



## BRIEFING PAPER

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# Legal aid for victims of domestic violence

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## Summary

This Commons Library briefing describes the availability of legal aid for private law children and family proceedings in England and Wales, as it may relate to people who have suffered domestic abuse.

It examines:

- Current eligibility criteria for civil legal aid
- The provision until April 2013 for legal aid for victims of domestic abuse, both for protection orders for domestic violence (and forced marriage) and more widely in private law children and family proceedings
- The changes introduced by the [Legal Aid, Sentencing and Punishment of Offenders Act 2012](#) (*LASPO Act 2012*) from 1 April 2013, with the removal of most private law children and family proceedings from the scope of legal aid and the introduction of the domestic violence “gateway”
- Commentary on how the gateway has operated in practice and whether victims of domestic abuse are receiving legal aid and
- The judgement of the Court of Appeal in February 2016, when it was held that the regulation requiring supporting documents in domestic abuse cases to be no more than 24 months old (at the time of applying for legal aid) was in principle invalid.

### **The Legal Aid, Sentencing and Punishment of Offenders Act 2012**

The *LASPO Act 2012* made wide-ranging changes to the scope and availability of civil legal aid in England and Wales. Its legal aid provisions came into force on 1 April 2013. Much of the detail of the current scheme is in regulations (secondary legislation).

The Act took most private law children and family proceedings out of scope for legal aid, but made provision for legal aid to continue to be available where there is evidence of domestic abuse. This is often called the domestic violence gateway. The range of evidence of domestic abuse to be accepted — although much discussed during the Bill’s passage — did not form part of the Act but has since been published in regulations. These regulations have subsequently been amended in the light of a Ministry of Justice (MoJ) review.

The Court of Appeal held in February 2016 that Regulation 33 of the [Civil Legal Aid \(Procedure\) Regulations 2012](#) - which deals with supporting documents in domestic abuse cases - was in principle invalid on two grounds, insofar that it required verifications of domestic violence to be given within a 24 month period before any application for legal aid and did not cater for victims of domestic violence who had suffered from financial abuse.

### **The domestic violence gateway**

Whether the gateway is enabling people who have experienced domestic abuse to access legal aid – or whether, conversely, vulnerable people are being left without such access – continues to be disputed.

[Critics of the changes](#) continue to argue that the gateway is too narrow, preventing victims of domestic abuse from obtaining the help that they need. [The MoJ, though, argues](#) that it has made it easier for victims of domestic violence to obtain legal aid, by adding to the range of evidence that will be accepted, and that this has contributed to a 19% rise in the number of grants awarded.

The Joint Committee on Human Rights, in its [report in February 2015](#) on violence against women and girls, reiterated its concerns about the potential impact of the evidence requirement on victims of domestic abuse who could not provide evidence of the specified types.

In its [report in March 2015](#) on the impact of the *LASPO Act 2012's* changes to civil legal aid, the Justice Committee noted that [Rights of Women](#) had said that (despite additions to the list of acceptable evidence) 39 per cent of women still had none of the acceptable forms of evidence. The Committee expressed concern that some victims of domestic abuse could not provide the requisite evidence and urged the creation of a “catch all clause”.

### **Should all victims of domestic violence be able to obtain legal aid?**

Recent remarks by justice minister Lord Faulks and an unnamed MoJ spokesperson suggest that there might have been some shift in the Ministry’s stance on whether all victims of domestic violence should be able to obtain legal aid.

The Government maintained throughout the passage of the Bill that became the *LASPO Act 2012* that the intention was not to provide legal aid to every victim of domestic violence; the then junior minister, Jonathan Djanogly (for example), said that the intention was not to make legal aid available to all victims of domestic violence, whatever the evidence for that abuse.

In February 2016, though, after the Court of Appeal ruling, a [MoJ spokesperson was quoted](#) as saying that they were determined that victims of domestic violence should be able to get legal aid “whenever they need it”. Lord Faulks [said the same](#) in the Lords in March 2016.

### **Controversy surrounding the *LASPO Act 2012's* reforms of legal aid**

This controversy is not new. The issue of legal aid for private law children and family cases involving domestic violence attracted controversy from the time that, in response to its public consultation on legal aid reform, the Government published its white paper and as the subsequent Bill (now the *LASPO Act 2012*) made its way through Parliament. Controversy continues about the effects of the Act and regulations in restricting access to legal aid, not just for people who have experienced domestic abuse.

Particular concerns and areas of controversy surrounding the *LASPO Act 2012's* impact on people seeking help with legal problems and on providers of legal aid, and the rise in the number of self-represented litigants (litigants in person) observed since the Act came into force, are discussed in other Commons Library briefings, available on Parliament’s [topic page for legal aid](#). Other briefings about domestic violence are available on the [topic page for crimes of violence](#).

# 1. Legal aid: the basics

Help with legal costs is available at different levels. The Citizens' Advice Bureau's Advice Guide [Legal system in England: Help with legal costs](#) explains the ways in which such help is offered:

If you need help with paying for legal advice, you may be able to get legal aid. You will have to meet the financial conditions for getting legal aid. In some cases, legal aid is free. In other cases, you may have to pay towards the cost.

Civil legal aid helps you pay for legal advice, mediation or representation in court with problems such as housing, debt and family.

The different types of civil legal aid

There are different types of legal aid which you can get which are:

- Legal Help – advice on your rights and options and help with negotiating
- Help at Court – someone speaks on your behalf at court, but does not formally represent you
- Family Mediation – helps you to come to an agreement in a family dispute after your relationship has broken down without going to court. It can help to resolve problems involving children, money and the family home
- Family Help – help or representation in family disputes like drawing up a legal agreement
- Legal Representation – representation at court by a solicitor or barrister
- Controlled Legal Representation – representation at mental health tribunal proceedings or before the First-tier Tribunal in asylum or immigration cases.<sup>1</sup>

The Commons Library briefing paper [Legal help: Where to go and how to pay](#) suggests some sources of such help.<sup>2</sup>

The Commons Library briefing paper [Civil legal aid changes since 2013: the impact on people seeking help with legal problems](#) provides some general information about the scope and eligibility requirements of legal aid.<sup>3</sup> It also examines the available evidence of the impact of the *LASPO Act 2012's* legal aid provisions, particularly the impact on clients, on those unable to access legal aid and on women and families.

The [civil legal aid eligibility calculator](#) on the Government's Justice website enables people seeking legal aid to check their financial eligibility.

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<sup>1</sup> Undated, accessed 13 April 2016

<sup>2</sup> SN 03207, 27 May 2015

<sup>3</sup> SN 06645, 14 January 2016

## 2. How does the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* provide for cases involving domestic abuse?

### 2.1 What was the previous provision for domestic abuse cases?

Under the civil legal aid system provided by the *Access to Justice Act 1999*, the only provision specific to victims of domestic abuse related to applications for a domestic violence (or forced marriage) “protection order”, such as a non-molestation order. These were civil orders designed to protect victims from abuse by placing restrictions on (for example) the type of contact an alleged perpetrator could have with the victim. For these cases, the legal aid rules were more generous than normal, with only a minimal merits test and a power to waive the standard financial eligibility limits.

The waiver applied only where a protective injunction was being sought and did not apply to other types of case in which a victim of domestic abuse might be involved. In practice, the Legal Services Commission (now replaced by the Legal Aid Agency (LAA)) would almost always exercise its discretion to waive the financial eligibility limits, but it had no power to waive any applicable contribution from income or capital which would be made under the usual criteria.<sup>4</sup>

The gov.uk website offers general guidance (updated 8 March 2016) on [domestic violence and abuse](#).

### 2.2 Protection orders

Paragraph 11 of Part 1 of Schedule 1 of the *LASPO Act 2012* (the 2012 Act) (family homes and domestic violence) provides for the provision of civil legal aid in relation to home rights and occupation and non-molestation orders. Paragraph 16 of Part 1 of Schedule 1 (forced marriage) similarly makes provision for forced marriage protection orders.

The [LASPO Act 2012](#) made no change to the provisions relating to protection orders.

### 2.3 Private law children and family cases: the domestic violence gateway

Section 9 of the 2012 Act provides (amongst other things) that civil legal services may be provided only if they are of a kind listed in Part 1 of Schedule 1 to the Act.

Paragraph 12 of Part 1 of Schedule 1 (victims of domestic violence and family matters) provides for the victim, but not the (alleged) perpetrator, to be eligible to receive legal aid thus:

A page on the Government’s Justice website (updated 6 August 2015) summarises the provisions for [legal aid for victims of domestic violence](#).

<sup>4</sup> See, for example, [HC Deb 25 January 2011 c200W](#)

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- (1) Civil legal services provided to an adult (“A”) in relation to a matter arising out of a family relationship between A and another individual (“B”) where
  - (a) There has been, or is a risk of, domestic violence between A and B, and
  - (b) A was, or is at risk of being, the victim of that violence.

Sub-paragraph 7(a) of the same paragraph defines a “family relationship” as where “two people ... are associated with each other” and sub-paragraph 9 defines domestic violence thus:

In this paragraph (...) “domestic violence” means any incident of threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other.

Various general exclusions apply.

The range of evidence of domestic abuse to be accepted in applications for legal aid in ancillary relief or private law children proceedings, although much discussed during the passage of the Bill that became the 2012 Act, does not form part of the Act but has subsequently been published in the [Civil Legal Aid \(Procedure\) Regulations 2012](#)<sup>5</sup>, as amended by the [Civil and Criminal Legal Aid \(Amendment\) Regulations 2015](#).<sup>6</sup>

A note by the MoJ sets out the [scope of family legal aid post-April 2013](#) and lists the evidence that must be submitted in applications involving domestic abuse.<sup>7</sup>

### 2.4 Spouses seeking indefinite leave to remain under the domestic violence rule

Paragraph 28 of Part 1 of Schedule 1 (immigration: victims of domestic violence and indefinite leave to remain) makes provision for legal aid in cases where a person who was granted leave to enter or remain in the UK as the spouse or partner of a person present and settled here is seeking indefinite leave to remain after the relationship has broken down because of domestic violence.

### 2.5 Cross-government definition of domestic violence and abuse

In September 2012, the then Deputy Prime Minister, Nick Clegg, announced that a new definition of domestic violence and abuse was to be adopted across government. It would include (amongst other things) “coercive control” and would cover 16 and 17 year olds.<sup>8</sup> The

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<sup>5</sup> SI 2012/3098: regulation 33 deals with supporting documents for domestic violence cases.

<sup>6</sup> SI 2015/1416

<sup>7</sup> Ministry of Justice, *Family Legal Aid Post April 2013* (undated), available on the website of Resolution (formerly the Solicitors Family Law Association)

<sup>8</sup> Deputy Prime Minister, [New definition of domestic violence and abuse to include 16 and 17 year olds](#), 19 September 2012

definition did not form part of the 2012 Act but was published in a Home Office circular in February 2013.<sup>9</sup> The definition of domestic violence in the *LASPO Act 2012* has been amended to reflect the new cross-government definition.

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<sup>9</sup> Home Office Circular 003/2013, [Circular: new government domestic violence and abuse definition](#), 14 February 2013

### 3. What has happened since the Act came into effect on 1 April 2013?

The question of what happens to victims of domestic violence who cannot access legal aid remains contentious.<sup>10</sup> Critics of the changes continue to argue that the domestic violence gateway for legal aid is too narrow, preventing victims of domestic abuse from obtaining the help that they need.<sup>11</sup> [The MoJ, though, argues](#) that it has made it easier for victims of domestic violence to obtain legal aid, by adding to the range of evidence that will be accepted, and that this has contributed to a 19% rise in the number of grants awarded.<sup>12</sup>

#### 3.1 How has the gateway operated in practice?

The Government maintained throughout the passage of the Bill that became the *LASPO Act 2012* that the intention was not to provide legal aid to every victim of domestic violence. In (for example), a discussion at Report stage of whether the definition of domestic violence in the Bill should match that used by the Association of Chief Police Officers (ACPO), Jonathan Djanogly said that the intention was not to make legal aid available to all victims of domestic violence, whatever the evidence for that abuse; ACPO's definition had a different purpose as it sought to cast the operational net wide, to capture behaviour that ought to be investigated.<sup>13</sup>

It was reported in June 2014 that the Public Law Project and Rights of Women were seeking to challenge the lawfulness of the changes to legal aid relating to domestic violence, on the basis that the regulations did not give effect to Parliament's intentions in the 2012 Act.<sup>14</sup> The High Court rejected the challenge in January 2015.<sup>15</sup> The judgement of the Court of Appeal in February 2016 is discussed later (in section 3.3).

The Joint Committee on Human Rights, in its [report in February 2015](#) on violence against women and girls, reiterated its concerns about the potential impact of the evidence requirement on victims of domestic abuse who could not provide evidence of the specified types. In its

<sup>10</sup> For a discussion of the controversy see (for example) [UK Human Rights Blog, Catch-33: Stringent documentary requirements upheld for legal aid in domestic violence cases - Vanessa Long and Adam Smith](#), 28 January 2015.

<sup>11</sup> See, for example, Mary O'Hara, ['Women will die' as legal aid becomes more difficult for victims of domestic abuse to get](#), *Guardian* online, 10 September 2014

<sup>12</sup> See, for example, Monidipa Fouzder, ["Court rules domestic violence legal aid time limit invalid"](#), *Law Society Gazette*, 16 February 2016

<sup>13</sup> [HC Deb 31 October 2011 c640](#)

<sup>14</sup> See, for example, Catherine Baksi ["Bid to save legal aid for domestic violence victims"](#), *Law Society Gazette*, 11 June 2014 and Rights of Women ["High Court to hear Rights of Women's legal challenge to restore access to legal aid for victims of domestic violence"](#), 19 September 2014

<sup>15</sup> Monidipa Fouzder, ["Domestic violence challenge on legal aid fails"](#), *Law Society Gazette*, 22 January 2015

conclusions and recommendations, it drew attention to the problems that some victims of domestic abuse might face:

We welcome the provision that those who can provide evidence of domestic violence continue to have access to legal aid for civil cases because this enables access to the family and other civil courts. We have concerns, however, about the problems some women face in providing such evidence, and the feasibility of victims of coercive control or women who may find it difficult to get out of the immediate community being able to provide such evidence.<sup>16</sup>

In its [report in March 2015](#), the Justice Committee examined the workings of the gateway. It noted that Rights of Women had welcomed the additions to the types of evidence accepted as indicative of domestic violence, but still believed they did not go far enough: 39 per cent of women still had none of the acceptable forms of evidence. Similarly, Women's Aid had told the Committee that emotional, psychological and financial abuse could be hard to evidence. The Committee expressed concern that some victims of domestic abuse could not provide the requisite evidence and urged the creation of a "catch all clause":<sup>17</sup>

67. (...) We note with concern the evidence from the Rights of Women survey suggesting 39% of women who were victims of domestic violence had none of the forms of evidence required to qualify for legal aid. Any failure to ensure that victims of domestic violence can access legal aid means the Government is not achieving its declared objectives.

68. We welcome the Ministry of Justice's commitment to keeping the types of evidence required to qualify for the domestic violence gateway under review and recommend the introduction of an additional 'catch-all' clause giving the Legal Aid Agency discretion to grant legal aid to a victim of domestic violence who does not fit within the current criteria.<sup>18</sup>

In July 2015, Catherine West suggested that women survivors of domestic violence were being repeatedly brought to court by their former partners, because they lacked legal representation. In reply, junior Home Office minister Karen Bradley said that the Government was determined that victims and survivors should be treated with dignity.<sup>19</sup>

## 3.2 Are victims of domestic abuse receiving legal aid?

In response to a PQ in November 2013, junior minister Shailesh Vara said that the majority of people applying for legal aid on the basis of the

<sup>16</sup> Joint Committee on Human Rights, [Violence against women and girls](#), 19 February 2015, HL Paper 106/HC 594

<sup>17</sup> 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, HC 311 2014-5: Page 27

<sup>18</sup> *Ibid.* Pages 27-8

<sup>19</sup> [HC Deb 6 July 2015 c21](#)

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domestic violence evidence requirement were receiving it, but there would be a review:

Although too early to have a definitive picture, latest figures from the Legal Aid Agency show that legal aid is granted to the majority of people who apply for legal aid on the basis of the domestic violence evidence requirements.

During debate on the regulations on 27 March 2013, Official Report, House of Lords, column 1114, we committed to monitor and review the operation of the requirement for evidence.

We expect this review to be completed early in the New Year, following engagement with stakeholders.<sup>20</sup>

In contrast to the minister's claim, the campaigning organisations Rights of Women, Women's Aid and Welsh Women's Aid published their own findings, which suggested that many victims of domestic violence were now unable to obtain legal aid because (amongst other reasons) they could not provide evidence of domestic abuse of the type prescribed in the regulations:

- 43% of women responding to the survey who had experienced or were experiencing domestic violence did not have the prescribed forms of evidence to access family law legal aid.
- Of those who did have evidence the most common forms were evidence from a health professional, of referral to a MARAC<sup>21</sup> and an assessment by social services.
- 33% of respondents were having to travel between 5 and 15 miles to find a legal aid solicitor. 13% had to travel more than 15 miles.
- 23% of respondents had to wait longer than 2 weeks to get copies of their evidence.
- 46.5% of respondents took no action in relation to their family law problem as a result of not being able to apply for legal aid. 32.1% paid a solicitor privately and 25% represented themselves at court.<sup>22</sup>

Similarly, the All Party Parliamentary Group on Domestic and Sexual Violence reported in March 2014 that the majority of respondents to its survey had concerns about the impact of the cuts to legal aid on women survivors' access to justice. Although the figures quoted were different, the general pattern of (for example) respondents not pursuing family law problems because they could not apply for legal aid was broadly similar:

- Half of all women in both surveys who had experienced or were experiencing domestic violence did not have the prescribed forms of evidence to access family law legal aid.
- 16.7% of respondents to our survey had to pay over £50 to obtain copies of the required evidence.

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<sup>20</sup> [HC Deb 28 November 2013 cc411-2W](#)

<sup>21</sup> Multi Agency Risk Assessment Conference

<sup>22</sup> Welsh Women's Aid, Rights of Women, Women's Aid, [Evidencing domestic violence: a year on](#), March 2014

- 60.5% of respondents took no action in relation to their family law problem as a result of not being able to apply for legal aid. 23.7% paid a solicitor privately and 15.8% represented themselves at court.<sup>23</sup>

### 3.3 The list of evidential requirements

#### Additions to the list

A guidance document published by the LAA in June 2014 confirmed that the review had resulted in the revision of the [Civil Legal Aid \(Procedure\) Regulations 2012](#), adding further types of evidence to the list.<sup>24</sup>

*Family Law Week* identified the additions to the list of evidential requirements and the welcome they had received:

New evidence that can be used to access legal aid for women affected by violence includes evidence of police bail for a domestic violence offence, a Domestic Violence Protection Order, evidence of referral to domestic violence support services from a health professional and evidence of not being able to access refuge accommodation.

Women's Aid, Rights of Women and Welsh Women's Aid have warmly welcomed the widening of the evidence criteria for legal aid as it will enable more women survivors of domestic violence to access the legal aid that they are entitled to.<sup>25</sup>

#### Time limit for evidence

Another controversial aspect of the evidence requirement is that some of the evidence must relate to incidents that took place within the previous two years. The LAA guidance document explains the requirement in more detail, including how the two year period is calculated:

Some of the prescribed forms of evidence must relate to incidents within the twenty four month period immediately preceding the date of the application for civil legal services. This time period applies from the date the application for civil legal services is made. However, where a client already has a certificate for a Family Help Higher matter and is applying for Legal Representation at the final hearing in the same proceeding, further evidence is not required even if the original evidence is more than 24 months old. But, valid evidence will still be required for any application for new proceedings to be added to the certificate.<sup>26</sup>

<sup>23</sup> Siân Hawkins and Claire Laxton, *Women's access to justice: from reporting to sentencing*, All Party Parliamentary Group on Domestic and Sexual Violence, March 2014, page 40

<sup>24</sup> SI 2012/3098, as amended by the [Civil and Criminal Legal Aid \(Amendment\) Regulations 2015](#) (SI 2015/1416). See also LAA, [The Legal Aid, Sentencing and Punishment of Offenders Act \(LASPO\) 2012 - Evidence Requirements for Private Family Law Matters](#), 18 June 2014

<sup>25</sup> "[Women's charities welcome new legal aid evidence criteria for domestic violence survivors](#)", *Family Law Week*, 1 April 2014

<sup>26</sup> LAA, [The Legal Aid, Sentencing and Punishment of Offenders Act \(LASPO\) 2012 - Evidence Requirements for Private Family Law Matters](#), 18 June 2014, paragraph 1.9

In June 2015, the minister of state in the Lords, Lord Bates, prompted by a question from Baroness Gale, undertook to look again at this aspect of the requirement.<sup>27</sup>

### Court of Appeal judgement on the time limit for evidence

In February 2016, the Court of Appeal held that Regulation 33 of the [Civil Legal Aid \(Procedure\) Regulations 2012](#), which deals with supporting documents in domestic abuse cases, was in principle invalid on the grounds that:

- it required evidence of domestic violence to be given within a 24 month period before any application for legal aid and
- it did not cater for victims of domestic violence who had suffered financial abuse.<sup>28</sup>

The *Law Society Gazette* reported the welcome to the ruling given by Rights of Women, Resolution and the Law Society:

Rights of Women director Emma Scott said today's 'important' judgment meant more women affected by violence will have access to advice and representation in the family courts.

(...)

Society president Jonathan Smithers said: 'The LASPO legal aid cuts have resulted in radical consequences for access to justice with the worst impact affecting the poorest and most vulnerable sectors of society. Survivors of domestic violence should not be subjected to the over-strict tests required by the regulations as they now stand.

'This ruling means that access to safety and justice will no longer be denied to the very people the government expressly sought to protect with its amendments to the regulations.'

Scott said Rights of Women 'look forward to working with the MoJ on amendments to the regulations to ensure that women affected by all forms of domestic violence are able to get legal aid'.

Family lawyers' group Resolution said its members were 'proud to help Rights of Women provide evidence that illustrates that the current rules are flawed'.

National chair Jo Edwards said: 'We look forward to working with the government and our partners to make the changes necessary to ensure more victims of domestic abuse have access to family legal aid.'<sup>29</sup>

The article also reported the comments of the MoJ, which welcomed the court's judgement that the Lord Chancellor could set evidence requirements. The MoJ spokesperson said that the Ministry was determined that victims of domestic violence should get legal aid "whenever they need it":

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<sup>27</sup> [HL Deb 16 June 2015 c107](#)

<sup>28</sup> [Queen on the application of Rights for Women v The Lord Chancellor – Judgment \[2016\] EWCA Civ 91 Case No: C1/2015/0459](#): paragraphs 51-3

<sup>29</sup> Monidipa Fouzder, "[Court rules domestic violence legal aid time limit invalid](#)", *Law Society Gazette*, 16 February 2016

A spokesperson for the Ministry of Justice said it was 'pleased' that the court 'confirmed the Lord Chancellor did have the power to set domestic violence evidence requirements.'

The ministry will 'now carefully consider the two findings made about the period of time for which evidence applies and concerns about victims of financial abuse'.

The spokesperson added: 'We are determined to ensure victims of domestic violence can get legal aid whenever they need it.'

'We have made it easier for victims of domestic violence to obtain legal aid, by ensuring a broader range of evidence qualifies. This has contributed to a 19% rise in the number of grants awarded.'<sup>30</sup>

Shortly after this, Rights of Women outlined the possible implications of the judgement and what they expected to see in response to it:

### **The two year time limit on evidence**

The list of domestic violence evidence set out in the legal aid regulations is no longer subject to a 24 month time limit. Any of the forms of evidence on the current list should be accepted by the Legal Aid Agency without any time limit as to when it was obtained or when it arose.

### **Evidence of financial abuse**

The Ministry of Justice must add a form or forms of evidence to the list of domestic violence evidence which will allow victim/survivors of financial abuse to apply for family law legal aid. We are working with them to look at what forms of evidence are realistically available for financial abuse and will update you as soon as we have more information.

In the meantime victim/survivors of financial abuse applying for family law legal aid should submit any evidence they are able to obtain to show they have experienced financial abuse and ask the Legal Aid Agency to accept it. If they refuse, their decision can be challenged and you should seek legal advice.<sup>31</sup>

In the Lords last month, justice minister Lord Faulks said that the Government was considering how to respond to the judgement. He too said that the Government was determined that victims of domestic violence should have access to legal aid whenever they need it:

We are pleased the court confirmed that the Lord Chancellor did have the power to set domestic violence evidence requirements. We are now carefully considering the judgment as we decide how best to respond to the court's concerns. We are determined to make sure victims of domestic violence can get legal aid whenever they need it.<sup>32</sup>

These remarks by Lord Faulks and the unnamed MoJ spokesperson might therefore seem to suggest that there has been some shift in the Ministry's stance on whether all victims of domestic violence should be able to obtain legal aid. (As noted earlier, the Government maintained

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<sup>30</sup> Monidipa Fouzder, "[Court rules domestic violence legal aid time limit invalid](#)", *Law Society Gazette*, 16 February 2016

<sup>31</sup> Rights of Women, [Our appeal: what does it mean in practice?](#), 7 March 2016

<sup>32</sup> [PQ HL6326, 8 March 2016](#)

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throughout the passage of the Bill that the intention was not to provide legal aid to every victim of domestic violence).

Earlier this month, in response to a question about what interim steps the MoJ was taking for victims of domestic abuse whose evidence was more than 24 months old, justice minister Mike Penning said that the department was “carefully considering” the judgement and would make a further announcement “in due course”.<sup>33</sup>

## 4. Policy background and debate on the proposals leading to the *LASPO Act 2012*

From the publication of the consultation (green) paper in November 2010 onwards, the coalition government's plans to reform civil legal aid provoked controversy. Two questions in particular proved contentious:

- what is meant by “domestic violence” or “domestic abuse” and
- however abuse is defined, how can or should it be evidenced for the purposes of qualifying for legal aid?

### 4.1 Reform of legal aid: what did the consultation (green) paper propose?

A consultation (green) paper on reform of legal aid was published in November 2010.<sup>34</sup>

One plank of the MoJ's approach to reform was to dissuade people from going to court too readily at the taxpayer's expense and instead to encourage them to seek alternative methods of dispute resolution.<sup>35</sup> The scope of legal aid (it argued) was now too wide.<sup>36</sup> The MoJ considered where issues sat on a “spectrum of objective importance”. Other factors which the MoJ considered in drawing up its proposals included the litigant's ability to present their own case and the availability of alternative sources of funding and of other routes to resolution.<sup>37</sup>

#### Protection orders for domestic violence and forced marriage

Because of the vulnerability of the client group, protection orders for domestic violence (and forced marriage) were among the areas that the MoJ proposed to keep within scope for legal aid. Thus the consultation paper proposed no change. It did not offer any definition of domestic violence, although it did refer to **abusive relationships** and to **physical harm**.<sup>38</sup>

<sup>34</sup> MoJ, [Proposals for the reform of legal aid in England and Wales](#) Cm7967, November 2010. Library briefing paper SN 05840 on [Legal aid: controversy surrounding the Government's plans for reform](#) (26 January 2011) looks more broadly at the consultation paper and its proposals.

<sup>35</sup> MoJ, [Proposals for the reform of legal aid in England and Wales](#). Cm7967, November 2010: Introduction

<sup>36</sup> *Ibid.* para 2.7

<sup>37</sup> *Ibid.* paras 4.22 – 4.29

<sup>38</sup> *Ibid.* para 4.64

## Private law children and family cases

The consultation paper proposed to take most private family law cases (generally cases involving child contact or financial issues arising from separation) out of scope for legal aid.<sup>39</sup>

Although the MoJ considered that legal aid was not normally justified for ancillary relief (financial provision) or private law family and children proceedings, different considerations applied where there was an “ongoing risk of physical harm from domestic violence” and where clients might be unable to assert their rights. Because of the difficulty victims might have in making their case in person against their abuser in court, the consultation paper therefore offered an exception for private law family cases involving victims of domestic violence (that is, where legal aid would not normally be available).<sup>40</sup>

For cases which would otherwise fall outside scope, there would be a new scheme for exceptional funding, providing legal aid where the Government was satisfied that it was necessary to fulfil domestic and international legal obligations, especially those under the European Convention on Human Rights.<sup>41</sup>

## What evidence would be required to qualify for private family legal aid?

As domestic violence would be the basis for the exception to the usual rule of not funding private law children and family cases, for these cases (but not, as already noted, for domestic violence protection cases) the consultation paper proposed four instances where it would be accepted that there was, in the MoJ’s words, “clear” and “objective” evidence of domestic violence for the purposes of legal aid. In the first two of these instances, the evidence would have to relate to the previous 12 months:

- where the LSC was funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant for legal aid
- where there were ongoing domestic violence (or forced marriage) proceedings brought by the applicant for legal aid, where the applicant had funded proceedings privately or had acted as a litigant in person
- where there was a non-molestation order, occupation order, forced marriage protection order or other protective injunction in place against the applicant’s ex-partner (or in the case of forced marriage, against any other person); and
- where the applicant’s partner had been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction was spent).<sup>42</sup>

The consultation paper invited views on whether there were any other circumstances which should be accepted as such evidence.

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<sup>39</sup> MoJ, [Proposals for the reform of legal aid in England and Wales](#), Cm7967, November 2010: paras 4.205 – 4.215

<sup>40</sup> *Ibid.* paras 4.154ff and 4.205ff

<sup>41</sup> *Ibid.* para 4.34

<sup>42</sup> *Ibid.* para 4.64 – 4.68

## 4.2 Reaction to the consultation paper's proposals

The way in which the Government's proposed reforms to legal aid would or would not affect cases involving domestic abuse, and the perceived narrowing of the extent of the domestic violence provisions, proved particularly controversial. In some of the controversy, there appeared to be some confusion between the proposal on legal aid for domestic violence protection cases (for which legal aid would remain unchanged) and the proposal to keep legal aid for private family law cases, for which evidence of domestic abuse would be required to qualify for legal aid.

The consultation paper attracted more than 5000 responses and it was reported in the legal press that the MoJ was looking again at the definition of domestic violence, in the light of the concerns expressed.<sup>43</sup>

In its [report on the Government's proposals for reform](#), the Justice Committee pointed to some of the concerns about the definition of domestic abuse that witnesses — including the President of the Family Division, Sir Nicholas Wall — had drawn to their attention. The Committee called on the Government to reconsider its plan to use domestic violence as a gateway to legal aid funding or, failing that, at least to ensure that the definition of domestic violence encompassed non-physical abuse.<sup>44</sup>

The question of how domestic abuse should be defined for legal aid was also raised several times in the House of Commons and was debated at length in December 2010, during a Westminster Hall debate initiated by Karen Buck (Labour).<sup>45</sup> In replying to the debate, the Solicitor General at the time, Edward Garnier, averred that legal aid was "an acutely difficult area of public policy" and difficult choices lay ahead.<sup>46</sup>

### Amended proposals in response to the consultation

The report published as the [Government's response to the consultation](#) argued that the MoJ had not sought to create a new definition of domestic violence. It went on to explain how the criteria for applications in private family law cases alleging domestic violence would be expanded, with the addition of three new criteria:

23. (...) As with the original proposals, only one of these criteria would need to be met:

- there are ongoing criminal proceedings for a domestic violence offence by the other party towards the applicant for funding;
- the victim has been referred to a Multi-Agency Risk Assessment Conference (as a high risk victim of domestic

<sup>43</sup> Catherine Baksi, "[Pressure prompts review of 'domestic violence' legal aid definition](#)" *Law Society Gazette*, 21 March 2001

<sup>44</sup> Justice Committee *Government's proposed reform of legal aid* HC 681 2010-11, 30 March 2011: pages 37-9

<sup>45</sup> [HC Deb 14 December 2010 c193WH](#)

<sup>46</sup> [HC Deb 14 December 2010 c210-2WH](#)

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violence) and a plan has been put in place to protect them from violence by the other party; or

- there has been a finding of fact in the family courts of domestic violence by the other party giving rise to the risk of harm to the victim, but the victim has not already been granted legal aid.

One of the original criteria – where there were ongoing proceedings for a domestic violence order (such as a non-molestation order or an occupation order) or forced marriage protection order, but an order had not yet been made – would, though, be discarded.

The evidence for the additional criteria would, the MoJ reiterated, have to relate to the previous 12 months.<sup>47</sup>

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<sup>47</sup> MoJ [\*Reform of Legal Aid in England and Wales: the Government Response\*](#). Cm 8072, June 2011: pages 15-16

## 5. The *Legal Aid, Sentencing and Punishment of Offenders Bill*: further reading

The *Legal Aid, Sentencing and Punishment of Offenders Bill* had its first reading in the House of Commons on 21 June 2011, as Bill 205 of 2010-12, and had its second reading on 29 June 2011.

Further information about the Bill can be found in

- [Library Research Paper 11/53](#), prepared for the second reading of the Bill<sup>48</sup>
- [Library Research Paper 11/70](#) (the Committee Stage Report).<sup>49</sup>
- [House of Lords Library Note LLN 2011/035](#), prepared for the Bill's second reading in the Lords on 21 November 2011<sup>50</sup> and
- [Commons Library briefing SN 06293](#), which discusses the Lords amendments. None of the Lords amendments were in the end agreed.<sup>51</sup>
- The Government's [Explanatory Notes](#) for the Bill.
- The [Bill page](#) on the Parliament website (where all the Bill documents, including more recent Explanatory Notes, can be found)

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<sup>48</sup> *Legal Aid, Sentencing and Punishment of Offenders Bill*, House of Commons Library research paper 11/53, 4 July 2011 (amended 15 September 2011)

<sup>49</sup> *Legal Aid, Sentencing and Punishment of Offenders Bill*, House of Commons Library research paper 11/70, 20 October 2011

<sup>50</sup> *Legal Aid, Sentencing and Punishment of Offenders Bill (HL Bill 109 of 2010–12) - Lords Library Note LLN 2011/035*, 15 November 2011

<sup>51</sup> *Legal Aid, Sentencing and Punishment of Offenders Bill – Lords amendments SN/HA/6293* 11 April 2012

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