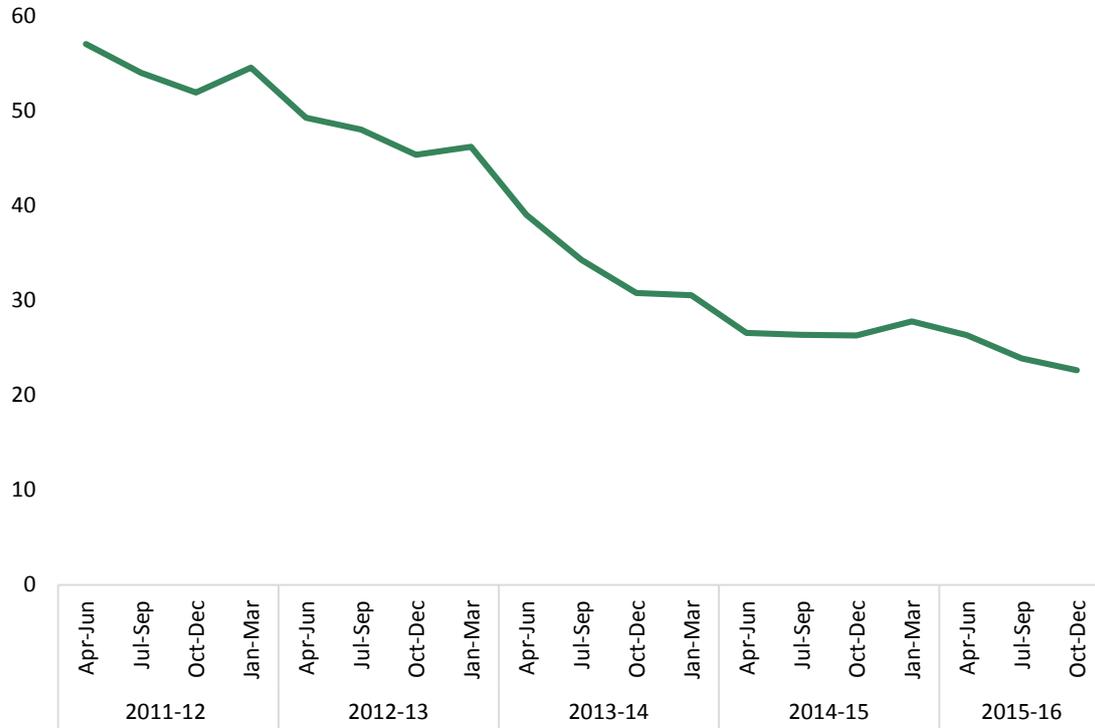
Legal Aid Agency expenditure on civil legal aid (£ million)



Source: Legal Aid Agency, [Legal aid statistics: October to December 2015](#)

Expenditure on legal help, that is advice and assistance but not representation in court, has fallen by nearly half from £197 million in 2012 to £101 million in 2015.

Legal Aid Agency expenditure on legal help (£ million)



Source: Legal Aid Agency, [Legal aid statistics: October to December 2015](#)

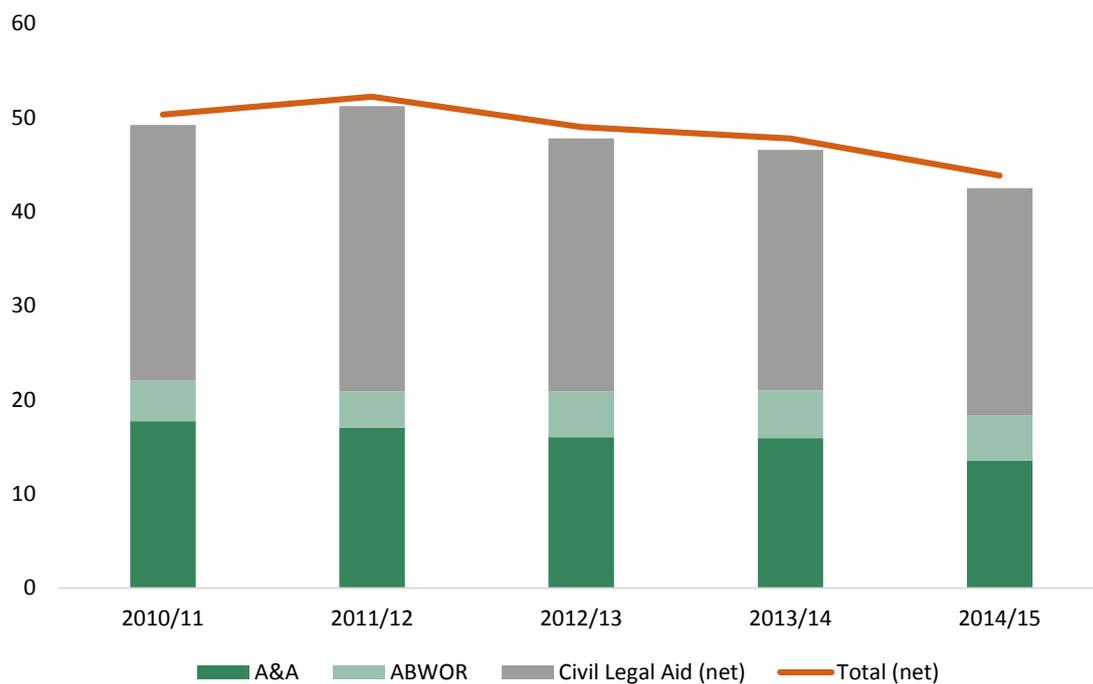
Scotland

The total net expenditure for legal aid in Scotland has fallen over the past four years. The Scottish Legal Aid Board suggest this is because of:

- A fall in the take-up of advice and assistance (A&A); and
- A reduction of 8% in the average cost of civil legal aid cases.¹¹

The total net cost of civil legal aid, constituting A&A, ABWOR, civil legal aid and Civil Legal Assistance Offices, fell from £52.2 million in 2011/12 to £43.9 million in 2014/15.

SLAB Legal Aid Expenditure (total cost to the taxpayer, £ million), 2010/11–2014/15



Source: SLAB, [Annual Report 2014-15](#), Key Statistics

Note: the cost of the Civil Legal Assistance Offices is not shown separately in the chart above, but is included in the net total.

¹¹ Scottish Legal Aid Board, *Annual Report 2014-15*, p10

6. International Comparisons

There are many difficulties in making international comparisons of legal systems. The legal jurisdictions operating in the UK all work, to a varying degree, on a common law system with cases decided on an adversarial basis. In contrast, in Europe, many countries' legal systems are founded on civil law where an inquisitorial procedure is used, taking a more investigative approach to evidence often led by a judge.

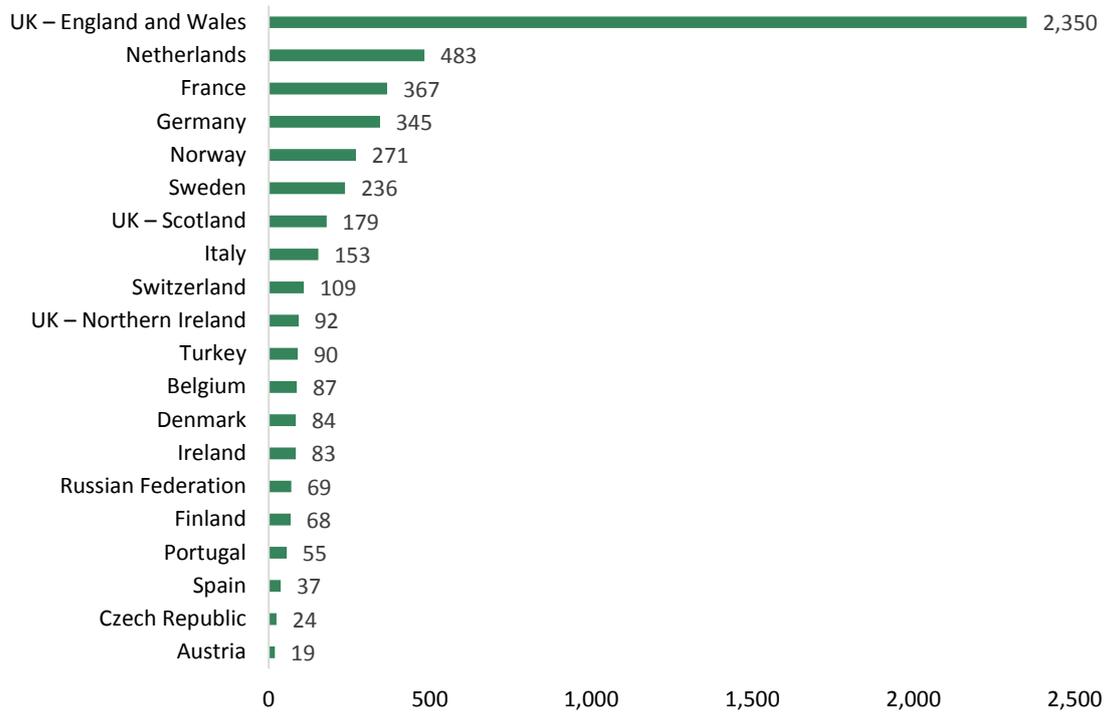
These differences in legal procedure and representation, make direct comparison of legal aid difficult. Furthermore, issues surrounding the quality and consistency of data collection, differing societal attitudes towards law and justice, and the variation in the day to day operation of legal aid systems should be taken into consideration. For example, in some countries legal advice at an early stage is government funded, but separately to the legal aid budget.

If international comparison of legal aid is difficult, then comparing civil legal aid between countries is near impossible. Not only has there been insufficient collation of consistent data to such a level of detail, but due to the differing nature of legal systems in operation across the world, the division between criminal and civil rarely mirrors that found in the United Kingdom. As a result, all the international comparisons made in this paper consider legal aid as a whole – both criminal and civil.

6.1 Europe

According to data collated by the European Commission for the Efficiency of Justice (CEPEJ) in 2012, England and Wales have the largest annual budget for legal aid at €2,350 million, over four times that of the country with the second largest legal aid budget, the Netherlands, at €483 million. The following chart shows the top 20 countries with the largest annual budgets for legal aid in Europe.

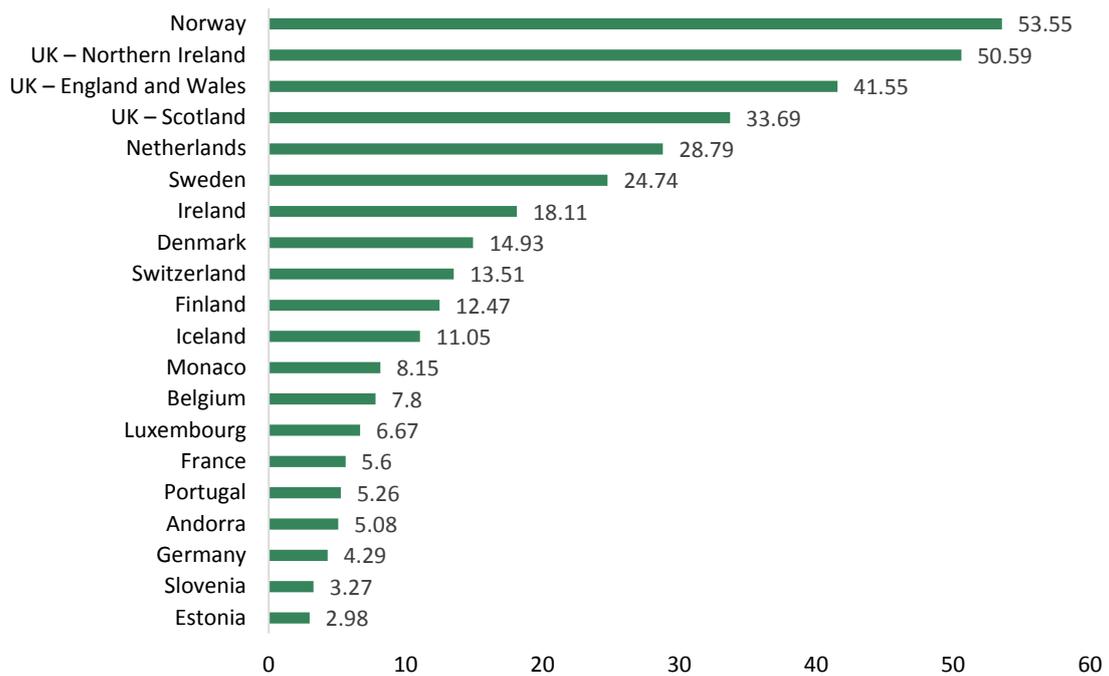
Total annual budget for legal aid, € million (Q1, 2012)



Source: CEPEJ, [European judicial systems – Edition 2014 \(2012 data\): efficiency and quality of justice](#), 2014, table 3.6 p77

When considering the legal aid budget per inhabitant, the UK comes just behind Norway, with Northern Ireland, England and Wales, and Scotland second, third and fourth highest in Europe respectively.

Annual legal aid budget per inhabitant, € (Q1, 2012)



Source: CEPEJ, [European judicial systems – Edition 2014 \(2012 data\): efficiency and quality of justice](#), 2014, fig. 2.15 p46

6.2 Common Law Countries

In 2011, the Ministry of Justice published an ad hoc statistical report on international comparisons of legal aid expenditure to support the *Legal Aid, Sentencing and Punishment of Offenders Bill*.¹² Noting the difficulties in making international comparisons of legal aid due to different legal systems, political and cultural traditions, the MoJ focused on comparisons with countries with similar, common law legal traditions: Ireland, Canada and New Zealand. The MoJ found that England and Wales spend the most per head on legal aid with the exception of Northern Ireland.

Legal Aid Expenditure Per Head (2008 ¹³), £	
Northern Ireland	48
England & Wales	39
Ireland	20
New Zealand	18
Canada	10

Source: [MoJ, *International Comparisons of Public Expenditure on Legally Aided Services*, p3](#)

¹² MoJ, [International Comparisons of Public Expenditure on Legally Aided Services, Ad hoc Statistics Note](#), 8 September 2011

¹³ Note: figures for England & Wales and New Zealand are for 2010.

7. Further Reading

7.1 Commons Library Briefing Papers

The following is a selection of briefing papers produced by the House of Commons Library relating to civil legal aid:

- [Civil legal aid changes since 2013: the impact on people seeking help with legal problems](#)
- [Controversy in 2010-11 surrounding the Government's plans for legal aid reform](#)
- [Have changes to legal aid in England and Wales since 2013 created more "advice deserts"?](#)
- [Litigants in person: the rise of the self-represented litigant in civil and family cases in England and Wales](#)
- [No win, no fee funding arrangements](#)
- [Paying the statutory charge: legal aid in England and Wales](#)

7.2 Other

European Commission for the Efficiency of Justice (Council of Europe), [Evaluation of European Judicial Systems](#), various reports 2002/04-2012/14, [accessed 1 June 2016]

Ministry of Justice, [International Comparisons of Public Expenditure on Legally Aided Services, Ad hoc Statistics Note](#), 8 September 2011

Northern Ireland Assembly Research and Information Service, [Civil Legal Aid](#), 22 April 2013

Northern Ireland Assembly Research and Information Service, [Supplementary Briefing on Civil Legal Aid](#), 17 May 2013

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