



## BRIEFING PAPER

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# Civil legal aid changes since 2013: the impact on people seeking help with legal problems

By Gabrielle Garton  
Grimwood

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## Summary

Long before the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*'s legal aid provisions came into effect on 1 April 2013, they had attracted a great deal of controversy.

In very broad terms, the coalition Government argued repeatedly that it had to make savings from the legal aid budget in England and Wales. Although it was focusing on those in greatest need and keeping the most pressing cases (such as those where the person faces an immediate risk of homelessness) in scope, it wished nonetheless to discourage cases from coming to court when they might better be resolved by other means, such as other forms of advice or mediation. Critics of the changes, on the other hand, argued that they would have a disproportionate effect on the poor and the vulnerable, who may have nowhere else to turn.

The 2012 Act removed many areas of law from the scope of civil legal aid in England and Wales.

This note therefore offers an overview of the available evidence of the impact of the Act's legal aid provisions, particularly the impact on people seeking help with legal problems, on those unable to access legal aid and on women and families.

Commentators such as the National Audit Office and Commons Public Accounts and Justice Committees agree that the changes have reduced spending on civil legal aid, but have questioned whether they have increased costs elsewhere in the legal system and have drawn attention to the increased difficulties that people may face in obtaining help with legal problems. Whether legal aid spending in fact allows the state to save money elsewhere is also the matter of some debate.

Particular issues surrounding the availability of legal aid for victims of domestic abuse, the 2012 Act's impact on providers of legal aid and the rise in the number of self-represented litigants (litigants in person) observed since the 2012 Act came into force are discussed in other Commons Library briefings, available on Parliament's [topic page for legal aid](#).

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

The Public Accounts Committee (PAC) has published a [report on implementing reforms to civil legal aid](#).<sup>1</sup> The National Audit Office (NAO) published its [report on changes to civil legal aid](#) in November 2014.<sup>2</sup>

Further briefing about recent developments in legal aid is available in the Lords Library briefing note prepared for the December 2015 debate on [the future of legal aid](#).<sup>3</sup>

The legal aid provisions of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (the 2012 Act) came into effect on 1 April 2013.

## 1.1 Civil legal aid since 1 April 2013: the basics

The 2012 Act made significant changes to civil legal aid, not only by amending some of the financial eligibility criteria but also (and even more controversially) by taking many areas of civil and family law out of scope.

To be eligible for legal aid in a civil case, an applicant must pass three tests:

- the case must be within scope for legal aid
- the applicant must have a 50:50 (or thereabouts) prospect of winning the case (this is the merits test) and
- the applicant must fulfil the financial eligibility criteria.

## 1.2 Why did the Government make these changes?

In putting forward its proposals for the reform of legal aid, the Ministry of Justice (MoJ) consistently argued the need to re-examine the nature and scope of legal aid funding. It argued that expenditure in England and Wales was higher than that in most other countries; that, at a time of financial constraint, people ought to be discouraged from taking matters to court when there might be simpler and cheaper methods of resolving their disputes; legal aid should be targeted at those who needed it most; and there should be better overall value for the taxpayer.<sup>4</sup>

<sup>1</sup> PAC, [Implementing reforms to civil legal aid](#), 4 February 2015, HC 808 2014-5

<sup>2</sup> NAO, [Implementing Reforms To Civil Legal Aid](#), 20 November 2014, HC 784 2014- 15

<sup>3</sup> LLN 2015/048, 7 December 2015

<sup>4</sup> For a fuller description of the Government's position and the reaction to it, see section 2 of [Library Research Paper 11/53](#), *Legal aid, Sentencing and Punishment of Offenders Bill*, 4 July 2011, prepared for the second reading of the Bill.

### 1.3 Narrowing the scope of civil legal aid: the “spectrum of objective importance”

Perhaps the biggest impact of the 2012 Act’s legal aid provisions has been the removal of whole tracts of law from the scope of civil legal aid. Whereas, until then, any type of case would be within scope for legal aid unless it was part of a (relatively short) list of exclusions, with the coming into force of the 2012 Act, 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).

The MoJ’s proposals for changing the scope of legal aid had been set out in chapter 4 of the consultation (green) paper in November 2010. No change was proposed then for criminal legal aid, but changes would (the MoJ proposed) be made to legal aid for civil and family matters.

The MoJ considered where issues sat on a “spectrum of objective importance”. At the highest end were cases where the individual’s life or liberty was at stake or they were at risk of serious physical harm or they faced intervention by the state in their family affairs, which could result in their children being removed from their care. Other important cases were those where the individual might lose their home and judicial review cases. On the other hand, proceedings where individuals were primarily seeking monetary compensation were not considered to warrant public funding, unless there was another aspect to the claim. The choices of the individual (and the degree of their control over the matter of dispute) might also, the MoJ considered, be relevant:<sup>5</sup>

Other factors which the MoJ considered 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>6</sup>

### 1.4 The scope of civil legal aid since 1 April 2013

Following publication of the consultation (green) paper and during the passage of the Bill, the narrowing of scope of civil legal aid attracted much controversy and debate. Nonetheless, with the exception of special educational needs and clinical negligence in the case of neurological injury to infants, none of the areas proposed for removal from scope was reinstated and so the cuts were made almost exactly as the MoJ envisaged.<sup>7</sup>

An article in *Legal Action* (the journal of the Legal Action Group) offers a useful summary of the remaining scope of civil legal aid:

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<sup>5</sup> Ministry of Justice [Proposals for the reform of legal aid in England and Wales](#) Cm7967, November 2010: paras 4.14 - 4.15

<sup>6</sup> *Ibid.* paras 4.22 – 4.29

<sup>7</sup> For a brief discussion of the concessions made by the Ministry of Justice in response to the consultation (green) paper, see page 11 of [Library Research Paper 11/53](#).



Category	Type of work
<b>Actions against the police etc</b>	<ul style="list-style-type: none"> <li>• Where the defendant is a public authority with the power to detain, imprison or prosecute:               <ul style="list-style-type: none"> <li>○ Abuse of a child or vulnerable adult</li> <li>○ Significant breach of human rights advice to victims of sexual offences</li> </ul> </li> </ul>
<b>Clinical negligence</b>	<ul style="list-style-type: none"> <li>• Neurological injury to infants causing severe disablement and which happened in the womb, during birth or up to eight weeks after birth</li> </ul>
<b>Community care</b>	<ul style="list-style-type: none"> <li>• The provision of community care services and of facilities for disabled persons</li> </ul>
<b>Debt</b>	<ul style="list-style-type: none"> <li>• Mortgage arrears and possession</li> <li>• Orders for sale of the home</li> <li>• Involuntary bankruptcy where the home is included in the estate</li> </ul>
<b>Discrimination</b>	<ul style="list-style-type: none"> <li>• Contravention of the Equality Act 2010 or a previous discrimination statute (a prescribed list is given at LASPO Act Sch 1 para 43(3))</li> </ul>
<b>Education</b>	<ul style="list-style-type: none"> <li>• Special educational needs</li> </ul>
<b>Family</b>	<ul style="list-style-type: none"> <li>• Public law children work:               <ul style="list-style-type: none"> <li>○ Child care and supervision</li> <li>○ Secure accommodation orders</li> <li>○ Adoption</li> <li>○ Child abduction and unlawful removal within England and Wales</li> <li>○ Inherent jurisdiction</li> <li>○ Forced marriage protection</li> <li>○ Domestic abuse and protection from harassment</li> <li>○ Enforcement of international child maintenance</li> <li>○ Private law children work and financial provision on relationship breakdown, but only where there is documentary evidence of domestic abuse</li> </ul> </li> </ul>
<b>Housing</b>	<ul style="list-style-type: none"> <li>• Possession of a rented home (including counterclaims in possession proceedings even if they would be out of scope as a stand-alone claim)</li> <li>• Unlawful eviction: both injunction and damages</li> <li>• Homelessness</li> <li>• Allocations where the client is homeless, or threatened with homelessness</li> <li>• Provision of accommodation by way of community care services (overlap with the community care category (see above))</li> <li>• 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</li> </ul>

<b>Immigration and asylum</b>	<ul style="list-style-type: none"> <li>• Where the repairs are carried out, any remaining damages claim drops out of scope and funding will end</li> <li>• Anti-social behaviour</li> <li>• Protection from harassment</li> <li>• Accommodation and support for asylum-seekers</li> <li>• Asylum</li> <li>• Detention (but only advice on the detention and bail, not on the substantive issue unless independently in scope) and residence restrictions pending deportation</li> <li>• Applications for leave to remain under the domestic violence rule</li> <li>• Applications for leave by victims of trafficking</li> <li>• Terrorism prevention and investigation measures</li> <li>• Proceedings before the Special Immigration Appeals Commission</li> <li>• Judicial review, but not             <ul style="list-style-type: none"> <li>○ where the same issue has been the subject of a previous judicial review or appeal within the last year</li> <li>○ of removal directions where the substantive decision or appeal was made in the last year</li> <li>○ of a negative decision on an asylum application where there is no right of appeal to the tribunal</li> </ul> </li> </ul>
<b>Mental health</b>	<ul style="list-style-type: none"> <li>• Services in relation to the <i>Mental Health Act 1983</i>, the <i>Mental Capacity Act 2005</i> and para 5(2) of the Schedule to the <i>Repatriation of Prisoners Act 1984</i></li> </ul>
<b>Miscellaneous</b>	<ul style="list-style-type: none"> <li>• Working with children and vulnerable adults</li> <li>• Protection from harassment where not arising from a family or housing relationship</li> <li>• Proceeds of crime</li> <li>• Environmental pollution</li> <li>• Advice to victims of sexual offences</li> <li>• Abuse of child or vulnerable adult except where in the actions against the police, etc category</li> <li>• Damages claims by victims of trafficking</li> <li>• Gang-related violence injunctions</li> </ul>
<b>Public law</b>	<ul style="list-style-type: none"> <li>• Human rights and public law challenges</li> </ul>
<b>Welfare benefits</b>	Upper Tribunal cases, cases in the Court of Appeal, Supreme Court and judicial review only

Source: Vicky Ling and Simon Pugh "[Continuing life under the LASPO Act](#)" *Legal Action*, April 2013 (subscription required)

## 1.5 Is the case winnable? The merits test

The [Civil Legal Aid \(Merits Criteria\) Regulations 2013](#) provided for the merits criteria which the Director of Legal Aid Casework at the Legal Aid Agency (LAA) 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.<sup>8</sup> The MoJ also published an [Explanatory Memorandum](#).

The MoJ, though, wanted to see further change and in its consultation paper [Transforming legal aid: delivering a more credible and efficient system](#) argued that the merits test was not stringent enough. Echoing Regulation 5, the paper set out how the test currently operated. The issue in contention was the “borderline” category; 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:

3.85 Cases must generally have at least a 50% chance of success to receive legal aid funding for full representation (i.e. must have a moderate or better prospects of success). However, there are certain types of housing or family cases which will receive funding with borderline prospects of success. In other cases funding will be available if there is a borderline prospect of success and the case has special features (that is to say it is a case of significant wider public interest or a case with overwhelming importance to the individual). Funding may also be granted in public law claims, claims against public authorities and certain immigration and family claims which have these special features or if the substance of the case relates to a breach of ECHR rights.<sup>9</sup>

The [Civil Legal Aid \(Merits Criteria\) \(Amendment\) Regulations 2014](#) removed borderline cases from scope.<sup>10</sup> The regulations were amended again in July 2015, following a successful legal challenge, which means that 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.<sup>11</sup>

## 1.6 Financial eligibility criteria

The [Civil Legal Aid \(Financial Resources and Payment for Services\) Regulations 2013](#) set out the rules on financial eligibility.<sup>12</sup> The [Explanatory Memorandum](#) summarises the main changes from the previous regulations, relating to so-called “passporting” benefits, the disregard of the value of the subject matter of the dispute and the level of income-based contributions:

7.5 First, under these Regulations, individuals in receipt of certain benefits are automatically deemed to satisfy the income

<sup>8</sup> SI 2013/104

<sup>9</sup> Consultation paper CP14/2013, 9 April 2013: page 34

<sup>10</sup> SI 2014/131

<sup>11</sup> [The Civil Legal Aid \(Merits Criteria\) \(Amendment\) \(No. 2\) Regulations 2015](#) (SI 2015/1571). See also LAA, [Civil news: civil legal aid merits regulations amended](#), 31 July 2015

<sup>12</sup> SI 2013/480, with some subsequent amendment relating to 2007 Hague Convention cases in the [Civil Legal Aid \(Financial Resources and Payment for Services\) \(Amendment\) Regulations 2013](#) (SI 2013/753).



thresholds for civil legal services; that is, they are passported through the means assessment process for income. However, the same capital eligibility rules are now applied to applicants in receipt of these “passporting” benefits as to other applicants for legal aid who are not in receipt of such benefits. This means that all applicants will be subject to means testing in respect of their capital and those on passporting benefits will only be passported in respect of the income part of the means test. (...)

7.6 Secondly, these Regulations cap the ‘subject matter of the dispute’ disregard at £100,000 for all forms of civil legal services. (...). The £100,000 cap for the subject matter of the dispute disregard already exists under the Community Legal Service (Financial) Regulations 2000 for people seeking legal aid for representation and as such clients are required to draw upon their own resources where they have sufficient assets; this change extends the £100,000 cap to all forms of civil legal services.

7.7 Thirdly, under these Regulations, the level of income-based contributions has been increased to a maximum of approximately 30% of monthly disposable income. Persons with a higher level of disposable income will contribute a higher percentage of monthly disposable income.

Financial eligibility limits for gross income are dealt with in Regulation 7: individuals with a gross monthly income of more than £2,657 are (as they were under the previous Regulations) ineligible for civil legal services.<sup>13</sup>

Financial eligibility limits for disposable income and disposable capital are dealt with in Regulation 8: individuals with a monthly disposable income not exceeding £733 and disposable capital not exceeding £8000 are eligible for civil legal services. A lower ceiling applies to legal representation before the Immigration and Asylum Chamber of the First-tier Tribunal, and the Immigration and Asylum Chamber of the Upper Tribunal in relation to an appeal or review the Immigration and Asylum Chamber of the First-tier Tribunal, in matters relating to immigration and victims of trafficking in human beings; here, individuals whose monthly disposable income does not exceed £733 and disposable capital does not exceed £3000 are eligible.

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<sup>13</sup> This figure is increased by £222 for each subsequent child, where the applicant has more than four dependent for whom they receive child benefit.

## 2. What have been the effects on people seeking help with legal problems in England and Wales?

The quarterly statistics on civil legal aid provided by the MOJ and the LAA provide indicators of the volume of legal help workload; civil representation workload; and the number of mediation assessments. Civil representation workload — representation by the solicitors and barristers for civil cases — fell following the implementation of the 2012 Act. The MOJ and the LAA state that, in April to June 2015, the civil representation workload was around two-thirds of what it was prior to the Act.<sup>14</sup>

Commentary on the impact of the changes to legal aid has, broadly speaking, focused on the effects on individuals who are no longer eligible for legal aid to resolve legal problems, on the courts which must deal with increased numbers of litigants in person (LIPs) and on the legal profession. Whether the reforms will generate the savings that have been claimed has also been a matter of debate.<sup>15</sup>

In the [report of its inquiry into the impact of the changes to civil legal aid](#), the Commons Justice Committee concluded that the MoJ had failed to meet three out of its four stated objectives for the reforms and, while making significant savings, had damaged access to justice for some litigants:

The Ministry's four objectives for the reforms were to:

- discourage unnecessary and adversarial litigation at public expense;
- target legal aid to those who need it most;
- make significant savings in the cost of the scheme; and
- deliver better overall value for money for the taxpayer.

Our overall conclusion was that, while it had made significant savings in the cost of the scheme, the Ministry had harmed access to justice for some litigants and had not achieved the other three out of four of its stated objectives for the reforms.<sup>16</sup>

<sup>14</sup> MoJ, [Legal Aid Statistics in England and Wales: April to June 2015](#), 24 September 2015: page 19

<sup>15</sup> This latter point is discussed in the context of self-represented litigants in the Commons Library briefing [Litigants in person: the rise of the self-represented litigant in civil and family cases](#) (SN07113, 14 January 2016).

<sup>16</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: Summary

## 2.1 What has the 2012 Act meant for those ineligible for legal aid?

In its 2015 report, the Justice Committee argued that the MoJ had not ensured that many people eligible for legal aid had access to it, thus creating an underspend:

Since the reforms came into effect there has been an underspend in the civil legal aid budget because the Ministry has not ensured that many people who are eligible for legal aid are able to access it. A lack of public information about the extent and availability of legal aid post-reforms, including about the Civil Legal Advice telephone gateway for debt advice, contributed to this and we recommend the Ministry take prompt steps to redress this.<sup>17</sup>

## 2.2 Have the reforms had a disproportionate impact on women and families?

In considering direct discrimination, harassment and victimisation, the [cumulative equalities impact assessment](#) for the changes to civil legal aid (published to accompany the consultation (green) paper) concluded that there would be no less favourable treatment by reason of relevant protected characteristics:

1.12 We have ... considered whether the proposed changes give rise to the possibility of a person being treated less favourably by reason of their relevant protected characteristic. The answer to this is 'no': these proposals would apply to all people, irrespective of their disability, race or sex, and irrespective of whether they have the protected characteristic of gender reassignment or whether they are married or a civil partner.

1.13 We have also, consistent with our equality duties, considered whether the proposed changes give rise to the possibility that a person having a relevant characteristic will be harassed or victimised. We do not consider that these proposals will have any impact on instances of harassment and victimisation.

1.14 Finally, we have considered whether the proposed changes give rise to the possibility of pregnancy and maternity discrimination or breach of an equality clause and concluded that they do not.<sup>18</sup>

In considering indirect discrimination, though, it concluded that the proposals did have the potential to disproportionately affect (amongst others) women seeking help with legal problems and female barristers:

- The proposals have the potential to disproportionately affect female clients, BAME clients, and ill or disabled people, when compared with the population as a whole. This is a result of these groups being overrepresented as users of civil legal aid services. However, it should be noted that, due to the significant proportion of clients for whom illness or disability information is

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<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: Summary

<sup>18</sup> Ministry of Justice, *Legal Aid Reform: Cumulative Impact: Equalities Impact Assessment (EIA)*: page 8

not known, findings in relation to this group, and to a lesser extent the BAME group, should be treated with caution.

- The proposals for civil legal aid have the potential to disproportionately affect solicitor providers with majority female ownership and control, and those with majority white ownership and control.
- The proposals for criminal legal aid have the potential to disproportionately affect solicitor providers with majority BAME ownership and control.
- The proposals to change crime fees might have a disproportionate impact on male barristers and BAME barristers.
- The proposals to change civil fees might have a disproportionate impact on female barristers.<sup>19</sup>

In the [oral and written evidence](#)<sup>20</sup> for the [Justice Committee's earlier report on the proposed reforms](#),<sup>21</sup> there was some discussion of the reforms' potential impact on women; see (for example) the evidence from the Family Law Bar Association and the Legal Action Group. Some of the submissions in the [volume of additional evidence](#) also mention the reforms' potential impact on women.<sup>22</sup>

In an exchange in the Commons in May 2011, the then junior minister, Jonathan Djanogly, confirmed that individuals with protected equality characteristics were over-represented within the current client base for civil and family legal aid:

**Liz Kendall:** The Minister has just said that he wants his plans to protect the most vulnerable, but his own impact assessment says that low-income families, women and minority ethnic groups will be disproportionately affected. Can he explain how that is fair?

**Mr Djanogly:** Legal aid per se involves poor people, so if we are going to reduce costs it will impact on poor people. It is true that individuals with protected equality characteristics are over-represented within the current client base of civil and family legal aid when compared with the population as a whole, although the extent of that varies by category of law.<sup>23</sup>

Virendra Sharma led a [Westminster Hall debate on legal aid for women and families](#) on 24 January 2012, in which some of the areas of contention and concern surrounding the Government's plans to reform legal aid were again debated.<sup>24</sup>

## 2.3 Has there been an increase in the use of mediation?

In promoting its reforms, the Government sought to boost mediation as an alternative to going to court. In [Proposals for the reform of legal aid](#)

<sup>19</sup> Ministry of Justice, *Legal Aid Reform: Cumulative Impact: Equalities Impact Assessment (EIA)*: Page 9

<sup>20</sup> Justice Committee, [Government's proposed reform of legal aid](#), 30 March 2011, HC 681-II 2010-11

<sup>21</sup> Justice Committee, [Government's proposed reform of legal aid](#), 30 March 2011, HC 681-I 2010-11

<sup>22</sup> Justice Committee, [Government's proposed reform of legal aid, Volume III](#), 4 April 2011, 2010-11

<sup>23</sup> [HC Deb 17 May 2011 c142](#)

<sup>24</sup> [HC Deb 24 January 2012 c67WHff](#)

[in England and Wales](#), the MoJ advocated mediation as a quicker, cheaper and less stressful means of resolving disputes. It argued that family mediation in private law family cases should remain within scope for legal aid, drew attention to (then) increasing numbers of publicly-funded mediations and pointed to the wider benefits of mediation.<sup>25</sup> The Commons Library briefing [Mediation and other alternatives to court](#) examines the options for alternative dispute resolution to settle civil disputes without the need for a formal court hearing.<sup>26</sup>

Paragraph 14 of Schedule 1 to the 2012 Act covers [mediation in family disputes](#). The gov.uk website offers a brief summary.<sup>27</sup> The LAA's [Family Mediation Guidance Manual](#) sets out the family mediation criteria (amongst other things) in more detail.<sup>28</sup> The MoJ has posted an animation [Understanding family mediation](#) on YouTube.<sup>29</sup>

The NAO reported in November 2014 that, since the 2012 Act came into force, fewer people were using mediation for family law disputes:

10 (...) The Ministry ... expected 9,000 more mediation assessments and 10,000 more mediations to start in 2013-14. However, mediation assessments fell by more than 17,000 and there were more than 5,000 fewer mediations starting in 2013-14 than there were in 2012-13.<sup>30</sup>

In response to a PQ in December 2014, the then minister Simon Hughes outlined the Government's plans to advance mediation in family disputes:

The Government are committed to advancing mediation as the best way of reducing the stress on separating couples, alleviating pressures on the court system, and saving money for taxpayers. Last year, seven out of 10 couples who went into mediation had a successful outcome. In the past few months, we have set up a system where the first mediation session is free for both parties if one of the parties is legally aided, and we are already seeing an increased take-up in mediation as a result.<sup>31</sup>

## 2.4 Has "exceptional cases" funding provided an adequate safety net?

The period April to June 2015 saw an increase in the number of applications for exceptional case funding, with the number of applications received increasing by 29 percent on the same period of the previous year. Of these applications—excluding those awaiting a decision—more than a third were granted. This was the highest proportion granted since the introduction of the exceptional case funding scheme in April 2013.<sup>32</sup>

<sup>25</sup> Cm 7967, November 2010: paras 4.69-72

<sup>26</sup> SN04176, 6 June 2013

<sup>27</sup> [Legal aid: family mediation](#)

<sup>28</sup> November 2014

<sup>29</sup> 29 May 2014

<sup>30</sup> NAO, [Implementing Reforms To Civil Legal Aid](#), 20 November 2014, HC 784 2014-15: page 7

<sup>31</sup> [HC Deb 16 December 2014 c1257](#)

<sup>32</sup> Ministry of Justice, [Legal Aid Statistics in England and Wales: April to June 2015](#), 24 September 2015: page 5

For cases that are out of scope, the only potential 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 and provides a link to the Lord Chancellor's funding guidance.<sup>33</sup> In essence, a client would have to demonstrate that European Convention on Human Rights or EU rights were at stake.

The NAO report in November 2014 observed that use of the exceptional funding route since the implementation of the 2012 Act had been lower than the MoJ had planned for:

The Agency planned for between 5,000 and 7,000 applications in the year following the reforms. It received just 1,520, of which 69 (5%) were granted. Legal aid providers who commented on the scheme in our consultation said that the application process created disincentives for applying. In June 2014 the High Court ruled that the Ministry's guidance for the scheme set too high a threshold and was unlawful. The Ministry is appealing this decision.<sup>34</sup>

In the March 2015 report of its inquiry into the impact of the changes to civil legal aid, the Justice Committee cited some cases in which (it argued) it was surprising that exceptional case funding had not been granted. The Committee quoted the view of one witness that a grant of exceptional funding in only 16 cases not involving inquests was "not a safety net". The very low grant for exceptional funding had (the Committee remarked) been attributed variously to the approach, knowledge and abilities of decision makers at the LAA and to the Lord Chancellor's Guidance to which they had to refer.<sup>35</sup> The Committee rejected the claim of the Minister, Shailesh Vara, that critics of the exceptional funding scheme misunderstood its purpose; he had suggested that it was wrongly thought to be a discretionary scheme where people might be lucky on a second application.<sup>36</sup> A decision at the Court of Appeal<sup>37</sup> was likely to increase the number of exceptional case funding grants.<sup>38</sup>

The Committee therefore concluded that

- The exceptional cases funding scheme had not done the job Parliament intended, as insufficient weight had been given to access to justice in the decision-making process

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<sup>33</sup> Section 10

<sup>34</sup> NAO, [Implementing Reforms To Civil Legal Aid](#), 20 November 2014, HC 784 2014-15: page 7

<sup>35</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: pages 14-15 and 17-19

<sup>36</sup> *Ibid.* page 16

<sup>37</sup> R (Gudanaviciene) v The Lord Chancellor, [2014] EWCA (Civ)

<sup>38</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 2014-15: page 16



- The LAA had failed to spot that the very low number of grants was a sign that the process was not working as Parliament intended
- Urgent investigative and remedial action was needed; failing to take such action meant the LAA and MoJ were failing to focus on the most serious cases and most vulnerable clients, and
- Staffing for the scheme should be reviewed.<sup>39</sup>

Responding to the Justice Committee, the MoJ defended the robust line it takes on exceptional funding, arguing that it should be available only where lack of legal aid would breach rights under the European Convention on Human Rights or EU law:

The exceptional case funding scheme was expressly provided for by Parliament under LASPO to make sure that funding will continue to be provided (subject to the statutory means and merits tests) in cases where its absence would breach or would risk breaching an individual's rights under the European Convention on Human Rights (ECHR) or EU law. The aim of the scheme is not – and never has been – to provide funding more generally in cases which are no longer within the scope of the civil legal aid system.

The MoJ did not agree that people who had been refused exceptional funding were at risk of a miscarriage of justice:

We do not accept that there has been or would be a miscarriage of justice in any case where an exceptional funding application has been properly considered and refused. Where an application for funding is refused, an individual may seek to provide further information and/or challenge the Director's decision, including potentially by way of judicial review.

The MoJ referred to a case at the Court of Appeal, which had ruled on the legality of the Lord Chancellor's Guidance:

A Court of Appeal ruling in December 2014, to which the Director was a party, clarified the tests the Director [of Legal Aid Casework] should apply. The court did not hold that the Guidance was wholly unlawful. A revised version of the Lord Chancellor's guidance on exceptional funding in non-inquest cases was published on 9 June 2015 and is available on GOV.UK. This version takes into account the latest case law. Previous to this, ECF cases have, since the Court of Appeal gave its judgment, been determined in accordance with that judgment.<sup>40</sup>

## 2.5 Other findings from the Justice Committee's 2015 report

The Justice Committee also remarked on

- A shortfall in debt cases<sup>41</sup>

<sup>39</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 20

<sup>40</sup> MoJ, [Government Response to Justice Committee's Eighth Report of Session 2014-15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Cm 9096, July 2015: page 18

<sup>41</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 12

- Underuse of the Civil Legal Advice telephone gateway<sup>42</sup>
- The Government's loss of a judicial review, where it had been held that the introduction of the proposed residence test for legal aid through secondary legislation would be *ultra vires*. The Committee questioned whether the Government's intention to appeal against this decision was a good use of public money, as the test would save little from the civil legal aid budget yet would prevent some very vulnerable people from gaining access to the courts. If the Government were determined to introduce such a test, it would be better to do so through primary legislation, to be debated and amended in Parliament.<sup>43</sup>
- Children as parties to legal proceedings. Some witnesses had reported that children – and particularly trafficked and separated children- were facing particular difficulties in accessing immigration and other legal advice and representation.<sup>44</sup>

## 2.6 Government response to the Justice Committee report

Replying to the Justice Committee, the MoJ argued that, to reduce the deficit, tough decisions had had to be made:

Very difficult decisions needed to be made rapidly. As the Committee recognises, the legal aid reforms ... made a considerable contribution to the Ministry of Justice programme to reduce its spending and that we were on course to achieve our planned savings. The continued focus of this Government on reducing the deficit and on-going budgetary responsibility mean pressure to limited public spending on those areas where it is truly justified will remain.

The MoJ accepted that there had been "challenges" but did not accept that they had largely failed to meet their other objectives:

By the very nature of the changes to the scope of civil legal aid, unnecessary and adversarial litigation at public expense has been reduced by excluding those matters identified as a lower priority.

Similarly, through those matters retained in the scope of civil legal aid, funding has been targeted at those who need it most. The reforms have also been expressly designed to make sure that we meet our legal commitments. The Exceptional Case Funding (ECF) scheme makes sure that funding will continue to be provided (subject to the statutory means and merits tests) where its absence would breach or would risk breaching an individual's rights under the European Convention on Human Rights or EU law. The aim of the scheme is not – and never has been – to provide funding more generally in cases which are no longer within the scope of the civil legal aid system.<sup>45</sup>

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<sup>42</sup> *Ibid.* page 13

<sup>43</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 23

<sup>44</sup> *Ibid.* pages 24-25

<sup>45</sup> Ministry of Justice, [Government Response to Justice Committee's Eighth Report of Session 2014–15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Cm 9096, July 2015: Introduction

On the question of the knock-on costs of the reforms, the MoJ argued that it was difficult meaningfully to monetise any wider costs and the NAO had been able to do so only in a very limited way:

The department has reservations as to the extent to which wider costs can be accurately monetised. Bearing in mind the breadth and reach of the LASPO reforms, a meaningful estimate specifically attributing impact to the reforms would require isolating the impact of the reforms from a number of other departmental policies, such as reforms to family justice and tribunal fees. The reforms would also need to be isolated from policies implemented by other government departments, such as changes to the benefits system, and wider societal trends, such as divorce rates or possession claims.

As an indication of the difficulty in accurately estimating wider costs, the government notes that the NAO were only able to estimate one wider cost during their audit, that of litigants in person to the courts. This estimate was primarily based on anecdote rather than detailed analysis, and represented a very small fraction (roughly 1%) of the legal aid savings they identified. The NAO were not able to meaningfully quantify the impact of wider costs outside of the justice system.<sup>46</sup>

The MoJ also outlined how it was supporting and encouraging mediation:

The Ministry of Justice wants to encourage more people to mediate in family disputes instead of pursuing an application in the court, which can be slow, stressful, and expensive. We have already taken significant steps to promote mediation, including making it a legal requirement that anyone considering applying to court for an order about their children or finances is legally obliged to attend a Mediation Information and Assessment Meeting (MIAM) first, unless specific exemptions apply (for example domestic violence). (...)

As of 3 November 2014, the first single session of mediation is publicly funded, without being subject to the means test, in all cases where one of the people involved is already legally aided. In this scenario, both participants will be funded for the MIAM and the first session of mediation. It is hoped that the combination of the compulsory MIAM with the free first mediation session will prove effective in introducing more people to the benefits of mediation, and diverting them from the courts.<sup>47</sup>

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<sup>46</sup> Ministry of Justice, *Government Response to Justice Committee's Eighth Report of Session 2014–15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, Cm 9096, July 2015: page 20

<sup>47</sup> *Ibid.* page 18

### 3. Have the reforms yielded the savings the Government sought?

Net expenditure on legal aid in 2014–15 was £1.6 billion. This compares to a net expenditure of £2.2 billion in 2010–11.<sup>48</sup> The largest part of the LAA's net expenditure on legal aid is on criminal legal aid. In 2014–15, spending on criminal legal aid was £919 million, while spending on civil legal aid was £622 million.<sup>49</sup>

The MoJ and the LAA publish [statistics](#) on legal aid workload and expenditure on a quarterly basis.<sup>50</sup> These statistics include figures for both the volume of the legal aid workload and the expenditure on legal aid. The basis on which workload volumes are measured varies between different types of legal aid. These measures are combined to produce an overall figure. Expenditure is based on completed pieces of work or cases.

The quarterly statistics on civil legal aid provided by the MOJ and the LAA provide indicators of the volume of legal help workload; civil representation workload; and the number of mediation assessments. Civil representation workload—representation by the solicitors and barristers for civil cases—fell following the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The MOJ and the LAA state that, in April to June 2015, the civil representation workload was around two-thirds of what it was prior to the Act.<sup>51</sup>

The Low Commission<sup>52</sup> argued that the reductions in the scope of legal aid would increase costs elsewhere:

These cutbacks have destabilised and reduced the advice and legal support sector at a time of increased need. As a result, instead of saving money, the cutbacks are very likely to end up costing more elsewhere in the system.<sup>53</sup>

Similarly, an [article in the \*New Law Journal\*](#) argued that the knock-on costs of the legal aid reforms would undermine government targets.<sup>54</sup>

In November 2014, the NAO too pointed to the mixture of savings on legal aid expenditure and additional costs elsewhere. On savings and costs, its key findings included:

- The reforms could reduce spending on civil legal aid by £300 million per year in the long term - a significant reduction - but the reforms could create additional costs, for the MoJ and beyond.

<sup>48</sup> LAA, [Annual Report and Accounts 2014–15](#), June 2015

<sup>49</sup> NAO, [A Short Guide to the Ministry of Justice](#), June 2014, page 16

<sup>50</sup> MoJ, [Legal Aid Statistics in England and Wales: April to June 2015](#), 24 September 2015

<sup>51</sup> *Ibid.*, page 19

<sup>52</sup> The Low Commission on the Future of Advice and Legal Support, chaired by the crossbencher Lord Low of Dalston, was established to develop a strategy for access to advice and support on social welfare law in England and Wales.

<sup>53</sup> Low Commission, [Tackling the advice deficit: A strategy for access to advice and legal support on social welfare law in England and Wales](#), January 2014: Executive summary

<sup>54</sup> "Hidden cost of legal aid cuts", *New Law Journal*, 12 January 2012

- The MoJ had not quantified most of the wider costs of the reforms. Not quantifying these 'hidden' costs risked overstating the impact of the reforms.<sup>55</sup>

The PAC examined the impact of the changes to civil legal aid. On whether the changes to civil legal aid had achieved overall savings, it argued that it was impossible to know whether the savings in expenditure would be offset by additional expenditure elsewhere or represented value for money. In its conclusions and recommendations, the PAC drew attention to the shortcomings in the MoJ's assessment of the impact of the changes and argued that the MoJ could not manage the impact of the increase in LIPs, because it still did not understand their impact on the courts service.<sup>56</sup>

The Justice Committee too was critical of the scanty evidence on which the MoJ had based its reforms. It noted that the Permanent Secretary at the MoJ had told the Public Accounts Committee that the chief motivation for the reforms was financial:

[The] Government was absolutely explicit that it needed to make these changes swiftly. Therefore, it was not possible to do research about the current regime before moving to the cuts.<sup>57</sup>

### 3.1 Why is legal aid spending now lower than the MoJ forecast?

As mentioned earlier, the Justice Committee also observed that the LAA was funding fewer cases than its own calculations had forecast.<sup>58</sup> The Committee had (it said) heard evidence from Citizens' Advice Bureau and others that eligibility was a "technical minefield", supporting the Minister's view that people eligible for legal aid were not accessing it because they lacked sufficient information on their eligibility. The Committee disagreed with the Minister's contention that people may not be accessing legal aid because they were getting the necessary legal advice from law centres and citizens' advice bureaux; this was at odds with their findings about the impact of the changes on the not-for-profit sector. It was possible that the campaign against the cuts had (the Committee found) inadvertently given the impression that legal aid was no longer available. The Committee urged the MoJ to provide better information to both the public and to providers.<sup>59</sup>

On the reasons for the underspend, the Committee concluded

- The LAA and MoJ had failed to ensure – through an overly restrictive and bureaucratic approach to the exceptional cases

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<sup>55</sup> NAO, [Implementing Reforms To Civil Legal Aid](#), 20 November 2014, HC 784 2014-15: page 6

<sup>56</sup> PAC, [Implementing reforms to civil legal aid](#), 4 February 2015, HC 808 2014-5: pp 3-6

<sup>57</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 2014-15: page 8

<sup>58</sup> 326,004 fewer cases of legal help and 36,537 fewer instances of funding for representation in court

<sup>59</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: pages 10-12

funding scheme, poor provision of information about availability and eligibility for legal aid and a lack of understanding about how people arrive at mediation - that the people eligible for legal aid had access to it.

- Vulnerable people were unable to gain access to justice. (One witness had mentioned that destitute women had been working in prostitution to pay legal fees).
- The MoJ should investigate immediately, as the underspend might represent a “significant impairment” of access to justice.<sup>60</sup>

In its response to the Justice Committee, the MoJ outlined what it had done and was doing to raise awareness of the availability of legal aid:

Before implementing the legal aid reforms we took various steps to raise awareness of the areas of law where legal aid would still be available and of changes to the process for accessing it.

We worked with other government departments, legal aid providers and referral partners (including Citizens Advice, Law Centres, and Shelter) to provide briefing and communication materials on the nature of the reforms, and placed particular emphasis on the need to signpost individuals to the Civil Legal Advice (CLA) gateway.

We have improved the information on legal aid on gov.uk and will soon be launching an enhanced digital service, which will allow individuals to check whether they qualify for legal aid. The digital service will provide comprehensive details of legal aid availability across all categories of law and information on local providers. It will also feature details of relevant advice agencies, including commercial options, for the benefit of individuals who do not qualify for legal aid.

Information on the availability of legal aid is generally only relevant to individuals with an existing legal issue, and it is difficult to reach such individuals with anything other than a tailored approach. We will use data collected through the online service (and the telephone helpline) to build the evidence base to inform a more targeted approach to raising awareness, considering how best to direct messaging at those whose need is greatest.<sup>61</sup>

## 3.2 Does spending on legal aid save money elsewhere?

Labour leader Jeremy Corbyn was reported this month as suggesting that every pound spent on legal aid could save the state £6.<sup>62</sup>

Prompted by these remarks, the organisation Full Fact has published a briefing - [How much money does legal aid save the country?](#) - bringing together some of the various reports examining whether spending money on legal aid can create savings elsewhere. The briefing comments that, although this claim has been made before, and there is

<sup>60</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: pages 20-22

<sup>61</sup> MoJ, [Government Response to Justice Committee's Eighth Report of Session 2014-15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Cm 9096, July 2015: page 5

<sup>62</sup> See, for example, [“Legal aid is a ‘basic human right’ not an ‘economic benefit’, says Jeremy Corbyn”](#), *Legal Cheek*, 7 January 2015



a lot of literature, not all of it is very convincing. Several studies indicated that legal aid could create other savings, but the quality of these studies was generally poor:

In 2014 academics from the University of Surrey looked into the "[business case](#)" for legal aid, and advice services more generally.

All the UK studies they found agreed that legal aid saves the government and the economy money, but the researchers [noted](#) their "concerns over the quality of the data and methodologies adopted". They concluded that the evidence was "[generally poor quality](#)" and that further research would be helpful.

Full Fact looks more closely at the claim of £6 saved for every £1 spent and remarks that it is an extrapolation from older research connected to cuts in 2008/09:

A claim to this effect was [made last year](#) by the trade union Unite and Goldsmiths University.

Their report on legal aid [says that](#) "for every £1 spent on legal advice and aid, the state saves around £6 on other forms of spending, such as families becoming homeless and children being taken into care".

This isn't an original research finding. The statistic is [from](#) the Legal Action Group, a charity promoting access to justice.

[In 2011](#) it said that £49 million of cut spending on legal aid would end up costing £286 million elsewhere. That's roughly £6 that would have been saved for every £1 spent, [according to the charity's director](#).

This is [calculated](#) by using older research from Citizens Advice on how much is saved by spending on different kinds of legal aid.

In its verdict, Full Fact urges caution:

This claim has evolved down a chain of several different pieces of research and should be treated with caution. Academics say that we need more research about the savings that spending on legal aid can bring.<sup>63</sup>

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<sup>63</sup> Conor James McKinney, "[How much money does legal aid save the country?](#)" *Full Fact*, 8 January 2015. Full Fact [describes its work](#) thus: "Our factchecks look at whether it's reasonable for people to trust the claims of politicians and journalists based on the evidence that's available to us. We link to all our sources so that people can judge issues for themselves. We publish all our findings, whether a claim turns out to be accurate or not."

## 4. Further reading: *The Legal Aid, Sentencing and Punishment of Offenders Bill*

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. The Government also published [Explanatory Notes](#).

The Library published various briefings on the Bill and Act and the [consultation \(green\) paper](#) that preceded them:<sup>64</sup>

- Commons Library briefing [Legal aid: controversy surrounding the government's plans for reform](#) offers a broad overview of the Government's plans for legal aid reform as they were published in the consultation (green) paper and the controversy they provoked.<sup>65</sup>
- [Commons Library Research Paper 11/53](#), prepared for the second reading of the Bill, discusses the background to the Bill and some of the controversy it provoked.
- [Commons Library Research Paper 11/70](#) (the Committee Stage Report) complements that paper.
- [House of Lords Library Note LLN 2011/035](#), prepared for the Bill's second reading in the Lords on 21 November 2011, summarises the report stage and third reading debate in the House of Commons and
- Commons Library briefing [The Legal Aid, Sentencing and Punishment of Offenders Bill: Lords amendments](#) discusses the Lords amendments.<sup>66</sup>

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<sup>64</sup> *Proposals for the reform of legal aid in England and Wales*, Cm 7967, November 2010

<sup>65</sup> SN 05840, 26 January 2011

<sup>66</sup> SN 06293, 11 April 2012



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