



LASPO – What you Need to Know

ASA Briefing

Adam Griffith
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1. Introduction

- 1.1. The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) reached the statute book in May 2012. The legal aid provisions are due to come into force on 1 April 2013 together with new legal aid contracts.
- 1.2. The Ministry of Justice (MoJ) is putting a lot of the new legal aid rules into regulations, some of which have been passed by Parliament, some of which have appeared in draft form, and most of which have yet to be seen. The MoJ has also issued some Policy Statements.
- 1.3. This bulletin sets out our understanding of the position as at **19th December 2012**. Please note that it is only our *understanding* of the position. Many things remain unclear. Some may be clarified before the new contracts start on 1 April 2013. Others may not be clarified until they have been considered by the courts.
- 1.4. This bulletin updates the notes prepared for workshops run by ASA in August 2012. It is structured under three headings:
 - Major changes – in eligibility and scope, including the introduction of Exceptional Cases Funding
 - Legal aid delivery from April 2013 – the telephone gateway, telephone contracts and face-to-face contracts
 - Scope in social welfare law – the detail
- 1.5. A list of the key documents which we have considered in preparing this bulletin is attached as an Appendix.
- 1.6. We plan, as soon as possible, to provide a separate briefing about the transitional provisions and the problem of running down cases
- 1.7. The detailed section on immigration and asylum is based on a presentation given by Jackie Peirce to the Law Centres Network Conference on 23 November 2012. We are very grateful to Jackie for allowing us to use her material.

2. The major changes

- 2.1. This section is set out under the following four headings:
 - Three eligibility changes
 - What will remain in scope
 - What will be out of scope
 - Exceptional Cases Funding (ECF)

Three eligibility changes

2.2. We understand that the revised rules on financial eligibility will be set out in regulations that are likely to be known as the “Financial” regulations. The regulations are expected to implement three specific changes, which will:

- Apply the same capital eligibility rules to applicants in receipt of “passporting” benefits as apply to other applicants for legal aid
- Retain the “subject matter of dispute” disregard but cap it at £100k for all levels of service (including controlled work / legal help)
- Increase the levels of income based contributions to a maximum of approximately 30% of disposable income.

What will remain in scope¹

2.3. The following types of civil cases will remain in scope:

Clinical Negligence

Only where a child suffers a neurological injury resulting in them being severely disabled during pregnancy, child birth or the postnatal period (eight weeks).

Debt

- Mortgage possession of the home
- Orders for sale of the home
- Involuntary bankruptcy (including dealing with a statutory demand) where the person’s estate includes their home.

Discrimination

Civil legal services provided in relation to a contravention of the Equality Act 2010.

Education (Special Educational Needs)

Special educational needs matters arising under Part 4 of the Education Act 1996, and assessments relating to learning difficulties for young people under the Learning and Skills Act 2000.

¹Adapted from the LSC summary at <http://www.legalservices.gov.uk/civil/legal-aid-reform-scope.asp>

Family

- Public family law regarding protection of children
- Private family law where there is evidence of domestic violence
- Private law children cases where there is evidence of child abuse
- Child abduction matters
- Representation for child parties in private family cases
- Legal advice in support of mediation
- Domestic violence injunction cases
- Forced marriage protection order cases.

Housing

- Possession of the home (other than mortgage possession)
- Eviction from the home (including unlawful eviction)
- Seeking repairs to rented accommodation where the disrepair poses a serious risk of harm to health or safety
- Homelessness assistance for persons who are homeless or threatened with homelessness
- Injunctions under the Protection from Harassment Act 1997 in the context of housing
- ASBO matters in the county court
- Accommodation for asylum seekers.

The scope provisions in housing are considered in more detail in section 4 below.

Immigration & Asylum

- Asylum – similar to the current legal aid provision for clients seeking asylum.
- Specific immigration (non-asylum) provisions, covering
 - certain domestic violence applications
 - SIAC proceedings
 - certain immigration applications for leave to enter or remain in the UK by victims of human trafficking.

The scope provisions in immigration and asylum are considered in more detail in section 4 below.

Welfare benefit appeals

- Appeals on a point of law to the Upper Tribunal (Administrative Chamber)
- Onwards appeals on a point of law to the Court of Appeal and Supreme Court.

The scope provisions in welfare benefits are considered in more detail in section 4 below.

Mediation – to resolve family law disputes

Other

The following categories will remain in scope with minor amendments:

- Mental Health
- Community Care
- Actions Against Public Authorities
- Public Law.

What will be out of scope

2.4. The following areas of work will be out of scope:

- asylum support (except where accommodation is claimed)
- consumer and general contract
- Criminal Injuries Compensation Authority cases
- debt, except where there is an immediate risk to the home
- employment cases, except where there is a discrimination issue
- education cases, except for cases of Special Educational Needs
- housing matters, except as stated above
- most immigration cases
- miscellaneous matters:
 - appeals to the Upper Tribunal from the General Regulatory Chamber of the First- tier Tribunal,

- cash forfeiture actions under the Proceeds of Crime Act 2002,
- legal advice in relation to a change of name,
- actions relating to contentious probate or land law,
- court actions concerning personal data,
- action under section 14 of the Trusts of Land and Appointment of Trustees Act 1996
- legal advice on will-making
- private family law (other than cases where criteria are met regarding domestic violence or child abuse)
- tort and other general claims
- welfare benefits, except as stated above.

Exceptional Cases Funding (ECF)

- 2.5. Section 10 of LASPO provides for “exceptional cases” to be funded in two circumstances
- where the Director decides that it is necessary because failure to do so would be or risks being a breach of the individual’s Convention rights (within the meaning of the Human Rights Act) or enforceable European Union rights
 - advocacy at an inquest where there is a wider public interest.
- 2.6. In recent paper ², the Ministry of Justice stated that:
- They expect to receive approximately 6,500 applications for Legal Representation a year (the large majority of which will be in private family cases), and a few applications for Legal Help
 - They expect that all applications will be made through a solicitor or other legal adviser
 - Setting out why the case meets the ECF criteria “should take no more than one or two hours at most”
 - They propose that payment for the cost of making the application will be made only if the application is successful.
- 2.7. The MoJ paper does not set out the criteria which the Director will use to decide whether or not to grant funding. It is intended that the criteria will

² Legal Aid Reform: Process for obtaining excluded cases funding, MoJ, March 2012

be published as guidance provided by the Lord Chancellor under the Act. The paper says that:

"In considering whether legal aid should be provided in an individual case engaging Article 6, the Director would need to take into account, for example, the importance of the issues to the individual concerned and the nature of the rights at stake; the complexity of the case; the capacity of the individual to represent themselves effectively; and alternative means of securing access to justice. Any application will also need to satisfy the relevant means and merits tests, as now."

2.8. In our response,³ we argued that

- Where clients are unable to find a provider willing to make an application for them (with or without payment) they should be able to make the application themselves.
- In order to help people to make applications themselves, the Ministry should prepare an application form, based on their guidance, inviting applicants to state the merits of their case, their means, and the criteria from the guidance upon which they rely.

2.9. The MoJ has conceded that individuals will be able to apply directly to them for funding.

2.10. The draft Civil Legal Aid (Procedure) Regulations state that

- The application must be made on a form specified by the Lord Chancellor.
- There will be a right to apply for a review of any decision made.

2.11. We understand that the MoJ will be issuing guidance on ECF in early 2013.

3. Legal Aid from April 2013

3.1. The legal aid scheme from April 2013 will operate through a reorganisation of face-to-face and telephone contracts, together with a revised telephone operator service that will act as a "gateway" in relation to some services.

3.2. This section is set out under the following headings:

- The Telephone Gateway
- Telephone contracts
- Face-to-face contracts

³ http://www.asauk.org.uk/fileLibrary/pdf/ExcludedCasesFunding_ASA_response.pdf

The Telephone Gateway

- 3.3. The main provisions concerning the Gateway are set out in Part 2 of the draft Procedure Regulations.
- 3.4. Use of the Gateway is mandatory (at Legal Help level) in three categories - Debt, Special Educational Needs (SEN), and Discrimination - unless the client is an "exempted person", that is an individual who
- Has been deprived of their liberty, or
 - Is a child (i.e. under 18), or
 - Is a previously assessed person with a linked problem (i.e. has been assessed within the last 12 months as needing face-to-face advice, and is seeking further help to solve a linked problem from the same provider).⁴
- 3.5. Note that such a previous assessment must be "by the gateway".
- 3.6. In emergency cases, clients who require Representation will not be required to call the Gateway. The MoJ does not define emergencies as including any situations in which clients need (or are only entitled to) Legal Help.
- 3.7. The renamed Civil Legal Advice service will assess callers in a two-stage process. Applicants will initially speak to an operator who will make an initial assessment of whether the problem is within scope and whether the applicant is financially eligible. If so, the client will be put through to a specialist telephone advice provider, who will assess whether a telephone and/or online service will be appropriate for the client (the "assessment of suitability"). This assessment will be carried out in accordance with guidance issued by the LSC/MoJ. According to version 1 of this guidance
- "The assessment of suitability will be based on a consideration of whether you can understand and act on the client's instructions and the client can understand and act on the advice provided by CLA, taking into account the Service Adaptations and Reasonable Adjustments reasonably available."*
- 3.8. When making a referral to a face-to-face advice service, Gateway operators and specialist telephone advisors will choose from an approved list of face-to-face providers. Selection will be based on client choice and proximity to the client.⁵
- 3.9. The draft specification for face-to-face contracts includes a paragraph stating that a provider with a face-to-face contract must not open a New Matter Start in debt unless the provider
- Has and can record a valid Gateway Work reference number, or

⁴ Draft Civil Legal Aid (Procedure) Regs 2012 – reg 20.

⁵ LASPO FAQ May 2012

- Certifies that the client is an exempted person and retains evidence of this on file.⁶
- 3.10. Where there are crossover issues, e.g. discrimination in housing, a face-to-face provider with a housing and debt contract can assist the client without having to signpost them to the Gateway first.⁷ The draft Category Definitions 2013 state that discrimination cases “may be dealt with either within the discrimination category itself or, where the underlying matter arises from an individual category . . . within that category.”⁸
 - 3.11. Where a caller’s case is out of scope, the operator will advise them of the existence of Exceptional Case Funding, and that they should contact a legal adviser if they want advice about whether this might be of help in their case.⁹
 - 3.12. Where a caller is dissatisfied with a decision (or “determination”) by the Gateway, they can make a complaint and/or apply for a review.¹⁰
 - 3.13. Where a client with an in scope debt problem (e.g. mortgage arrears) is helped under the Housing Possession Court Duty Scheme, it seems that they must then be referred to the Gateway if any further work is required on their case.
 - 3.14. The MoJ will review the operation of the Gateway. A report will be published within two years of its introduction.¹¹

Telephone contracts

- 3.15. The LSC has tendered for new contracts to deliver Community / Civil Legal Advice specialist telephone advice services from April 2013 in family, housing and debt, education (SEN) and discrimination. The Information for Applicants (IFA) refers to the services as “Remote Advice”, which is to be delivered by web-cam, email or post, as well as by telephone.¹² The LSC estimates that 5% of matters may require online (as opposed to telephone) advice.¹³
- 3.16. On the 28th November 2012 the LSC announced that the successful bidders were as follows:

⁶ Draft Specification para 3.30 (e)

⁷ Letter from Hugh Barrett to Richard Miller

⁸ Category Definitions 2013 para 7.

⁹ Letter from MoJ: Legal Aid Reform – Process for obtaining excluded cases funding, March 2012, para 24

¹⁰ See part 14 of the CLA Guidance

¹¹ LASPO FAQ May 2012

¹² Information for Applicants (IFA) para 2.14

¹³ See Q26 of the FAQs published on 7.9.12

Family	Housing & Debt
Duncan Lewis Cooperative Legal Services Access Legal Training Limited	Duncan Lewis Derbyshire Housing Aid Access Legal Training Limited Shelter Carillion Energy Services
Education	Discrimination
MG Law limited The Children's Legal Centre NYAS	Stephensons Howells Merseyside Employment Law

3.17. It should be noted that there are important differences between these contracts:

- Family advice is not subject to the gateway
- Within housing and debt, housing is not subject to the gateway but debt is
- Discrimination and education (SEN) are subject to the gateway, and the successful applicants are required also to provide face-to-face advice.

3.18. A crucial question in our view concerns when cases should be referred from telephone to face-to-face advice. The IFA says that

*"There will be situations where telephone advice will not be appropriate for some clients and in these circumstances we will expect clients to be referred on to a face-to-face advice service. This assessment will be carried out by either the call agent or the specialist telephone adviser according to specified criteria."*¹⁴

The "specified criteria" are presumably those set out in the CLA Guidance prepared by the LSC/MoJ.

3.19. The draft Specification says that providers must have an appropriate procedure to assess whether Remote Advice can reasonably be expected to enable (a) the provider to understand and act on the client's instructions and (b) the client to understand and act on the advice received. If not, the client should be referred for or provided with face-to-face advice.¹⁵ In family and housing (which are not subject to the gateway), clients must also be referred to a face-to-face provider if they request face-to-face advice.¹⁶

¹⁴ IFA para 2.7

¹⁵ Draft CLA Specification (August 2012) paras 1.9 – 1.10

¹⁶ Ibid para 1.11. The CLA Guidance suggests that the same rule applies in relation to Welfare Benefits.

- 3.20. Providers that have face-to-face contracts in family, and housing and debt, will be able to refer cases to themselves in specified circumstances.¹⁷
- 3.21. In education (SEN) and discrimination the successful applicants will have to provide face-to-face services themselves where necessary. The IFA assumes that 10% of cases in education and discrimination are likely to require face-to-face advice.¹⁸
- 3.22. In relation to education (SEN) and discrimination, the LSC has divided England and Wales into seven procurement areas: London, North East, Midlands and East of England, South East, North West, South West and Wales.¹⁹
- 3.23. Providers in these two categories were required, as part of their bid, to demonstrate a comprehensive 'Face-to-face Service Delivery Plan' in each of the seven procurement areas that would ensure quality, consistency and convenience for clients.²⁰
- 3.24. Such a face-to-face service may be provided:
- From either an office or alternative, local arrangements
 - In exceptional circumstances, by travelling to see the client
 - By using an Approved Third Party or Agent
 - By providing appointments in clients' own procurement area, or another procurement area if more convenient to the client
 - In Discrimination only by making a referral to another face-to-face provider with a contract in an appropriate category of law.²¹
- 3.25. When providing appointments, clients can be expected to travel for up to 45 minutes within each procurement area.²² Appointments are expected to be made within specified time scales.²³

Face-to-face contracts

- 3.26. The LSC has tendered for
- Face to face contracts in family, housing & debt, immigration & asylum
 - Some Housing Possession Court Duty Schemes (37 schemes)
 - Mediation (to build capacity).

¹⁷ Draft spec para 4.38

¹⁸ IFA, p.30

¹⁹ Draft spec para 3.2. Full details of the areas are set out in the FAQ.

²⁰ IFA p.54

²¹ Draft specification paras 3.2, 3.3, 4.3

²² FAQ Q22

²³ Draft Specification Annex 5, p.3

3.27. In the following categories of law, existing contracts are being extended:

- Community Care
- Mental Health
- Actions against Public Authorities
- Public Law
- Most Housing Possession Court Duty Schemes (HPCDS)
- Existing mediation contracts.

3.28. The tenders for family, housing and debt, and immigration and asylum closed on 22 October. The LSC is currently notifying providers of the outcome of the tenders.

3.29. It is important to note a number of changes that have been made to face-to-face contracts.

3.30. Contracts are “exclusive”, not inclusive.

“All Categories of Work are exclusive under this Contract. You must have Schedule Authorisation in a Category to undertake work in that Category unless it is Miscellaneous Work”.²⁴

Therefore, with the exception of Miscellaneous Work, there is no provision for tolerance work.

3.31. KPIs have been changed and separated from sanctions. Providers are no longer required, for example, to use a specified proportion of the Matter Starts allocated to them.

3.32. There are some changes to the supervisor standards

- A new standard in discrimination
- A new general requirement:

“1 example of the ability to recognise a possible contravention of the right and freedoms expressed in the European Convention on Human Rights 1950, as given effect in the Human rights Act 1988.”

- Other amendments to individual standards – e.g. in relation to mortgage arrears in the Housing & Debt standard.

3.33. There will be very little opportunity for matters to be brought into scope as “connected” matters or “mixed cases”. Para 46 of Part 1 of Schedule 1 of LASPO enables the Lord Chancellor to make regulations about connected matters. The Ministry of Justice has issued a Policy Statement which says:

²⁴ Draft Specification para 2.28. Under the Category Definitions 2013, the Miscellaneous category includes matters concerning: working with children and vulnerable adults; protection from harassment; proceeds of crime; environmental pollution; and sexual offences where the client is the victim of the offence.

"3. The Government intends to use the regulation-making power under paragraph 46 of Part 1 of Schedule 1 to prescribe that civil legal services excluded from scope by virtue of the exclusions at paragraphs 11 (trust law), 13 (company or partnership law) or 14 (business cases) may be funded where the purpose of such services is to identify the correct defendant in proceedings that are described in Part 1 of Schedule 1 to the Act.

6. We do not intend to use the power at paragraph 46 of Part 1 of Schedule 1 to prescribe that cases can be brought into scope by virtue of any other connection with matters described in Part 1 of Schedule 1. Nor do we intend to use the power to prescribe a general rule for such matters.

9. To the extent that there may be 'connected' proceedings that are preliminary or incidental to a matter described in Part 1 of Schedule 1, these will be covered by the provision at paragraph 5 of Part 4 of Schedule 1 (provided they are not specifically excluded under Part 2)."

4. Scope in social welfare law

4.1. This section is set out under the following headings:

- Housing and debt
- Immigration and asylum
- Welfare benefits

Housing and debt

4.2. Housing and debt remain as two separate categories (in the category definitions), but there is only one supervisor standard and you can only have a contract to provide them both.

4.3. Matters concerning home owners are classed as **debt**, rather than housing matters. The draft Category Definitions 2013 state that the debt category includes Legal Help and all proceedings in relation to:

- Court orders for sale of an individual's home (under paragraph 33(1)(a) of Part 1 of Schedule 1 to the Act);
- Court orders for possession of an individual's home arising out of failure to make payment due under a mortgage (under paragraph 33(1)(a) of Part 1 of Schedule 1 to the Act).
- A bankruptcy order against the individual under Part 9 of the Insolvency Act 1986 where the estate includes the individual's home and where the petition for bankruptcy was not presented by the client, including [services provided] in relation to a statutory demand under

Part 9 of that Act (paragraph 33(2) of Part 1 to Schedule 1 to the Act)."

- 4.4. All debt work falls within the Gateway (see above). It is unlikely that many debt cases will fall within the exemptions. We do not know how many debt cases will be referred to face-to-face providers by the Gateway, but do not expect the numbers to be large. Successful bidders for housing and debt contracts will only be awarded 4 Matter Starts each in debt.
- 4.5. Where a client with an in scope debt problem (e.g. mortgage arrears) is helped under the Housing Possession Court Duty Scheme, it seems that they must then be referred to the Gateway if any further work is required on their case.
- 4.6. The draft Category Definitions 2013 say that **housing** covers Legal Help and proceedings in relation to:
 - (a) Possession of an individual's home (other than mortgage possession) (paragraph 33(1)(a) of Part 1 of Schedule 1 to the Act). Possession arising from mortgage arrears and court orders for sale of the home fall within the debt category and cannot be undertaken in this category.
 - (b) Eviction from an individual's home of the individual or others, including unlawful eviction and planning eviction matters (paragraph 33(1)(b) of Part 1 of Schedule 1);
 - (c) The provision of accommodation and assistance under Parts 6 and 7 of the Housing Act 1996 for an individual who is homeless or threatened with homelessness (paragraph 34 of Part 1 of Schedule 1 to the Act);
 - (d) The provision of accommodation by way of community care services as specified in paragraph 6 of Part 1 of Schedule 1 to the Act, in relation to an individual who is homeless or threatened with homelessness;
 - (e) Housing disrepair matters described in paragraph 35 of Part 1 of Schedule 1 to the Act, namely removing or reducing a serious risk of harm to the health or safety of the individual or relevant family member where the risk arises from a deficiency in the individual's rented or leased home and the legal services are provided with a view to securing that the landlord makes arrangements to remove or reduce the risk. This includes Legal Help for applications under section 82 of the Environmental Protection Act 1990 for a statutory nuisance, where the application falls within the terms of paragraph 35 of Part 1 of Schedule 1.
 - (f) Anti-social behaviour matters in the county court, namely orders under section 1B of the Crime and Disorder Act 1998, interim orders under section 1D (following an application under section 1B), intervention orders under section 1G in connection with a section 1B Order and anti-social behaviour injunctions under section 153A of the Housing Act 1996 (paragraph 36 of Part 1 of Schedule 1).
 - (g) Injunctions under the Protection from Harassment Act 1997 (paragraph 37 of Part 1 of Schedule 1 to the Act); and

(h) The powers of the Secretary of State to provide or arrange to provide accommodation under section 4 or 95 of the Immigration and Asylum Act 1999 (accommodation for persons temporarily admitted and asylum seekers) and section 17 of the Nationality, Immigration and Asylum Act 2002 (support for destitute asylum seekers) (paragraph 31 of Part of Schedule 1 to the Act).

- 4.7. Discrimination cases and public law/judicial review cases within housing are also covered in the Category Definitions 2013.
- 4.8. Note that para 33(6) of Schedule 1, Part 1 of LASPO states that some specific claims that are out of scope can be included in counterclaims in possession proceedings, or in claims for unlawful eviction, i.e. claims for
- Assault, battery or false imprisonment
 - Trespass to goods
 - Trespass to land
 - Damage to property
 - Breach of statutory duty.
- 4.9. Counterclaims for damages for disrepair are not referred to specifically, but the government stated both in the original consultation paper on the legal aid reforms and at Commons Committee stage that these would be in scope.²⁵
- 4.10. Schedule 1 Part 4 para 4 OF LASPO is also important:
- "References in this Schedule to services provided in relation to proceedings, orders and other matters include services provided when such proceedings, orders and matters are contemplated."*
- 4.11. The MoJ confirmed during the original consultation that a letter from a landlord or lender threatening proceedings would be sufficient to trigger eligibility for advice.

Immigration and asylum

- 4.12. The authorised immigration and asylum work in Schedule 1 Part 1 of LASPO is: -

Asylum (para 30) – rights to enter and remain in the UK arising from:

- Refugee Convention
- Articles 2 (right to life) or 3 ECHR (prohibition on torture, inhuman or degrading treatment)

²⁵ Proposals for the Reform of Legal Aid in England and Wales, para 4.76; Commons Committee 6th September 2011
<http://www.publications.parliament.uk/pa/cm201011/cmpublic/legalaid/110906/pm/110906s01.htm>

- Temporary Protection Directive (sudden influx of displaced persons – has never happened)
- Qualification Directive (EU approximation of asylum and ECHR protection claims).²⁶

This does not include

- Refugee family reunion (arises from the UNHCR Handbook not the Convention)
- Asylum interviews unless allowed by regulations (mainly children, detained fast track).

Immigration Detention – including bail, temporary release or admission including the conditions applied to the person on release (Paras 25 – 27) but not their immigration application.

Victims of domestic violence

- Where the victim is applying for indefinite leave to remain after having been granted leave to remain as a “partner” of a person “present and settled” in the UK (para 28)
- Where the victim comes under EU law and is applying for a residence card with a retained right to reside (as a victim of domestic violence) or with a permanent right to reside (para 29).

Domestic violence has the wide definition (including psychological, physical, sexual, financial or emotional) and need not come from the “partner” (an associated person per s 62 Family Law Act 1968).

Other than the above, the fact that applicant is a victim of domestic violence does NOT generally entitle them to immigration advice (e.g. overstayers, or partners of those on short term leave).

Note that immigration domestic violence cases are **not** currently intended to be covered by the Ministry of Justice “Policy Statement: Domestic Violence and Child Protection (Supporting Evidence)” nor are they mentioned in the relevant paragraphs of the draft Procedure Regulations, so there appears to be no documentation gateway to legal advice for these clients.

Victims of Trafficking in Human Persons (para 32)

Relating to an application for leave to enter or remain for someone who has been a victim of trafficking. There must be either a conclusive determination that they are a victim or a “reasonable grounds” determination that they are a victim **and** no negative determination.

²⁶ This will include applications for settlement/further permission to remain as a refugee or with humanitarian protection but not with discretionary leave.

If there has been a negative determination, assistance in challenging that would be by way of judicial review but there could be no immigration advice in the meantime.

The draft Procedures Regulations at para 31 (8) prescribe the time period in which the application for funding must be made.

Special Immigration Appeals Commission (SIAC) (para 24) - All proceedings before the Commission are included.

Services provided in relation to a TPIM [Terrorism prevention and investigation measures] notice and control order proceedings (para 45)

Judicial Review

4.13. Although generally Judicial Review remains in scope (para 19 of the Schedule), in immigration cases, it is restricted by specific exclusions of what are perceived to be "abusive" "second" judicial review claims where:

- Judicial review is sought in relation to an issue in respect of which an appeal or judicial review (however funded) of the **same or substantially the same issue** was resolved adversely to the applicant/appellant, less than one year previously (para 19(5))
- Judicial review is sought of **removal directions given not more than one year after a decision was made to remove** the individual or any appeal against such a decision was determined (para 19(6)).

4.14. These specific restrictions do not apply to judicial review of certain matters (generally fresh claims and certified claims where there would be no in country right of appeal) specified in para 19(7).

4.15. The Merit Regulations, as currently drafted, allow funding only where "all" possible alternative remedies have been exhausted. The Legal Aid Minister stated on 3rd December however that the government was not attempting to change the rules as far as judicial review is concerned and undertook to reconsider the relevant wording.

Excluded from scope

4.16. Everything else not listed above (in paragraphs 4.11 and 4.12) is excluded, including:

- Article 8 ECHR (also not covered by the exceptional cases provisions)
- Post-conviction deportation
- EU cases
- Applications for permission to stay by detainees
- Applicants with mental health/capacity issues

- Children's out of scope cases
- Entry clearance applications or appeals (other than perhaps on Article 3 ECHR grounds)
- Appeals for excluded cases to tribunals and higher courts (Court of Appeal and Supreme Court).

Mixed Cases or Connected Matters

- 4.17. A mixed case is one in which part of the work needing to be done in the matter is in scope and part is out of scope. As noted above, the MoJ has declared in their Policy Statement an intention not to recreate the current rule.
- 4.18. This is particularly significant in the immigration context because individuals making applications for asylum or on domestic violence or trafficking victims grounds will often also have other grounds for remaining in the UK. These will often be Article 8 ECHR or possibly another out of scope rule. The precise wording of the scope inclusions may be crucial. For domestic violence the scope can be interpreted as covering any application made by a victim of domestic violence. For trafficking victims the inclusion is for services in relation to an application for leave to enter or remain. The asylum inclusion is though only services in relation to the listed asylum or other protection rights.
- 4.19. As well as usually being in the client's interests to raise those additional grounds, in the course of making their "in scope" application or appeal most clients will be **required** to put forward those out of scope reasons by what is known as the immigration "one-stop" regime. This requires an individual to state all existing grounds on which he or she claims to be entitled to remain in the UK. Failure to raise any existing grounds in response to a "one stop notice" or in an appeal will usually mean that there would be no right of appeal against the refusal of any subsequent application based on those grounds.
- 4.20. If work on those out of scope grounds is not going to be funded by legal aid, advisers will face potentially very difficult ethical and practical problems in advising and assisting their clients. Even in the best case scenarios, where alternative funding is available for that work, or even if the adviser does that work pro bono, they will still need to jump through hoops to demonstrate that no time has been charged to the legal aid file for that work.

Exceptional Cases

- 4.21. The draft Immigration Specification includes (para 8.14) provision for applications for exceptional funding to be made within the Asylum and Immigration category of law. However, the Government view is that exceptional funding will not be applicable in immigration cases on ECHR grounds and rarely in EU cases.

- 4.22. In this they rely on established case law of the European Court of Human Rights [Maaouia v France 39652/98 [2000] ECHR 455 (5 October 2000)] that Article 6(1) of the ECHR is not engaged in immigration matters.

Welfare benefits

- 4.23. Para 8 of Schedule 1 Part 1 of LASPO covers civil legal services provided in relation to an appeal on a point of law to the Upper Tribunal, the Court of Appeal or Supreme Court relating to a benefit, allowance, payment, credit or pension under
- A social security enactment
 - The Vaccine Damage Payments Act 1979, or
 - Part 4 of the Child Maintenance and Other Payments Act 2008.
- 4.24. Following a commitment given during the passage of LASPO, the MoJ proposed to amend Schedule 1 to include advice and assistance for those welfare benefit cases in the first-tier tribunal where the first-tier tribunal has itself identified an error of law in its own decision. Details of the proposal were set out in a Written Ministerial Statement on 18 September 2012.²⁷
- 4.25. These proposals were included in a regulation entitled the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendments to Schedule 1) Order 2012. This regulation was however defeated by a “fatal motion” in the House of Lords on 3rd December 2012. We do not know if the proposals will be replaced.
- 4.26. The LSC has stated that they will run a tender for 2013 welfare benefits face-to-face contracts starting on 1 October 2013. They are finalising this approach and will provide further details in due course. The Written Ministerial Statement of 18 September 2012 gives an indicative timetable as follows:
- Pre-Qualification Questionnaire – February 2013
 - Invitation to Tender – May 2013
 - Contract Commencement – October 2013.
- 4.27. In the meantime, advice on the areas remaining in scope will be delivered through the current CLA telephone contracts for the period from 1 April to 30 September 2013. Face-to-face advice will also be provided through these contracts, where required.²⁸

²⁷ Written Ministerial Statement 18 September 2012

²⁸ CLS news 21 November 2012

Appendix: LASPO – Key Documents

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

2. Regulations laid on 29 October

	Title	Purpose	Current status
1	Civil Legal Aid (Merits Criteria) Regulations 2012	Sets out the merits criteria which the Director of Legal Aid Casework (the Director) must apply when deciding whether an applicant qualifies for civil legal service.	Approved by Parliament
2	Civil Legal Aid (Family Relationship) Regulations 2012	Defines orders made under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 as 'matters arising out of a family relationship'	Subject to negative procedure (until 15.12.12)
3	Civil Legal Aid (Pollution of the Environment) Regulations 2012	Prescribes the types of pollution of the environment for which civil legal services may be available, in relation to claims in private nuisance arising out of such pollution where an injunction is sought.	Subject to negative procedure (ditto)
4	Civil Legal Aid (Immigration Interviews)(Exceptions) Regulations 2012	Sets out where legal aid may be made available for applicants attending an asylum application interview.	Subject to negative procedure (ditto)
5	Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendments to Schedule 1) Order 2012	Amends Schedule 1 of LASPO, which sets out the scope of civil legal aid services. Amendments made are: <input type="checkbox"/> a technical correction to the wording of the Act regarding Judicial review; <input type="checkbox"/> the addition of welfare benefits reviews by the First-tier Tribunal <input type="checkbox"/> adds services in connection with the 2007 Hague Convention on international family maintenance cases.	Not approved by the House of Lords (essentially struck down)

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3. MoJ documents issued in December 2012

The Civil Legal Aid (Procedure) Regulations 2012 – laid before Parliament on 17 December 2012

The Civil Legal Aid (Procedure) Regulations 2012 – Briefing note

Community Legal Advice Guidance: Assessment of Suitability for Remote Advice – version 1 - 13 December 2012

4. Other MoJ draft documents

Policy Statement: Domestic Violence and Child Protection (Supporting Evidence)

Policy Statement – Revocation of a Determination

Policy Statement – Connected Matters

Policy for payment of civil and family work provided through a telephone contract under section 2(3) of the LASPO Act 2012

Policy for payment of civil and family work provided through a face to face contract under section 2(3) of the LASPO Act 2012

Policy Statement – Financial eligibility and contributions

Policy Statement – Transition between the Legal Aid Scheme under the AJA 1999 to that under LASPO

List of functions in the draft Civil Legal Services (Procedure) Regulations 2012

List of functions in the draft Civil Legal Services (Merits) Regulations 2012

5. Draft Contract Documents

The Standard Terms 2013

2013 Standard Civil Contract Specification

Civil Contract for Signature 2013

Category Definitions 2013

<http://www.justice.gov.uk/legal-aid/contracts-and-tenders/standard-civil-contract-2013>

The Foundry (Room 303), 156 Blackfriars Rd, London SE1 8EN

☎ 020 7953 3088 www.asauk.org.uk info@asauk.org.uk

The Advice Services Alliance is a company limited by guarantee, registered in England & Wales No.3533317. Registered office : New Bridge Street House, 30-34 New Bridge Street, London EC4V 6BJ. Charity no. 1112627