

Legal Aid reforms

Quick Guide

December 2013

Introduction

This Quick Guide focuses on the current civil Legal Aid system in England and Wales following changes implemented in April 2013. Some proposals in relation to criminal Legal Aid are also discussed.

Legal Aid is the public funding of legal costs. There are separate schemes for civil Legal Aid and criminal Legal Aid. Responsibility for the Legal Aid system is not devolved to Wales. The coalition agreement between the Conservatives and Liberal Democrats at Westminster in 2010 included a commitment to carry out a fundamental review of Legal Aid to make it work more efficiently.¹ This led to a consultation in November 2010 which outlined the government's proposals for changes to civil Legal Aid.² At that point, no proposals were made for the reform of criminal Legal Aid. The 2010 consultation document proposed reducing the areas of law for which assistance was available, changes to eligibility criteria and a cut in fees payable to providers (solicitors etc.) for Legal Aid work. The UK Government stated at the time that it believed Legal Aid had expanded far beyond its original intentions and was available for a wide range of issues, many of which in its opinion need not be resolved through the courts.³ The proposals were set to save £350 million from the £2 billion annual Legal Aid budget.⁴

Commenting on the proposals in a House of Commons statement on 21 June 2011, the then Lord Chancellor and Secretary of State for Justice, Kenneth Clarke QC MP, noted that with the exception of cases where people's life or liberty is at stake, where people are at risk of serious physical harm or the immediate loss of their home, or where their children may be taken into care, Legal Aid would either be removed or restricted by the proposals.⁵

Although the consultation had highlighted widespread opposition to the proposals, including from the legal profession, the government continued with its plans and the reforms were brought into force largely unchanged from the original proposals by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. Provisions relating to civil Legal Aid, or civil legal services as they are referred to in the legislation, were commenced on 1 April 2013. Critics, including the Law Society, have suggested that these changes could leave vulnerable people without access to justice and lead to more "litigants in person" causing congestion in the courts by attempting to present their own cases.

¹ HM Government, *The Coalition: our programme for government*, May 2010, p23 [accessed 8 October 2013]

² Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales*, November 2010 [accessed 8 October 2013]

³ *Explanatory Memorandum to the Civil Legal Aid (Merits Criteria) Regulations 2013*, para 7.1 [accessed 8 October 2013]

⁴ Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales*, November 2010, para 1.4 [accessed 8 October 2013]

⁵ *HC Deb 21 June 2011 c166* [accessed 14 November 2013]

In April 2013 the UK Government announced that it intends to further limit the scope of Legal Aid and modify financial eligibility and the merits test in areas including prison law.⁶ These new plans also contain proposals for defendants in the crown court to contribute towards their legal costs, introducing a residency test for civil Legal Aid and restricting Legal Aid for “weak” judicial reviews. Furthermore, the UK Government initially proposed the introduction of price-competitive tendering for criminal Legal Aid services. This proposal proved highly controversial as it would have potentially resulted in fewer firms providing services across a geographic area and removed client choice – accused people would not have been able to choose their own solicitor. The Lord Chancellor, Chris Grayling MP, made it clear that the reason for this proposal was to give greater certainty of case volume for providers, making it easier and more predictable for them to organise their businesses to provide the most cost-effective service to the taxpayer.⁷ However, this proposal has now been dropped and replaced by a model that would in practice retain the same level of choice for clients seeking criminal Legal Aid as now.⁸ The consultation on the new proposals ended on 1 November 2013.

Services civil Legal Aid can currently provide

Legal Aid can provide a range of services⁹, including:

- **Legal Help**, which provides initial advice and assistance on a civil legal problem including drafting letters and negotiating with third parties;
- **Help at Court** provides some help (which may include a limited amount of advocacy) at court, without the client being formally represented in the proceedings. For example, help with an application to suspend a possession warrant;
- **Family help** to provide help with family disputes;
- **Family mediation** (or help with family mediation) to help work out an agreement with a former partner (including a same sex partner) without going to court;
- **Legal representation** in court or at some tribunals.

Eligibility for civil Legal Aid

Eligibility criteria changed on 1 April 2013.¹⁰ There are a number of tests that must now be passed for a person to receive funding for civil Legal Aid:

- The case must be within the **scope** of what may be provided by Legal Aid (see the next section for a full breakdown);
- The applicant must undergo a test of **financial resources**¹¹;

⁶ Ministry of Justice, *Transforming Legal Aid: delivering a more credible and efficient system*, 9 April 2013 [accessed 22 November 2013]

⁷ House of Commons Justice Committee, *Transforming Legal Aid: evidence taken by the Committee*, 16 July 2013, **Appendix B** [accessed 14 November 2013]

⁸ Ministry of Justice, *Transforming Legal Aid: Next Steps*, September 2013, para 2.27 [accessed 8 October 2013]

⁹ *Civil Legal Aid (Merits Criteria) Regulations 2013, Regulations 12-19 (SI 2013/104) / CAB AdviserNet*

¹⁰ *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, s11 and *Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104)*

¹¹ Subject to some exceptions. In addition the Legal Aid Agency has discretion when applying the financial eligibility criteria in certain cases. See *Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (SI 2013/480)*

The Ministry of Justice has issued a Key Card for providers of legal services to determine whether an applicant is likely to pass the test of financial resources.¹²

- The applicant must normally satisfy a **merits test** which includes having a reasonable (50 per cent or better chance of success) prospect of winning the case. In some types of case the prospects of success are not a factor in awarding Legal Aid.¹³

There are a number of general merits criteria that apply to all cases within particular categories (for example those seeking help at court), and also specific merits criteria that apply to particular types of case (for example mental health proceedings). The specific criteria can disapply, modify or supplement the general criteria.

The UK Government has signalled that it believes the merits test should be strengthened in a further consultation that took place between April and June 2013.¹⁴

Exceptional cases funding

As an additional safeguard, the Director of Legal Aid Casework has powers to make funding available for exceptional cases where failure to make legal services available to an individual would be a breach of:

- the individual's Convention rights (within the meaning of the **Human Rights Act 1998**); or
- any rights of the individual to the provision of legal services that are enforceable EU rights; or
- where it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to provide legal services would be a breach of the above rights.

Areas of law eligible for civil Legal Aid

As noted earlier, on 1 April 2013 many areas of law were removed from the scope of civil Legal Aid. Part 1 of Schedule 1 to the 2012 Act outlines the full details of what is still within scope. This Schedule is not easy to understand without extensive cross-referencing both within the Act and across other legislation; there are many caveats and exclusions. The following list summarises the main areas still within scope for civil Legal Aid services:

- **Actions against the police etc.** – where the defendant is a public authority with the power to detain, imprison or prosecute: only for cases that involve the abuse of a child or vulnerable adult or where there have been significant breaches of human rights advice to victims of sexual offences;
- **Clinical negligence** – only where there is neurological injury to infants causing severe disablement and which happened in the womb, during birth or up to eight weeks after birth;
- **Community Care** – the provision of community care services and facilities for disabled persons;
- **Council tax reduction schemes** - appeals on a point of law to the High Court, the Court of Appeal or the Supreme Court;
- **Debt** – only for mortgage arrears and possession; orders for the sale of the home; and involuntary bankruptcy where the home is included in the estate;
- **Discrimination** – contravention of the *Equality Act 2010* or preceding legislation;

¹² Ministry of Justice, **Keycard 49**, April 2013 [accessed 8 October 2013]

¹³ **Explanatory Memorandum** to the *Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104)* [accessed 22 November 2013]

¹⁴ Ministry of Justice, **Transforming Legal Aid: Delivering a more credible and efficient system**, April 2013 [accessed 8 October 2013]

- **Education** – only cases involving Special Educational Needs;
- **Family** - public law children work; forced marriage protection; domestic abuse and protection from harassment; enforcement of international child maintenance; private law children work and financial provision on relationship breakdown, but only where there is documentary evidence of domestic abuse;
- **Housing** – only cases where a person’s home is at risk (excluding trespassers who have been evicted or face eviction, e.g. squatters), including defending possession proceedings, homelessness and unlawful eviction cases; housing allocations where the client is threatened with homelessness; provision of accommodation by way of community care services; serious disrepair but not solely for damages; anti-social behaviour and protection from harassment; accommodation and support for asylum seekers;
- **Immigration and asylum** – however most non-asylum immigration work has been removed from scope;
- **Mental health** – Legal Aid is available for mental health cases including mental capacity issues. It includes legal representation for mental health tribunal proceedings.
- **Miscellaneous** – this category includes: decisions barring work with children and vulnerable adults; protection from harassment; proceeds of crime; environmental pollution; advice to victims of sexual offences; the abuse of a child or vulnerable adult (subject to exclusions);
- **Protection from harassment** injunctions under the *Protection from Harassment Act 1997* and to vary or discharge a restraining order under the *Protection from Harassment Act 1997*;
- **Public Law** – challenges under the Human Rights Act and public law challenges;
- **Welfare Benefits** - only appeals on a point of law to the Upper Tribunal (Administrative Chamber) and onward appeals on a point of law to the Court of Appeal and Supreme Court. All other areas of welfare benefits law are excluded.

Source: **Legal Action**, April 2013/**CAB AdviserNet**

Areas no longer within scope for civil Legal Aid

Until the passing of the 2012 Act areas of law were automatically within the scope of civil Legal Aid unless they were in a list of exemptions. This position has now been reversed and now only those areas of law listed in Part 1 of Schedule 1 to the 2012 Act are within scope. From 1 April 2013 Legal Aid is therefore not available in the following areas:

- **Advice on will-making;**
- **Business law;**
- **Company or partnership law;**
- **Consumer and general contract;**
- **Conveyancing;**
- **Criminal Injuries Compensation Authority cases;**
- **Defamation or malicious falsehood;**
- **Employment;**

- Legal advice in relation to a change of name;
- Matters of trust law;
- Personal injury or death;
- Tort and other general claims.

Source: **CAB AdviserNet**

Accessing civil Legal Aid services

Services funded by Legal Aid can only be delivered by a provider that has a contract with the Legal Aid Agency. The Ministry of Justice provides an online search tool that can help find a local provider at <http://find-legal-advice.justice.gov.uk> or alternatively a provider can be identified by calling the **Civil Legal Advice (CLA) helpline on 0845 345 4345**. The CLA helpline can also provide direct advice in a range of areas that are within the scope of Legal Aid.

Legal services in some areas of law will be provided by telephone or email rather than on a face-to-face basis.

Refusal of civil Legal Aid

The Legal Aid Agency is responsible for determining whether a client is eligible for Legal Aid, in accordance with the statutory rules.

The **Civil Legal Aid (Procedure) Regulations 2012** outline procedures for reviews of decisions regarding the award of Legal Aid, and the appeals process. Procedures vary depending on the type of legal assistance that has been applied for, but the Legal Aid Agency must give reasons for the decision and information about the applicant's right to request a review of the decision. In certain cases there is also a right of appeal to an independent adjudicator.

The Legal Aid Agency

The Legal Aid Agency has replaced the Legal Services Commission. In its current (2013-14) business plan¹⁵ the Agency outlines its operations across England and Wales:

The Agency will operate throughout England and Wales with a headquarters co-located with that of the MoJ in London.

We will maintain a regional contract management presence in order to be physically close to our provider base and other justice system partners.

Case management activities will be directed from our three largest sites: South Tyneside for Civil and Family; Nottingham for Crime; and London for Exceptional and High Cost cases. In addition to these sites, case working will also be undertaken on a number of sites across England and Wales where we can deliver a cost effective electronically enabled service to our providers.

The Public Defender Service will be administered from Darlington and Cardiff but will provide services in the areas of Pontypridd, Swansea, Cheltenham and Darlington, as well as having a capacity to deliver anywhere in England and Wales in the event of market failure.

The Agency will be a customer for MoJ-wide shared services in Human Resources, Information Technology, Procurement, Internal Audit, Legal and Estates.

In all our locations we will aim to move to be co-located with other MoJ or Civil Service departments in order to reduce our estates costs where it makes economic and strategic sense to do so.

¹⁵ Legal Aid Agency, **Business Plan 2013/14**, April 2013 [accessed 8 October 2013]

Arrangements in Wales

The Legal Aid Agency retains an office in Cardiff. It notes in its 2013/14 Business Plan:

The Lord Chancellor and Secretary of State for Justice is accountable to Parliament for our activities and performance across England and Wales. In addition, within Wales, the Agency will maintain close links with the Welsh Government, in recognition of the devolved administration. This includes working directly with stakeholder groups such as the Welsh Civil Justice Forum and the Criminal and Family Justice Boards in Wales. We will adopt the MoJ's Welsh Language Scheme to continue to meet our statutory obligations and provide access to legal aid services in Wales.

Further information and Legal Aid Agency contact details

The Legal Aid Agency has published a list of frequently asked questions on Legal Aid reforms.¹⁶ Members of the public can use the 'Can You Get Legal Aid' tool at www.gov.uk/legal-aid to check whether they are likely to be eligible for Legal Aid. The tool provides a check of both the scope of the case and the applicant's financial eligibility.

The Legal Aid Agency's office in Wales is based in Cardiff:

Legal Aid Agency
2nd Floor
Churchill House
17 Churchill Way
Cardiff
South Glamorgan
CF10 2HH

There are a range of central contact email addresses for the LAA depending on the nature of the query. Details are provided on the Ministry of Justice website.¹⁷ Requests for legal advice should be directed to advice providers or the **Civil Legal Advice (CLA) helpline on 0845 345 4345**, not the Legal Aid Agency.

¹⁶ Ministry of Justice, *Legal Aid Reforms* [accessed 8 October 2013]

¹⁷ Ministry of Justice website, *Legal Aid Agency contact details* [accessed 27 November 2013]

Further information

For further information about **Legal Aid reforms**, please contact **Jonathan Baxter** (jonathan.baxter@Wales.gov.uk), **Research Service**.

Other sources of information on Legal Aid reforms:

- Ministry of Justice website, **Legal Aid Reform**;
- House of Commons Justice Select Committee, **Inquiry on Access to Justice and Sentencing Proposals**, March 2011.
- House of Commons Library, **Civil Legal Aid: changes since 1 April 2013**, May 2013;
- Legal Action Group, Legal Action, **Continuing life under the LASPO Act**, April 2013.

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Enquiry no: 13/2206

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