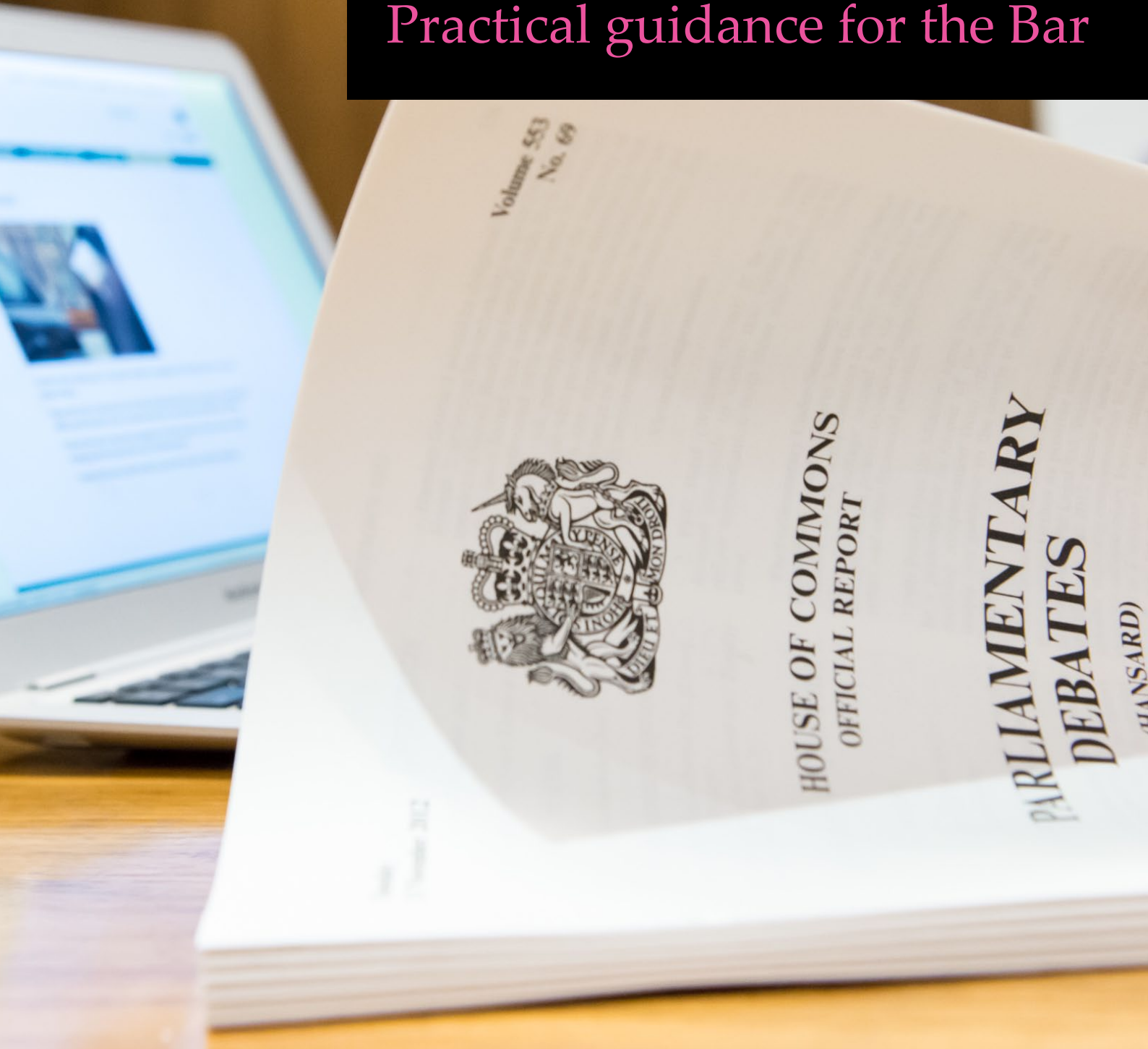


Civil legal aid

Practical guidance for the Bar



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Acknowledgments

This guide has been written by the Remuneration Committee's Civil (Public) Panel. The Bar Council welcomes any comments or suggestions to improve future revisions of this guidance, and any errors and omissions should be drawn to the attention to the Bar Council's Remuneration Team (Remuneration@BarCouncil.org.uk).

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Overview

Summary

1. This Guidance is directed to barristers undertaking civil legal aid work after 1 April 2013 in all categories of civil cases other than family cases.

2. The Guidance is intended to help explain how civil legal aid work has been changed by the legal aid reforms introduced by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) and the secondary legislation made under it. This material has been prepared by a team of practising barristers and clerks who comprise the Bar Council's Civil (Public) Panel. It will be regularly revised and updated. The Bar Council welcomes any comments or suggestions to inform future revisions of the Guidance. Any comments should be sent to Remuneration@BarCouncil.org.uk

3. This Guidance cannot, and does not, seek to cover all dimensions of the changes which have taken place. It focuses only on one specific issue – the remaining *scope* of civil legal aid – with the intention of helping a barrister determine whether a case can be brought within one of the new prescribed categories where civil legal aid remains available or within the new exceptional funding criteria. This Guidance provides an overview of the scope of civil legal aid now available in each of the following categories of law:

- Actions against the police;
- Clinical negligence;
- Community care;
- Debt;
- Education;
- Employment;
- Housing;
- Immigration and asylum;
- Inquests;
- Mental health;
- Personal injury;
- Public law and judicial review; and
- Welfare benefits.

4. Readers interested in pursuing other dimensions of the legal aid reforms are directed to guidance available from the following sources:

- [*The Lord Chancellor's Guidance on Civil Legal Aid*](#) (February 2015) Ministry of Justice
- [*Frequently Asked Questions: Civil Legal Aid Reforms \(v1.4, up to May 2013\)*](#) Legal Aid Agency
- [*Frequently Asked Questions: Legal Aid Transformation \(October 2014 update\)*](#) Legal Aid Agency
- [*Out of scope, out of mind: Who really loses from legal aid reform*](#) (March 2012) Citizens Advice Bureau Service, and
- [*Legal Aid Handbook 2013/2014*](#) (April 2013) Legal Action Group.

5. This Guidance does not address alternative methods of funding civil cases whether by private payment, conditional fee agreements, damages-based agreements or otherwise. Barristers seeking guidance on those funding methods should consult the Bar Council's [Guidance for Barristers and Clerks Relating to Privately Funded Civil Litigation](#) .

6. This Guidance is best read electronically and care should be taken that the most up to date version is accessed. This is to ensure that hyperlinks in the Guidance lead to the correct sources.

Keeping up to date

7. The Bar Council and the Legal Aid Agency (LAA) have agreed that there should be regular opportunities for the exchange of information between the Bar and legal aid officials about the operation of the legal aid reforms, including the matters covered in this Guidance. Individual barristers can get involved in this process by:

- attending the meetings held in London and on Circuit where barristers can meet and discuss issues directly with legal aid officials. These are known as Bar Reference Group meetings.
- raising issues of concern about the general administration of civil legal aid for the Bar Council to canvass at its regular liaison meetings with senior legal aid officials. (Such issues should be notified by email to [Julie Demeritt at the Bar Council \(JDemeritt@BarCouncil.org.uk\)](mailto:JDemeritt@BarCouncil.org.uk)).

8. Regular updates on aspects of the material covered in this Guidance are available free of charge from three sources to which all civil legal aid practitioners should consider subscribing:

- [Remuneration Update](#) (issued by the Bar Council)
- [Advocates' Bulletin](#) (issued by the Legal Aid Agency)

- [Legal Aid Agency Bulletin](#) (issued by the Legal Aid Agency)

9. The LAA have also published [online training modules](#) covering the impact of the legal aid reforms and there is a Government web page dedicated to the reforms described as [Legal Aid Transformation](#).

10. Barristers regularly undertaking civil legal aid casework may benefit from membership of the [Legal Aid Practitioners Group \(LAPG\)](#).

Legal Aid, Sentencing and Punishment of Offenders Act 2012

The headline changes

11. In April 2013 civil legal aid underwent its biggest shake-up in a generation. The driving force for change was Government policy to reduce public spending.

12. The changes were first outlined in a consultation paper, [Proposals for the Reform of Legal Aid in England and Wales](#), issued in 2010. There were some 5,000 representations received in the consultation process but the [Government's response](#) to the consultation, published in 2011, advised that it would press forward with the reforms largely as originally proposed. LASPO was the subsequent legislative vehicle for the central reforms. It completed the Parliamentary process and received Royal Assent on 1 May 2012. Since then the detail of the changes has been supplied in a series of statutory instruments.

13. The 'headline' changes include:

- **Abolition of the Legal Services Commission.** The LSC was abolished on 1 April 2013. Decision-making on legal aid is now the role of a Director of Legal Aid Casework and administration of applications, claims and payments is now handled by the Legal Aid Agency (LAA) based within the Ministry of Justice. All policy responsibility is taken directly by the Lord Chancellor and other ministers in the Ministry of Justice.
- **Reduced scope of civil legal aid.** Before 1 April 2013 the assumption was that civil legal aid was available to help on almost all aspects of English law, with narrowly prescribed exceptions. Since 1 April 2013 the situation has been completely reversed – civil legal aid is now only available for prescribed topics and types of legal work, subject to a narrow override for exceptional funding in other cases.
- **Reduced access to civil legal aid through means-testing.** There has long been an element of means-testing to determine who qualifies for legal aid. From 1 April 2013 the means-test has been tightened so that fewer individuals qualify for legal aid.

- **Tightened merits testing.** Before 1 April 2013, LSC officials decided legal aid applications by applying criteria in the Funding Code and Guidance. Since 1 April 2013 the basis on which civil legal aid will be made available has been circumscribed by statutory instrument (see [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#) and its many subsequent amending regulations). From 27 January 2014 the criteria have been further tightened in that it is no longer possible to obtain legal aid for a case with only “borderline” merits (see [Civil Legal Aid \(Merits Criteria\) \(Amendment\) Regulations 2014 SI No. 131](#))
- **Shift away from face-to-face access.** Government is increasingly keen that publicly-funded legal services should be accessed otherwise than through the traditional ‘high street solicitor’ route. From 1 April 2013 there is a greater emphasis on call-centre provision under which legal advice is sought and provided by telephone, email and online from the service called [Civil Legal Advice \(CLA\)](#). Those call-handlers giving advice are not usually solicitors but the intention is that their work be supervised by solicitors. For some subject areas it will only be possible to access legal aid by first passing through a ‘gateway’ of telephone advice services. In April 2013 the Ministry of Justice published a leaflet explaining how the new arrangements for those subjects were intended to work: [Legal aid in debt, discrimination and special educational needs cases - A summary of what you need to do](#). An independent review of the mandatory [Civil Legal Advice Gateway](#) telephone service was published by the Public Law Project in 2015. By then, the Government had published the [outcomes of its own research](#) and the Ministry of Justice's own review of the [Civil Legal Advice mandatory gateway](#).
- **Reduced remuneration for undertaking legal aid work.** The first round of cuts in rates of pay for solicitors, barristers and experts handling civil legal aid work were implemented early in the process of legal aid reform and apply to all work done in legal aid cases where legal aid applications were made after 3 October 2011. The rates of payment in effect from 3 October 2011 were implemented by [The Community Legal Service \(Funding\) \(Amendment No.2\) Order 2011 SI No. 2066, Schedules 1 and 2](#). Rates of pay were, in effect, cut by 10 per cent. From 1 April 2013, the rates of payment to solicitors, barristers and experts in civil legal aid cases have been prescribed by new regulations (see [Civil Legal Aid \(Remuneration\) Regulations 2013 SI No. 422](#)). A second round of even more significant cuts in rates of pay for junior barristers undertaking civil legal aid work came into effect for new cases on 2 December 2013 (see [Civil Legal Aid \(Remuneration\) \(Amendment\) Regulations 2013 SI No. 2877](#)). The Bar Council has published a table of the various permutations of the [prescribed civil legal aid rates](#) for barristers and arrangements for their enhancement. The Bar Council and Association of Costs Lawyers

have jointly published guidance on the process of [claiming enhancements](#) to some of the prescribed rates for civil (non-family) legal aid work.

- **Changes in the supplier-base.** Most front line suppliers of civil legal aid services were given notice ending their contracts with the LSC from 31 March 2013. Following a tendering-exercise, new contracts with the LAA were issued with effect from 1 April 2013. A minority of suppliers continue to work under the terms of the 2010 contract, which was subject to variation in order to bring it into line with LASPO and to provide as much consistency with the 2013 contract as possible. Providers of face-to-face legal aid services in mental health and community care hold 2014 contracts. A further 2015 variant of the contract has been offered in new contracts to deliver face-to-face Actions Against the Police etc., Clinical Negligence and Public Law Services in England and Wales from 1 November 2015. A full list and the content of the different [contracts](#) have been published.

In the course of these post-2013 changes, some previous suppliers have left the market. Many new providers have contracts to supply services in subject areas in respect of which they have not previously practised. Because some subject areas were exposed to over-bidding, the number of cases offered to successful bidders may have been so limited as to make contracts non-viable. It was only in January 2015 that the LAA issued [Supplementary Matter Starts guidance](#) about how contractors could undertake additional cases. Supplementary matter starts guidance. But, despite all these arrangements, there are legal aid 'deserts' in which no local provider of specialist legal services is available to take on particular types of legal aid cases. The Bar Council understands that no contracts have been issued to barrister-led bidders.

- **Changes to civil legal aid procedures.** The rules about how legal aid applications are made, processed and determined (and the various forms in which civil legal aid can be provided) are detailed in a new statutory instrument (see [Civil Legal Aid \(Procedure\) Regulations 2012 SI No. 3098](#)) which must be read subject to subsequent amending regulations.
- **Changes in the Civil Procedure Rules.** The availability of civil legal aid has also been affected by the changes introduced to the management of civil cases by amendments to the Civil Procedure Rules which came into effect on 1 April 2013¹ and by subsequent further amendments to those Rules. Most obviously, the doubling of the upper limit of the small claims track from £5,000 to £10,000 has meant that civil legal aid effectively

¹ [Civil Procedure \(Amendment\) Rules 2013 SI No. 262](#)

ceased to be available in respect of the taking or defending of most claims for sums between £5,000 and £10,000.

- **Changes to forms and in technology.** All the forms used to apply for legal aid or be paid for the provision of civil legal aid services were changed on 1 April 2013 and many were changed again in August 2014². All claims submitted on the old forms will be rejected. However, paper forms are on the way out. The LAA intends to implement a new online computer system ('CCMS') through which it will deal with applications for civil legal aid, with most other civil legal aid transactions, and with claims for payment presented by barristers and solicitors. All barristers doing civil legal aid work will need to register for participation in the new computer system before it is rolled-out nationally. In January 2015, the LAA gave notice that the use of the computer-based system for applications for civil aid and claims for payment would become mandatory for all cases in October 2015. This date has since been extended to February 2016.
- **Changes to costs protection.** As with the old legal aid arrangements, the new scheme provides some measure of costs protection for circumstances in which a legally aided client loses their case. The details are given in a new set of regulations.³ These also set out the circumstances in which the Lord Chancellor can be ordered to meet the costs of the successful party.
- **Supplementary Legal Aid Scheme.** It had been envisaged that a new Supplementary Legal Aid Scheme might be introduced alongside the mainstream legal aid reforms. That proposal has not been taken forward, at least for the time being.
- **Arrangements for payment of barristers.** Under the new civil legal aid scheme there continues to be no contract between the LAA and any barrister for the payment by the LAA of a barrister's fees. Nor does counsel have any statutory entitlement to be paid for his or her services by the LAA. The scheme for payment of barristers in civil legal aid cases is intended to work by the LAA requiring its contracted suppliers to themselves pay professionals whom they engage in legal aid cases, including barristers and experts, and by the LAA agreeing, under those contracts, that in some cases it will pay barristers directly. It is therefore for each barrister to make their own agreement with a legal aid supplier, such as a solicitor, as to the terms on which they will accept a brief or instructions to undertake civil legal aid work. The old default Terms of Work between barristers and solicitors ceased to apply on 31 January 2013 and as a result any liability on the solicitor to pay (or arrange for the LAA to pay) in a civil legal aid case will only be

² The forms are available on-line [here](#)

³ [Civil Legal Aid \(Costs\) Regulations 2013 SI No. 611](#)

enforceable if the barrister enters into a contract with the supplier.⁴ The Bar Council's Fee Collection Service remains available to assist counsel if a solicitor will not pay (or will not arrange for a barrister to be paid by the LAA) in a civil legal aid case.⁵

- **Very High Cost Civil Cases.** As with the pre-reform arrangements, civil legal aid cases likely to incur costs of over £25,000 for the assisted client will be treated as 'high cost' cases and will be subject to special measures.⁶ In each such case, the solicitor will enter into an individual contract with the LAA specifically designed to manage high cost cases. Since 1 April 2013 the form of the contract has changed but not its essential structure which requires prior LAA approval of each 'stage' of the case and imposes a reduced (risk rate) payment from the LAA if the case does not result in full costs recovery at *inter partes* rates. For counsel, the risk rates are at the same rates which have been frozen since 2000.⁷ A barrister instructed by a solicitor holding a high cost contract does not become a party to the contract and has no statutory or contractual right to payment from the LAA. Although the LAA issued guidance on 1 April 2013 for barristers instructed in high cost cases,⁸ the guidance was not drafted jointly with, or approved by, the Bar Council. An updated revision of the guidance was issued in December 2013.

How the Act works

14. This part of the Guidance offers an outline of how LASPO works and how barristers can identify what is within, and what is now outside, the scope of civil legal aid.

15. "Civil legal aid" is once again the term covering non-crime legal aid services. It is defined as constituting the "civil legal services" required to be made available under sections 9 or 10 of LASPO or under paragraph 3 of Schedule 3 of the Act.⁹

16. Civil legal aid services are services providing advice and assistance both as to the application of the law and legal proceedings. The term also covers providing advice and assistance to prevent or resolve legal disputes and for enforcing decisions in legal proceedings or other decisions resolving legal disputes.¹⁰

⁴ Contractual terms that can be used for civil (non-family) legal aid work are available on the [Bar Council website](#).

⁵ Further information on the Fees Collection Service is available on the [Bar Council website](#)

⁶ Further information about civil VHCCs is available on the LAA webpage for [civil high cost cases](#).

⁷ £50 per hour for a junior, £90 per hour for a QC

⁸ The [High Cost Case guidance](#) is available on-line.

⁹ [LASPO](#) s 1(2)(a)

¹⁰ [LASPO](#) s 8

17. Sections 9 and 10 of LASPO deal respectively with first “General cases” and then “Exceptional cases”.

General cases

18. General cases are now those cases in which the subject matter is brought within the scope of the civil legal aid scheme because it is described in Part 1 of Schedule 1 of LASPO and the Director of Legal Aid Casework (through LAA officials) has determined that the individual qualifies for civil legal aid services. Exceptional cases are those limited number of cases where civil legal aid remains available notwithstanding that they would not otherwise qualify as general cases.

19. The starting point in most cases will be to determine whether or not the case is of a type which falls within scope (i.e. is listed in Schedule 1 Part 1 and not excluded under Schedule 1 Part 2 or Part 3). The Schedule works by identifying a particular subject, describing which services within that subject are covered, and then applying a series of definitions, conditions and exclusions. The amount of cross-referencing within the Schedule produces a snakes-and-ladders type exercise to determine whether a particular sub-class of case is in or out of scope. The function of the detailed chapters in this Guidance is to break the back of that exercise so that barristers can more readily discern what is in or out of scope.

20. The fundamental concept is that if a case does not fall within the parameters of Schedule 1, Part 1, it is out of scope. The net effect is that the following key matters are now outside the scope of civil legal aid:¹¹

- 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;
- education cases, except for cases of Special Educational Needs;
- housing matters, except those where the home is at immediate risk (excluding those who are “squatting”), homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the County Court
- immigration cases (non-detention);

¹¹ A summary of these areas is found in [*Reform of Legal Aid in England and Wales: the Government Response*](#) (2011). Do note that the response was published prior to the Parliamentary passage of LASPO and some changes were made to scope, such as a minor provision for some welfare benefits work to remain in scope.

- 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*;
- actions relating to contentious probate or land law;
- actions under section 14 of the *Trusts of Land and Appointment of Trustees Act 1996*;
- private family law (other than cases where criteria are met regarding domestic violence or child abuse);
- tort and other general claims; and
- welfare benefits, except for appeals on a point of law in the Upper Tribunal (but not advocacy in the Upper Tribunal), and onward appeals to the Court of Appeal and Supreme Court.

21. The Lord Chancellor has power to alter, amend and add to Schedule 1 Part 1 and has exercised that power more than once.¹² This means that the Schedule must always be read in an updated or revised form in the light of the exercise of those powers.

22. Even if a case is within scope, the qualifying criteria for civil legal aid remain governed by tests of means and merits.¹³ The means test is established by section 21, as again detailed in regulations. The merits test is framed by the general criteria in section 11 of LASPO which have subsequently been fleshed out in detailed regulations.¹⁴

23. The way in which the merits criteria are drawn means that it is not sufficient for a case to be within the scope of Schedule 1 Part 1. It must also meet the criteria set out in the regulations for the funding of such a case.¹⁵ Again, the detail is in the respective subject-related chapters of this Guidance.

Exceptional cases

24. As indicated above, failure to bring a case within the parameters of Schedule 1 Part 1 is not necessarily fatal to legal aid entitlement. Two classes of exceptional case are provided for under section 10.

¹² See, for example, [Civil Legal Aid \(Preliminary Proceedings\) Regulations 2013 SI No. 265](#). See also [The Legal Aid, Sentencing and Punishment of Offenders 2012 \(Amendment of Schedule 1\) Order 2013 SI No. 748](#) and [Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(Amendment of Schedule 1\) \(Advocacy Exceptions\) Order 2014 SI No 3305](#).

¹³ See [LASPO](#) s 11

¹⁴ [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#)

¹⁵ Including amending regulations such as [Civil Legal Aid \(Merits Criteria\) \(Amendment\) Regulations 2013 SI No. 772](#)

25. The first and more limited class applies to inquests and that class is dealt with in the [Inquests](#) chapter of this Guidance.

26. The second and broader class is set out in sections 10(2)-10(3) of LASPO in these terms:

- (2) *This subsection is satisfied where the Director —*
 - (a) *has made an exceptional case determination in relation to the individual and the services, and*
 - (b) *has determined that the individual qualifies for the services in accordance with this Part,*
(and has not withdrawn either determination).
- (3) *For the purposes of subsection (2), an exceptional case determination is a determination —*
 - (a) *that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—*
 - (i) *the individual’s Convention rights (within the meaning of the Human Rights Act 1998), or*
 - (ii) *any rights of the individual to the provision of legal services that are enforceable EU rights, or*
 - (b) *that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.*

27. How particular cases in specific subject areas can satisfy that test is considered in the subject-specific chapters of this Guidance. The Lord Chancellor has issued specific guidance to LAA officials on the operation of this category of ‘non-inquest’ exceptional funding.¹⁶ Although it had been expected that significant numbers of applications would be successfully made for exceptional funding, only a small number of applications have been made of which only a tiny number has been successful. The first official figures on applications and awards of exceptional funding were made available by the Ministry of Justice in 2014 and they, together with those published subsequently, have shown only a very small number of successful applications. The Lord Chancellor’s initial Guidance was successfully made subject to a judicial review claim on the basis that it was too restrictive. An [appeal by the Lord Chancellor](#) was dismissed. As an interim measure, [supplementary guidance](#) was issued indicating that caseworkers must have regard to the court’s decisions. Further guidance was released on the [9 June 2015](#).

¹⁶ [Lord Chancellor’s Exceptional Funding Guidance \(Non-Inquests\)](#)

28. Although every effort has been made to describe the provisions of LASPO accurately in this Guidance there can be no substitute for the legislation itself. This Guidance can usefully be read with:

- [The Act](#)
- [The Explanatory Memorandum](#)

Provider contracts

29. Providers are entitled to carry out work where they have a contract schedule authorisation for specified Categories of Law. The 2015, 2014, 2013 and amended 2010 Civil Contract definitions of categories of law do not purport to state what is in scope or what cases are eligible for exceptional funding. They do, however, define what cases providers can carry out under their contract. Any work that is in scope but is not within a Contract category is known as Miscellaneous Work and can be carried out by any Civil Contract holder.¹⁷

Regulations and official guidance

30. As the numerous references in the text and footnotes to this Guidance indicate, there are many regulations and orders published in exercise of the powers to make delegated legislation given in LASPO. Where possible this Guidance provides hyperlinks to them.

31. The Lord Chancellor has published various pieces of official guidance, including:¹⁸

- [The Lord Chancellor's Guidance on Civil Legal Aid](#) (February 2015) Ministry of Justice
- [The Lord Chancellor's Guidance on Exceptional Funding \(Non-Inquests\)](#) (June 2015) Ministry of Justice, and
- [The Lord Chancellor's Guidance on Exceptional Funding \(Inquests\)](#) (February 2013) Ministry of Justice.

32. This official guidance was written by civil servants in the Ministry of Justice. Its content was not the subject of any prior consultation with the Bar or with any other external body. It cannot be a substitute for the wording of the Act or the Regulations and the legal accuracy of the guidance that it gives cannot necessarily be assured. By way of illustration only, the *Guidance on Exceptional Funding (Non-Inquests)* states that whether or not there is a McKenzie friend (MF) who could be granted permission to speak on behalf of a party to proceedings is something a caseworker should consider when determining how capable an applicant for exceptional

¹⁷ Further information is available in the [Standard Civil Contract 2013, Category Definitions](#)

¹⁸ Civil legal aid funding guidance is available on the [Ministry of Justice website](#)

funding is of presenting their case effectively.¹⁹ Compare and contrast this with the Master of the Rolls *Practice Guidance 2010* on the role of MFs:²⁰

Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a MF.

33. Those interested in identifying the precise intended consequences of particular aspects of the new regime will find the detail set out in a host of impact assessments and equality impact assessments,²¹ including assessments dealing specifically with the changes to scope.²²

Actions against the police

Category definition and scope

LASPO Schedule 1, Part 1

34. The LASPO categories of most relevance to Actions Against the Police (AAP) are those set out in Schedule 1, Part 1, paragraphs 21 and 22. Paragraphs 3 and 39 will also assist in some cases.

35. Paragraph 21 covers cases involving “abuse by a public authority of its position or powers”. However, Schedule 1, Part 1, paragraph 21(4) goes on to provide that

For the purposes of this paragraph, an act or omission by a public authority does not constitute an abuse of its position or powers unless the act or omission –

- (a) is deliberate or dishonest, and*
- (b) results in harm to a person or property that was reasonably foreseeable.*

36. Paragraph 22 covers claims in tort or claims for damages (other than claims in tort) in respect of a “significant breach of Convention rights” by a public authority.²³

37. Paragraphs 21(5) and 22(4) provide that for the purposes of paragraphs 21 and 22 “public authority” has the same meaning as in the *Human Rights Act 1998*, section 6:

(3)[...] “public authority” includes –

- (a) a court or tribunal, and*

¹⁹ See [Lord Chancellor’s Exceptional Funding Guidance \(Non-Inquests\)](#), page 9

²⁰ [Practice Guidance – McKenzie Friends \(Civil and Family Courts\)](#), paragraph 19

²¹ The impact assessments and equality impact assessments are available on the [archived Ministry of Justice website](#).

²² See the *Impact Assessment specifically dealing with changes to scope* and the *Equality Impact Assessment*

²³ Further information on the meaning of “significant breach” is provided by the [Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), paragraphs 11.1-11.3

- (b) *any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.*

[...]

- (5) *In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.*

38. Paragraph 3 brings within scope cases involving the physical or mental abuse of children or vulnerable adults, and paragraph 39 covers assistance to the victims of certain sexual offences.

Regulations

39. Chapter 3 of the *Civil Legal Aid (Merits Criteria) Regulations 2013* sets out specific merits criteria provisions for claims against public authorities.²⁴

40. Regulation 57 provides that where a claim is made for **investigative representation** in relation to a matter described in paragraphs 21 and 22, regulations 39 and 40(1)(a) and (b) apply. Regulation 39 contains the standard criteria for determinations for legal representation, while regulation 40(1)(a) and (b) contains the general criteria for investigative representation (prospects of success of the case are unclear and substantial investigative work is required before those prospects can be determined & the Director has reasonable grounds to believe that once investigative work is done the case will satisfy the criteria for full representation).

41. The “minimum damages” criteria set out in regulations 40(1)(c),²⁵ and (2),²⁶ only apply to the extent that the case²⁷

- (a) *is part of a multi-party action, and*
- (b) *does not relate to*
 - (i) *the abuse of a child or a vulnerable adult; or*
 - (ii) *a contravention of the Equality Act 2010 or of a previous discrimination enactment.*

²⁴ [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#)

²⁵ Which provides that “if the individual’s claim is primarily a claim for damages or other sum of money in which the likely damages do not exceed £5,000, the case must be of significant wider public interest”

²⁶ Which provides that “[f]or the purposes of paragraph (1)(c), if the claim forms part of a multi-party action only the lead claim within that action is capable of being a case of significant wider public interest”

²⁷ [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), regulation 57(2)

42. Regulation 58 provides that where a claim is made for **full representation** in relation to such cases the applicable criteria are those set out in regulation 39,²⁸ regulation 43 and Regulation 58(2).

43. Regulation 43 and 58(2) between them provide that funding will be granted if:

- a. the proportionality test is met²⁹ and
- b. the prospects of success are either very good, good or moderate.³⁰

44. Funding will no longer be granted for cases with borderline prospects of success.

45. Regulation 59 sets out the criteria for **full representation in relation to multi-party claims against public authorities**: multi-party action damages criterion. It specifies that the criteria in [regulation 41\(c\)](#) and [44](#) (multi-party action damages criterion) do not apply where the matter relates to the abuse of a child or a vulnerable adult or breach of an anti-discrimination enactment.

46. The Lord Chancellor's Guidance,³¹ at parts 4-5 and 7, provides further guidance on the merits and costs benefit tests. Paragraphs 4.2.7 to 4.2.9 deal specifically with the proportionality test. These parts of the guidance should be examined closely by AAP practitioners given the different merits and costs benefit tests that apply to claims under paragraphs 21 and 22.

47. It should also be noted that, under Regulation 20 of the *Civil Legal Aid (Procedure) Regulations 2012*,³² discrimination cases that fall within the AAP contract category are exempt from the "gateway" provisions.

Standard Civil Contract 2010 (as amended)

48. The Standard Civil Contract 2010 (between the then Legal Services Commission and contracted legal aid providers) previously included, within its "Actions Against the Police, etc" category, reference to claims arising out of the deliberate/dishonest torts such as assault, wrongful arrest and malicious prosecution but also claims arising from "...other abuse of authority or neglect of duty against any body or person, public or private, with power to detain, imprison or prosecute".

²⁸ Standard criteria for determinations for legal representation

²⁹ [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), regulation 58(2) – the proportionality test itself is set out in regulation 8.

³⁰ [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), regulation 43

³¹ [Lord Chancellor's Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012](#)

³² [SI No. 3098](#)

49. The amended category definitions that apply from 1 April 2013³³ make clear that funding under the Actions Against the Police Etc category is now only available for cases within Schedule 1, Part 1, paragraphs 3, 21, 22 and 39 of LASPO.

50. The amended category definition refers to claims only being within scope of the category if they relate to claims against public or private authorities with “....the power to prosecute, detain, or imprison”. This limitation on the definition of public authority is not to be found in LASPO (which would prevail over the guidance) but this category would nevertheless appear to embrace the main types of authorities against which claims of this nature are brought (namely the police, prisons, immigration authorities and private bodies carrying out these functions).

51. The amended category definition also provides that claims for damages for clinical negligence (including claims funded via exceptional funding) are included only if the clinical negligence forms part of a claim which includes another cause of action against a body or person with power to detain or imprison.

52. The amended contract category definition also makes clear that exceptional funding under section 10 of LASPO can be made available for applications to the Home Office under the *Criminal Justice Act 1988*, section 133 or the *ex gratia* scheme for compensation for wrongful conviction and claims under the Criminal Injuries Compensation Authority Scheme, including any applications to the First-Tier Tribunal arising out of such a matter. It also makes clear that claims for damages in respect of alleged professional negligence in the conduct of a matter included in the category are covered.

Types of cases covered in practice

53. It is likely that most AAP cases will fall to be considered under LASPO Schedule 1, Part 1, paragraphs 21 and 22.

54. The reference in paragraphs 21(5) and 22(4) to the *Human Rights Act 1998* definition of a public authority makes clear that where a private body is carrying out public functions it will be regarded as a public authority for these purposes. This is welcome given the increasing privatisation of public functions. It means that, for example, actions against those running private prisons or court escort services will continue to be within scope.

55. The main limitation on the scope of paragraph 21 claims is the provision in paragraph 21(4) confining claims under this category to those which arise from “deliberate or dishonest”

³³ <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/legal-aid/civil-contracts/category-definitions-2010.pdf>, paragraphs 31-33

acts or omissions of public authorities and which result in “reasonably foreseeable harm to a person or property”.

56. It is likely that the first limb of this definition will cause most difficulty, because it is hard to envisage many deliberate or dishonest acts by public authorities that do not also result in reasonably foreseeable harm to a person or property.

57. The limitation of claims to those arising from deliberate or dishonest acts means that the following sorts of cases may theoretically now fall out of scope (unless they are covered by paragraph 22):

- claims of loss of liberty arising from the negligence of the police and/or immigration authorities
- claims in respect of arrests pursuant to defective warrants, and
- cases where, due to negligence of the detaining authorities, a prisoner has been in a position to assault another prisoner.

58. The LAA has refused at least one funding application on the basis that an arrest alleged to have been carried out without the required reasonable suspicion did not involve a ‘deliberate or dishonest act’. This is based on a questionable interpretation of paragraph 21(4)(a), and in particular the term ‘deliberate’. It does not appear to be the position generally taken by the LAA.

59. The main limitation on the scope of paragraph 22 is the requirement that a claim only falls within it if it involves a “significant” breach of Convention rights by a public authority. Guidance on the meaning of “significant breach” is provided by the *Lord Chancellor’s Guidance on Civil Legal Aid*, at paragraphs 11.1-11.3 (which replaces the previous Funding Code guidance on the meaning and effect of “Significant Human Rights Issue”).³⁴ The new Guidance indicates that:

- This category is “intended to focus legal aid on the most serious cases”
- The word “significant” should be given its natural meaning, and
- Factors which might be relevant in considering whether there has been a significant breach of a Convention right by a public authority include whether the breach was deliberate, and whether the individual has suffered a significant disadvantage taking

³⁴ [*Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012*](#)

account of both his or her subjective perceptions and what is objectively at stake in a particular case.

60. It is unsurprising that the Guidance seeks to focus funding for human rights cases on the most serious claims. In the police context, this provision is perhaps most likely to be of use in civil claims involving breaches of the rights set out in Articles 2, 3, 5, 8, 9, 10 and 14 of the European Convention on Human Rights (ECHR). In particular, it appears likely that any loss of liberty in contravention of Article 5 would amount to a “significant breach”.

61. There has been publicity over the issue of sexual offences committed by police officers and the victims of those offences may be assisted by LASPO Schedule 1, Part 1, paragraphs 3 and 39 (although many of those cases would also fall under paragraphs 21 and/or 22).

62. As indicated above, the amended contract category definition makes clear that exceptional funding under section 10 of LASPO can be made available for applications to the Home Office under the *Criminal Justice Act 1988*, section 133 or the *ex gratia* scheme for compensation for wrongful conviction and claims under the Criminal Injuries Compensation Authority Scheme. However, claims for exceptional funding in these cases and any other AAP claims which fall outside the general AAP funding provisions (such as those relating to negligence by the police or other authorities which do not on their facts fall within LASPO paragraphs 3, 21, 22 or 39) will need to meet the criteria for exceptional funding.

63. The [*Lord Chancellor's Guidance on Exceptional Funding \(Non-Inquests\)*](#) makes clear that caseworkers should consider whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to an obvious unfairness in proceedings. Claims for compensation for miscarriages of justice are notoriously difficult, and such cases should have reasonable prospects of obtaining exceptional funding, as should complex claims relating to negligence by the police or other authorities. Particularly complicated Criminal Injuries Compensation Authority claims may well also meet the exceptional funding threshold.

64. The provisions of regulation 57 dis-applying the “minimum damages” criteria to certain cases are welcome and should mean that even discrimination claims against public authorities that are worth less than £5,000 are brought within scope.³⁵

³⁵ See [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), regulation 57

Clinical negligence

Category definition and scope

LASPO Schedule 1, Part 1

65. Clinical negligence is defined for the purposes of LASPO by paragraph 23(5) of Part 1 of Schedule 1 as “breach of a duty of care or trespass to the person committed in the course of the provision of clinical or medical services (including dental or nursing services)”.

66. LASPO removed all claims for damages for clinical negligence from the scope of civil legal aid, with one exception: clinical negligence during pregnancy, child birth, or the postnatal period (eight weeks), which causes a child to suffer severe disability due to a neurological injury.

67. The conditions which must be met are set out in LASPO Schedule 1, Part 1, paragraph 23. They are that:

- clinical negligence caused “a neurological injury” to the individual (V)³⁶ and, as a result of the neurological injury, V is “severely disabled”³⁷
- the clinical negligence occurred
 - (a) “while V was in his or her mother’s womb”, or
 - (b) “during or after V’s birth”; and
 - i. if V was born before the beginning of the 37th week of pregnancy, the period of eight weeks beginning with the first day of what would have been that week; or
 - ii. if V was born during or after the 37th week of pregnancy, the period of eight weeks beginning with the day of V’s birth.³⁸

68. Paragraph 23(5) provides that “disabled” means “physical or mentally disabled” and defines “birth” as “the moment when an individual first has a life separate from his or her mother” and references to an individual being born are interpreted accordingly.

69. The services under the certificate of public funding must be provided to V, or where V has died, to his or her “personal representatives”, defined as being:³⁹

³⁶ The individual is defined as ‘V’ throughout [LASPO](#) Schedule 1, Part 1, paragraph 23

³⁷ [LASPO](#) Schedule 1, Part 1, paragraph 23(1)

³⁸ [LASPO](#) Schedule 1, Part 1, paragraph 23(2)

- (a) a person responsible for administering the individual's estate under the law of England and Wales, Scotland or Northern Ireland, or
- (b) a person who, under the law of another country or territory, has functions equivalent to those of administering the individual's estate.

70. Other clinical negligence claims can still secure civil legal aid if the LAA makes an “exceptional case determination” under section 10(2) of LASPO.

71. Section 10(2) applies where it is “necessary to make the services available to the individual under this Part because failure to do so would be a breach of...the individual’s Convention rights (within the meaning of the *Human Rights Act 1998*)”, or where “...it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach”.⁴⁰

Regulations

72. The same merits and financial eligibility criteria apply to clinical negligence claims which fall within the scope of civil legal aid as apply to a general case under paragraph 23 of Part 1 of Schedule 1 of LASPO and to those where an exceptional funding application is made under section 10(2) of LASPO.

73. There is no longer a specific category for clinical negligence claims in the relevant merits criteria. Instead, clinical negligence claims are subject to the general merits criteria before legal representation (investigative or full representation) can be granted or continue.⁴¹

74. Essentially, for **investigative representation** to be granted,

- the prospects of success must be “unclear” and substantial investigative work required before the prospects can be determined to be “poor”, “moderate”, “good” or “very good”, and
- there must be reasonable grounds for believing that once the investigative work is performed, the criteria for full representation will be met.

75. To qualify for **full representation** both the “cost benefit” criteria in regulation 42 and the “merits” criteria in regulation 43 must be met.

76. In terms of “merits”, the prospects of success must not be “poor” or “borderline” but must be at least “moderate” (50 percent or more, but less than 60 percent) or greater.

³⁹ [LASPO](#) Schedule 1, Part 1, paragraph 23(5)

⁴⁰ [LASPO](#) s 10(3)

⁴¹ [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), regulations 40-43, as amended

77. The “cost benefit” criteria, which relate to likely damages versus likely costs, are in the form of a sliding scale, depending upon whether the merits of the claim are moderate, good or very good.⁴² In short, likely damages must exceed likely costs by the following ratios:

- moderate prospects of success – 4:1
- good prospects of success – 2:1, and
- very good prospects of success – 1:1.

78. The definitions of “likely damages” and “likely costs” in regulations 9 and 10 respectively bear careful examination. “Likely damages” means the amount of damages that the individual is likely to receive if “substantially successful” at trial or other final hearing. “Likely costs” means the total costs to final settlement or judgment calculated on legal aid rather than *inter partes* rates. The prospects of the claim settling before trial are explicitly to be taken into account in assessing “likely damages”. Because there may be legitimate debate over when an individual case may compromise, the application of the “cost benefit” criteria may not be straightforward.

79. Because of the costs involved in claims involving serious disabilities caused by neurological injury, it is almost certain that every clinical negligence claim which falls within the scope of LASPO will be treated as “Special Case Work” within the meaning of Part 6 of the *Civil Legal Aid (Procedure) Regulations 2012*.⁴³ A fully costed case plan is likely to be required,⁴⁴ which will include details of the tasks to be undertaken by counsel.

Standard Civil Contract 2010 (as amended)

80. The amended category definition of the Standard Civil Contract 2010 (between the then Legal Services Commission⁴⁵ and contracted legal aid providers) refers to the provisions of LASPO Schedule 1, Part 1, paragraph 23.⁴⁶ The Contract also refers to grants of exceptional funding including:⁴⁷

⁴² [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), as amended. The definitions of likely damages and likely costs are set out in regulations 9 and 10 respectively.

⁴³ [SI No. 3098](#)

⁴⁴ [Civil Legal Aid \(Procedure\) Regulations 2012 SI No. 3098](#), regulation 55

⁴⁵ Now the Legal Aid Agency (LAA)

⁴⁶ See

<http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/legal-aid/civil-contracts/category-definitions-2010.pdf>, paragraphs 24-25

⁴⁷ <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/legal-aid/civil-contracts/category-definitions-2010.pdf>, paragraph 25

all proceedings in relation to a claim for damages or a complaint to a relevant professional body in respect of an alleged breach of duty of care or trespass to the person committed in the course of the provision of clinical or medical services (including dental or nursing services); or a claim for damages in respect of alleged professional negligence in the conduct of such a claim.

Types of cases covered in practice

Claims within Scope

81. **Identity of the negligent healthcare professionals.** Paragraph 23 of Part 1 of Schedule 1 does not limit the healthcare professionals whose negligence could give rise to a claim. So long as the other criteria are met, clinical negligence claims could be brought as a result of negligence not only of doctors, nurses, or dentists, but midwives, physiotherapists, healthcare visitors or any other healthcare professional.

82. **Neurological injury not confined to the brain.** The definition of neurological injury is not confined to injury of the brain. It could encompass injury to other parts of the nervous system, although such a case may not qualify under the criteria which relate to the severity of the injury or the timing of the negligence. The definition in paragraph 23 is probably wide enough to cover claimants suffering from severe Erbs' palsy caused during delivery.

83. **Requirement for there to be negligence in the course of treatment of a patient.** For a prospective claim to fall within the scope of civil legal aid under paragraph 23, the neurological injury must be caused by clinical negligence. This will exclude claims where the occurrence of the injury is incidental to the claimant's presence in a hospital or other location where healthcare services are provided. For instance, a serious neurological injury caused by a slip or trip on the premises will not fall within this category. The qualifying injury must be caused by a negligent act or omission in the treatment of a patient.

84. **Common scenarios.** There are countless scenarios in which healthcare professionals can injure, or fail to prevent injury to, a child in utero or in the first eight weeks of life so as to cause a serious neurological injury. The most common of these is likely to be obstetric negligence where mismanagement of a mother's labour leads to deprivation of oxygen for the foetus, resulting in hypoxic ischaemic brain injury. Alternatively, negligence by paediatricians or neonatologists where a newborn infant is not resuscitated adequately in the immediate aftermath of birth, or where serious illness is not recognised on attendance to hospital. Another common species of claim will relate to General Practitioners who fail to refer to hospital infants who are suffering serious illness, such as meningitis or septicaemia.

85. **Exclusion of claims based on pre-conception negligence.** Claims where the clinical negligence occurs before conception will not be eligible for legal aid under this paragraph. For

example, in cases where drugs administered to the mother before conception cause malformation of the brain, or other serious neurological abnormality, the child would not be eligible for legal aid.

86. **Latent injury.** The drafting of paragraph 23 makes it clear that it is the time of the negligence not the injury which is relevant. Consequently, even if the injury did not declare itself until much later – as may be the case with neurological injury causing only cognitive disabilities – the claim would still fall within scope so long as the first act of negligence occurred within the qualifying timeframe.

87. **Treatment of third parties.** Paragraph 23 is sufficiently wide to encompass clinical negligence in the treatment of a patient other than the child (V). For example, the following situation would potentially remain within the scope of civil legal aid: administration of a drug to treat a medical condition in V's mother during her pregnancy, the direct effects of which cause a serious neurological injury to V in utero, preventing V's mother's ability to deliver V without such an injury.

88. **Legal aid available for all parts of the proceedings.** Subject to the criteria in paragraph 23 of Part 1 of Schedule 1 of LASPO, civil legal aid will be available for advocacy services in all courts in which clinical negligence claims are heard, from the County Court to the Supreme Court.⁴⁸

Exceptional Funding

89. Exceptional case determinations are made by the LAA applying the guidance in the *Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)*. The guidance recognises that the overarching question to be asked is "will withholding of legal aid mean the applicant will be unable to present his or her case effectively, or lead to an obvious unfairness in the proceedings?"⁴⁹ Guidance which is specific to clinical negligence cases is found at paragraphs 47 and 48. The following factors may be particularly relevant:

- In relation to the importance of the matter at stake, is the applicant a disabled person who is seeking to recover damages which would, in whole or in part, cover adjustments, adaptations, equipment and care
- In relation to the complexity of the case, how complex is the case at hand bearing in mind the complexity and volume of any medical expert evidence and any medico-legal arguments in issue in the case, and

⁴⁸ See [LASPO](#) Schedule 1, Part 3 (Advocacy: exclusion and exceptions)

⁴⁹ See [Lord Chancellor's Exceptional Funding Guidance \(Non-Inquests\)](#), page 3

- In relation to the ability of the applicant to present their own case, how able is the applicant or litigation friend to do this, bearing in mind any caring responsibilities they have due to caring for a disabled child or family member or any disabilities or medical problems they have?

90. If alternative funding is available, a claim will not qualify for civil legal aid under the exceptional funding scheme. Because the same means criteria apply to legal aid under the exceptional funding scheme as to general cases, the claimants who potentially would qualify are unlikely to have the means to litigate using their own private funding. In the main, the scheme will only benefit those claimants of qualifying means who do not have any form of before-the-event (BTE) insurance and are unable to secure a conditional fee agreement (CFA). All clinical negligence claims require medical expert evidence on breach of duty, causation and quantum. Because of their complexity, lay people are usually ill-equipped to present these claims effectively. The type of clinical negligence claim that is most likely to succeed in an application for exceptional funding is a claim of moderate to high value where the claimant has failed to find a solicitor to accept it as a CFA because its merits appear to be moderate rather than good.

Community care

Category definition and scope

LASPO Schedule 1, Part 1

91. Community Care was one of the areas of civil legal aid least affected by the April 2013 changes. Under LASPO Schedule 1, Part 1, paragraph 6(3), funding available for “community care” includes services which a relevant person (namely a local authority Primary Care Trust or Local Health Board) may provide or arrange to be provided under the following provisions:

- a) Part 3 of the National Assistance Act 1948 (local authority support for children and families)*
- b) section 47 of the 1948 Act (removal to suitable premises of persons in need of care and attention);*
- c) section 48 of the 1948 Act (temporary protection for property of persons admitted to hospital);*
- d) section 45 of the Health Services and Public Health Act 1968 (arrangements for promoting welfare of old people);*
- e) section 117 of the Mental Health Act 1983 (after-care);*
- f) section 17 of the Children Act 1989 (“the 1989 Act”) (provision of services for children in need);*
- g) section 20 of the 1989 Act (provision of accommodation for children);*
- h) sections 22A, 22B, 22C and 23 of the 1989 Act (accommodation and maintenance for children in care and looked after children);*

- i) sections 23B and 23C of the 1989 Act (local authority functions in respect of relevant children);
- j) sections 24, 24A and 24B of the 1989 Act (provision of services for persons qualifying for advice and assistance);
- k) section 2 of the Carers and Disabled Children Act 2000 (services for carers);
- l) section 254 of, and Schedule 20 to, the National Health Service Act 2006 (functions of local social service authorities); and
- m) section 192 of, and Schedule 15 to, the National Health Service (Wales) Act 2006 (functions of local social service authorities).

92. In April 2015, the Care Act 2014 Part 1 came into effect-making new community care provision for adults. Effectively, the NAA 1948 and other provisions which deal with adults with community care issues have been consolidated into one provision under the Care Act 2014. Some aspects of the legislation above is still in effect however in respect of children and section 117 of the MHA 1983 is also still in effect in respect of both adults and children.

Legal Aid in housing/community care cases

93. Legal advisers with Housing contracts from the Legal Aid Agency can assist clients with issues under Part 1 if the client is homeless or threatened with homelessness. That is the result of LASPO Act 2012 Schedule 1 paras 6 and 28. Para 6 was amended by para 96 of the Schedule to the *Care Act 2014 and Children and Families Act 2014 (Consequential Amendments) Order 2015*. For a copy of that Order, [click here](#)

Standard Civil Contract 2014

94. The specific Standard Civil Contract of 2014 has a section which defines category of law.⁵⁰ It states that the category of law is defined in relationship with Schedule 1 read with Schedule 2 and 3 of LASPO.

95. In respect of public law claims, it says:

Public law challenges to the acts, omissions or decision of public bodies (including under the Human Rights Act 1998), in particular challenges by way of judicial review (as described in paragraph 19 of Part 1 of Schedule 1 to the Act) and habeas corpus (as described in paragraph 20 of Part 1 of Schedule 1 to the Act) are covered by the Category in which the principal matter or proceedings appear or by the Category which relates to the underlying

⁵⁰ [Category Definitions 2014](#)

substance of the case (as referenced by the widest Category Definition incorporating excluded work). They are also covered by the Public Law Category.

96. The LAA identifies that simply because the defendant is a public authority does not automatically mean that the case is a Public Law case. For a case to constitute a public law challenge it must be determined according to judicial review principles (limited to paragraph 19 Part 1 of Schedule 1 to the Act). Claims for damages against Public Authorities, other than Human Rights Act claims, do not usually fall within Public Law but may come within Actions Against the Police etc. Claims under the Human Rights Act may well come within both Public Law and Actions Against the Police etc.

97. Community care is defined as:

“Legal Help and related proceedings concerning the provision of community care services, as defined in paragraph 6 of Part 1 of Schedule 1 to the Act, the provision of facilities for disabled persons as set out in Paragraph 7 of Part 1 of Schedule 1 to the Act and the inherent jurisdiction of the high court in relation to vulnerable adults, as set out in paragraph 9 of Part 1 of Schedule 1 to the Act. This includes legal services provided in relation to community care assessments, service provision decisions, and issues around the delivery of services, but excludes any matter falling within the Welfare Benefits Category or Clinical Negligence Category and proceedings before the First-Tier Tribunal (Mental Health). “

“Legal Help on issues arising under the Mental Capacity Act 2005 and advocacy in proceedings to extent set out at paragraph 4 of Part 3 of Schedule 1 to the Act, regarding a person’s capacity, their best interests (welfare and/or medical treatment) and deprivation of liberty issues.

To the extent that any relevant grant of exceptional funding is made (in accordance with section 10 of the Act), this category also includes advocacy for matters arising from such).”

Types of cases covered in practice

98. In practice, the overwhelming majority of Community Care cases will be either cases which concern public law challenges by way of judicial review to decisions or omissions of public authorities (principally local authorities, CCG’s, NHS England) or cases under the Mental Capacity Act 2005 issued in the Court of Protection concerning the health, welfare or deprivation of liberty of an adult who lacks capacity.

99. For further information about the circumstances in which funding for judicial review is available, please see the chapter of this Guidance on [Public Law and Judicial Review](#). Please note that the Guidance above suggests that most cases of judicial review are covered by the category in which the underlying substance of the case relates, rather than it being a separate category in and of itself, and also by the public law category (for which solicitors can obtain a contract even if they do not have a specialist contract in the underlying areas of work). Please also note that many community care cases, and practically every case in the Court of Protection is likely to involve consideration of the Human Rights Act (principally Articles 2, 3, 8 and 14).

100. For cases concerning the Court of Protection, please note the restriction which provides that public funding is not available for all cases under the MCA 2005 (only those involving life, liberty, engagement of family life or welfare/medical treatment). Cases concerning financial aspects of the MCA 2005 and the challenge to a lasting power of attorney or concerning the financial affairs of someone who lacks capacity do not attract public funding.

Debt

Category definition and scope

LASPO Schedule 1, Part 1

101. LASPO Schedule 1, Part 1, has effectively removed debt work from the scope of legal aid. A residual category of housing-related debt is within scope and, under paragraph 33, can cover civil legal services relating to:

- court orders for sale of an individual's home
- court orders for the possession of an individual's home following failure to make mortgage payments (which could include a "secured loan"⁵¹), and
- bankruptcy orders 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 individual.

Standard Civil Contract 2013

102. No contracts to provide for eestanding debt work have been available since 1 April 2013. The Standard Civil Contract 2013 reiterates the provisions of LASPO Schedule 1, Part 1 to define what work is covered by the new Housing and Debt contracts.⁵²

⁵¹ See Legal Aid Agency, [Frequently Asked Questions – Civil Legal Aid Reforms](#), FAQ 92

⁵² [Standard Civil Contract 2013, Category Definitions](#)

103. Legal help is available for work that is in scope. However, because Debt is a subject area covered by the 'Gateway' arrangements, such help must be sought first through the Civil Legal Advice online and telephone service.⁵³ That is not to say that a defendant to a Debt-related claim cannot ever get full legal representation. The LAA has clarified that "providers can use their delegated functions in Debt where proceedings have been issued (as opposed to threatened) to grant legal representation where the relevant scope, means and merits criteria are met. ...Where advice under Controlled Work would be more appropriate clients must be signposted to CLA at the earliest opportunity (unless they are an exempted person). Any delay would be contrary to s.2.49 of the 2013 Standard Civil Contract Specification and s.7.2 of the 2013 Standard Civil Contract Standard Terms relating to acting in the best interests of potential clients and contract sanctions could be applied"⁵⁴
104. In response to a specific question, the LAA has also clarified that an order for sale made under the Proceeds of Crime Act 2002 could fall under the scope of the Debt category. However, it added that confiscation or restraint orders made under the same Act would not be in scope of the Debt category. Certain work under the Proceeds of Crime Act, including restraint orders, will fall under miscellaneous work.⁵⁵
105. The category definition of Debt clarifies that possession of an individual's home arising out of any matter other than failure to make mortgage payments, falls within the Housing category. To undertake such Housing work, a provider must hold a Housing contract as the categories of work are exclusive.
106. To the extent that any relevant grant of exceptional funding is made in the Debt category, the grant can include legal help and all proceedings:⁵⁶
- (a) *For the payment of monies due or the enforcement of orders in such proceedings (excluding any matter which falls within the Housing category); and*
 - (b) *Arising out of personal insolvency, including bankruptcy, administration, Debt Relief representation or IVA proceedings, but excluding representation in proceedings against parties in default of a fine or other order in criminal proceedings in the magistrates' court who are at risk of imprisonment.*

⁵³ Further information is available on the [Ministry of Justice website](#)

⁵⁴ See Legal Aid Agency, [Frequently Asked Questions – Civil Legal Aid Reforms](#), FAQ 91

⁵⁵ See Legal Aid Agency, [Frequently Asked Questions – Civil Legal Aid Reforms](#), FAQ No 76

⁵⁶ [Standard Civil Contract 2013, Category Definitions](#), paragraph 19

Types of cases covered in practice

107. The thrust of the April 2013 legal aid reforms was to exclude most debt cases from scope, leaving only a small residual category where enforcement of the debt puts a home in jeopardy (usually where a lender seeks to enforce a secure loan).
108. The *Lord Chancellor's Guidance on Exceptional Funding (Non-Inquests)* does canvass the possibility that some other debt cases might be brought back into scope,⁵⁷ but only where legal aid is essential to avoid obvious unfairness in proceedings where the party is faced with enforcement action in respect of a debt.
109. The LAA has answered two specific questions from providers about the availability of legal aid under the Debt category in relation to bankruptcy proceedings.⁵⁸

89. What happens where a creditor pays the charges for bankruptcy proceedings? Would this be classed as voluntary or involuntary bankruptcy as client could agree to it but creditor pays the actual charge?

The Act specifies that cases where the petition for a bankruptcy order against a client is made by a person other than the client would be in scope. However, providers should also be mindful of the Civil Legal Aid (Merits Criteria) Regulations 2013 which provide that legal help may only be provided where there is sufficient benefit to the client to justify work being carried out. For example, a case where a petition made by a creditor is undefended or otherwise agreed with the debtor would be unlikely to meet the merits criteria or to justify the provision of specialist legal advice.

90. Bankruptcy matters where the petition for bankruptcy was issued by a creditor are in scope. Can advice be given to clients who are not being made bankrupt themselves but co-own a property with the person who is being made bankrupt e.g. a spouse or partner?

Advice in relation to a bankruptcy order against the individual is within scope; BUT a co-owner would not qualify. Such a co-owner may qualify if an order for sale of the property was sought or if they were made homeless and were making an application for re-housing.

Education

Category definition and scope

LASPO Schedule 1, Part 1

⁵⁷ See [Lord Chancellor's Exceptional Funding Guidance \(Non-Inquests\)](#), paragraphs 49-51

⁵⁸ See Legal Aid Agency, [Frequently Asked Questions – Civil Legal Aid Reforms](#), FAQ 89 and 90

110. LASPO Schedule 1, Part 1, Paragraph 2 defines Civil Legal Services for Special Educational Needs as:

(1) Civil legal services provided in relation to

(a) matters arising under Part 4 of the Education Act 1996 (special educational needs) [or Part 3 of the Children and Families Act 2014]

(b) assessments relating to learning difficulties under [section 140 of the LEA 1996 and Skills Act 2000]

Exclusions

(2) Sub-paragraph (1) is subject to the exclusions in Parts 2 and 3 of this Schedule

111. The amendments in brackets have been made as a result of the coming into force on 1 September 2014 of the Children and Families Act 2014 (“the CFA 2014”).

112. Part 3 of the CFA 2014 extends special educational needs provision to young people in England up to the age of 25, and accordingly, for children and young people in England repeals Part 4 of the Education Act 1996 (“EA 1996”) and ss. 139A and 140 of the Learning and Skills Act 2000.

113. The situation in Wales remains governed by Part 4 EA 1996 and the Learning and Skills Act 2000. The CFA 2014 also introduced Education and Health Care Plans for children and young people in England between 0-25, over the transition period these will replace Statements of Special Educational Needs (“Statements”) and Learning Difficulty Plans.

114. Some education cases will also fall within:

a. Judicial Review Civil Legal Services in Schedule 1, Part 1, paragraph 19; and

b. Equality Act 2010 Civil Legal Services in Schedule 1, Part 1, paragraph 43.

Exclusions

115. Civil Legal Services for Special Educational Needs exclude (all the references are to Parts and Paragraphs within Schedule 1):

a. Part 2, Paragraph 13 “*Civil legal services provided in relation to a claim for damage in respect of a breach of Convention rights by a public authority to the extent that the*

claim is made in reliance on s. 7 of the Human Rights Act 1998” (i.e. a claim that there has been a breach of the Right to Education, Article 2, First Protocol);

b. Part 2, Paragraph 18 *“Civil legal services provided in relation to judicial review of an enactment, decision, act or omission”*;

c. Advocacy except:

i. Part 3, Paragraph 1: Advocacy in the Supreme Court;

ii. Part 3, Paragraph 2: Advocacy in proceedings in the Court of Appeal;

iii. Part 3, Paragraph 3: Advocacy in proceedings in the High Court;

iv. Part 3, Paragraph 17: Advocacy in proceedings in the Upper Tribunal under [section 11](#) of the Tribunals, Courts and Enforcement Act 2007 (appeals on a point of law) from decisions made by the First-tier Tribunal or the Special Educational Needs Tribunal for Wales in proceedings under—

(a) [Part 4](#) of the Education Act 1996 (special educational needs),
[...]¹

(b) the [Equality Act 2010](#) [, or]²

[

a. (c) [Part 3](#) of the Children and Families Act 2014⁴
(children and young people in England with special educational needs or disabilities).

v. Part 3, Paragraph 17: Advocacy in proceedings in the Upper Tribunal to exercise its JR jurisdiction under s. 15 of the Tribunals, Courts and Enforcement Act 2007 (and where transferred to the UT from the High Court, Part 3, Paragraph 19).

116. In July 2014 the Government produced a new Code of Practice on special educational needs- *"Special educational needs and disability code of practice 0-25 years"*. The July 2014 version of this Code of Practice is valid until 31 March 2015. A January 2015 version was introduced and will be valid from 1 April 2015.⁵⁹

117. Paragraphs 11.61-11.66 provide guidance on the availability of legal aid for cases brought in the First-tier Tribunal (HEA 1996) the Education and Social Care Chamber) ("the Tribunal") (see pages 264-265 of the January 2015 Code of Practice). These paragraphs state:

- a. legal aid can fund legal advice and assistance in preparing an appeal to the Tribunal, but not representation at the Tribunal;
- b. legal aid can provide advice, assistance and representation if a parent or young person's appeal to the Tribunal is unsuccessful and they wish to mount a further appeal to the Upper Tribunal (or beyond to the Court of Appeal);
- c. Legal aid for disability discrimination cases is available on the same basis as appeals of statements/Education and HEA 1996) the care Plans;
- d. A parent or young person seeking access to legal aid for a SEN case or disability discrimination case should go to the legal aid checked or contact the Civil Legal Advice (CLA) service;
- e. Young people under 18 or those assessed by CLA in the previous 12 months as requiring face to face advice, who have a further linked problem, are not required to apply via CLA.

Standard Civil Contract

118. The Standard Civil Contract 2013 category of Education (Special Educational Needs) is defined as:⁶⁰

⁵⁹ [Special Educational Needs and Disability Code of Practice 0-25 Years](#)

⁶⁰ [Standard Civil Contract 2013, Category Definitions](#)

Legal Help and all proceedings in relation to:

- a) *matters arising under Part 4 of the Education Act 1996 (Special Educational Needs) (under paragraph 2(1)(a) of Part 1 of Schedule 1 to the Act as set out above);*
 - b) *assessments relating to learning difficulties under sections 139A and 140 of the LEA 1996 and Skills Act 2000 (under paragraph 2(1)(b) of Part 1 of Schedule 1 to the Act); and*
 - c) *any other matter within the scope of Part 1 of Schedule 1 to the Act where the primary problem or issue relates to the provision of, or failure to provide, education or funding for education.*
2. *For the avoidance of doubt, the following are included in the category:*
- a) *Legal Help and all proceedings in relation to a contravention of Part 6 of the Equality Act 2010 (Education); and*
 - b) *Legal Help and all proceedings in relation to a contravention of a previous discrimination enactment as far as the matter concerns the provision or funding of education.*
3. *Proceedings in relation to judicial review of an enactment, decision, act or omission as far as this concerns the provision or funding of education. To the extent that exceptional funding is granted (in accordance with section 10 of the Act) this category includes Legal Help and proceedings in relation to any matter where the primary problem or issue relates to the provision of or failure to provide education or funding for education.*

119. This is a significant departure from the previous Education category under the Standard Civil Contract 2010, where Education was defined as:

1. *Legal Help in relation to matters where the primary problem or issue relates to the provision of or failure to provide education or funding for education, including special educational needs. This would include such issues or problems relating to admissions, exclusions or Disability Discrimination Act claims.*
2. *Any proceedings before a court concerning the above issues. This excludes claims for damages falling within the Personal Injury, though claims for damages arising out of a failure to provide adequate education or assessment for education are included.*

Types of cases covered in practice

120. Legal help is available in cases before the First Tier Tribunal/Special Educational Needs Tribunal for Wales (SENTW):

- appeals against the contents of a Statement or an EHC. These appeals will include appeals of other related Local Authority decisions, i.e. refusal to assess, refusal to issue a Statement/EHC, refusal to amend a Statement/EHC following an Annual Review and;
- *Equality Act 2010* claims for disability discrimination in the First Tier Tribunal, i.e. claims that a school discriminated against a pupil by excluding him/her or claims based on failures to make reasonable adjustments.

121. However, Schedule 1, Part 3 of LASPO makes it clear that Special Educational Needs civil legal services do not include advocacy at the First-Tier stage.

122. Legal representation is available for appeals to the Upper Tribunal from the First-Tier Tribunal or SENTW on a challenge to special needs decisions, which might include:

- A reasons appeal in relation to waking day curriculum issues and links to social care;
- An appeal on section 316 EA 1996/section 33 CFA 2014 regarding integrated education;
- An appeal on education otherwise and home education under section 319 EA 1996/section 61 CFA 2014;
- An appeal on practice and procedure in the First-Tier Tribunal.

123. Advocacy is funded in proceedings in the Upper Tribunal under the [Tribunals, Courts and Enforcement Act 2007](#)⁶¹ from decisions made by the First-Tier Tribunal or the SENTW in proceedings under the following:⁶²

- (a) Part 4 (special educational needs) of the Education Act 1996 (“EA 1996 1996”)
- (b) *The Equality Act 2010 (“the Equality Act”) or;*

⁶¹ See [section 11](#) – appeals on a point of law

⁶² [LASPO](#) Schedule 1, Part 3, paragraph 17

(c) *Part 3 of the Children and Families Act 2014 (children and young people in England with special educational needs or disabilities).*

124. Appeals to the Upper Tribunal from the First-Tier Tribunal or SENTW on a discrimination claim under the *Equality Act 2010* (legal representation and advocacy funding is available) will include:

- the application of the *Equality Act 2010* Disability Regulations on excluded conditions
- a school's failure to make reasonable adjustments, and
- direct discrimination.

125. Some Equality Act education cases will be brought outside the First-Tier Tribunal, such as claims by University students. These will be brought in the county court and both legal representation and advocacy are covered for these claims.⁶³

126. If an SEN or an Equality Act case is appealed from the Upper Tribunal to the Court of Appeal and then to the Supreme Court, there is cover for legal representation and advocacy.⁶⁴

127. There is cover for legal representation and advocacy in judicial reviews.⁶⁵ Examples of education-related judicial reviews include challenges to:

- a Local Authority's decision not to provide transport for an eligible child pursuant to Section 508B EA 1996. Legal representation and funding for advocacy is available
- a Local Authority's failure to comply with Section 324 EA 1996/Section 42 CFA 2014 and make the provision specified in a Statement
- a Local Authority's failure to implement the First-Tier Tribunal's decision
- decisions regarding religious education to include human rights issues

⁶³ Schedule 1, Part 3, paragraph 5

⁶⁴ Schedule 1, Part 3, paragraphs 1 and 2

⁶⁵ See [LASPO](#) Schedule 1, Part 3, paragraph 3 which provides for funding for advocacy in proceedings in the High Court. See further the relevant chapter of this Guidance on Public Law and Judicial Review.

- a Local Authority's failure to comply with Section 19 EA 1996 and provide lawful and adequate out of school provision for those out of school for medical, exclusion, or other reasons, and
- decisions regarding post-19 continued education in complex cases including where there are links to social care. Here the issues will plainly overlap with work covered by Community Care.

128. Education cases that are no longer covered by civil legal aid include:

- bullying and other educational negligence cases⁶⁶
- schools exclusions and admissions cases, save:
 - (a) where there is an *Equality Act 2010* claim to the First-Tier Tribunal (in which case legal help but not advocacy will be available), or
 - (b) an appeal to the Upper Tribunal, or
 - (c) where a judicial review arises following an ultimate determination in those cases, and
- breach of contract in education cases.

Employment

Category definition and scope

129. LASPO defines employment law as “an enactment or rule of law relating to employment, including in particular an enactment or rule of law conferring powers or imposing duties on employers, conferring rights on employees or otherwise regulating the relations between employers and employees”.⁶⁷ Since April 2013, there has been no civil legal aid available for employment law cases except for cases which involve a contravention of the *Equality Act 2010* or the legislation which preceded it (“discrimination claims”) or

⁶⁶ [LASPO](#) Schedule 1, Part 2, paragraph 2 excludes civil legal services provided in relation to a claim in tort in respect of negligence.

⁶⁷ [LASPO](#) Schedule 1, Part 1, paragraph 32(8)

cases in connection with the exploitation of an individual who is a victim of trafficking in human beings (“trafficking claims”).⁶⁸

Types of cases covered in practice

130. Prior to April 2013, the most common type of advocacy funded under legal aid was bringing or defending appeals to the Employment Appeal Tribunal, Court of Appeal or Supreme Court. Since April 2013, advocacy for these types of cases has continued to attract legal aid where the underlying claim is a discrimination claim.⁶⁹ Advocacy in trafficking appeals before the Court of Appeal or the Supreme Court is also eligible for legal aid.⁷⁰ Schedule 1, Part 3 of LASPO excludes advocacy in the Employment Tribunal.

131. Prior to April 2013, legal help (i.e. legal aid amounting to assistance short of advocacy) was available in employment cases. While legal help would not cover advocacy, it was possible for barristers to be compensated via “disbursements” for drafting in particular cases, for example settling particulars of claim or schedules of loss. Since April 2013, legal help has only remained available for discrimination claims⁷¹ and trafficking claims.⁷²

132. Employment practitioners may be able to make use of exceptional funding, which is available where failing to provide legal aid “would result in a breach of the individual’s rights to legal aid under the *Human Rights Act 1998* or European Union law”.⁷³

133. The *Lord Chancellor’s Guidance on Civil Legal Aid* provides that an application for exceptional funding in the Employment Tribunal in a discrimination claim will be assessed under the “general merits” criteria for legal representation.⁷⁴ This is explained in the *Civil Legal Aid (Merits Criteria) Regulations 2013* as follows:⁷⁵

- a) *if the prospects of success of the case are very good, the Director must be satisfied that the likely damages exceed likely costs;*
- b) *if the prospects of success of the case are good, the Director must be satisfied that the likely damages exceed likely costs by a ratio of two to one; or*

⁶⁸ [LASPO](#) Schedule 1, Part 1, paragraphs 32 and 43; Part 3, paragraph 20. The Government has also proposed to extend the current RTA Portal Scheme to cover Employers’ Liability claims up to £25,000. Further information is available on the [Ministry of Justice website](#).

⁶⁹ [LASPO](#) Schedule 1, Part 3, paragraphs 1, 2 and 20

⁷⁰ [LASPO](#) Schedule 1 Part 3, paragraphs 1 and 2

⁷¹ [LASPO](#) Schedule 1 Part 1, paragraph 43

⁷² [LASPO](#) Schedule 1, Part 1, paragraph 32

⁷³ [LASPO](#) s 10(2)-10(3) sets out the statutory requirements

⁷⁴ [Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), paragraph 7.10

⁷⁵ [SI No. 104](#), regulation 42(2)

c) if the prospects of success of the case are moderate, the Director must be satisfied that the likely damages exceed likely costs by a ratio of four to one.

134. The *Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)* provides that such funding may be made available in claims relating to a private contract of employment. The Guidance invites caseworkers to consider "whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to an obvious unfairness in proceedings".⁷⁶
135. In *Steel and Morris v The United Kingdom*,⁷⁷ the European Court of Human Rights (ECtHR) found significant unfairness where the Claimant was a large multinational and the case was an exceptionally lengthy non-employment (libel) hearing and the Defendants were refused legal aid. Generally, the lengthiest and most complex Employment Tribunal cases are direct discrimination, harassment or equal pay claims, which, depending on the circumstances, may require exceptional funding for advocacy in the Employment Tribunal. At appeal stage they are eligible for funding under the provision for funding of discrimination claims.
136. It is possible to imagine cases raising the Claimant's capacity to represent themselves (for example, a claim brought by a disabled person for "ordinary" unfair dismissal, where the facts of the dismissal were unusually complex) or cases of particular legal difficulty (for example, raising statutory interpretation under human rights or European law) which might come within this test.
137. Significantly, the Exceptional Funding Guidance envisages that exceptional funding might be appropriate not merely in Employment Tribunal proceedings and appeals from the Tribunal but also potentially in professional disciplinary proceedings where the proceedings will have a substantial effect on the applicant's civil right to practice his or her profession.⁷⁸

Housing

Category definition and scope

LASPO Schedule 1, Part 1

138. Schedule 1, Part 1, paragraphs 33-36 of LASPO describe housing law matters as including:

- Loss of home

⁷⁶ See [Lord Chancellor's Exceptional Funding Guidance \(Non-Inquests\)](#), paragraphs 54-55

⁷⁷ [2005] ECHR 103; 18 BHRC 545

⁷⁸ See [Lord Chancellor's Exceptional Funding Guidance \(Non-Inquests\)](#), paragraphs 54-55

- Homelessness
- Risk to health or safety in rented home
- Anti-social behaviour
- Protection from harassment
- Immigration: accommodation for asylum seekers etc.
- Judicial review (but only arising out of matters that are already covered in this category), and
- Exceptional funding cases.

Regulations

139. The *Civil Legal Aid (Merits Criteria) Regulations 2013* implements specific merits criteria that have to be met for certain types of housing work in addition to the general merits test.⁷⁹ These Regulations have been amended with effect from 27 January 2014 to remove borderline cases from scope.⁸⁰ Regulation 43, as amended, has been incorporated into the Regulations dealing with criteria for full representation in specific areas. This includes public law claims,⁸¹ claims against public authorities,⁸² and possession claims.⁸³ These changes do not affect applications made before the commencement date.

140. The specific merits criteria for housing cases include:

- **For full representation in relation to a claim for a court order for possession of an individual's home.** The Director must be satisfied the individual has a defence; the prospects of success are very good, good or moderate; and the proportionality test is met.⁸⁴
- **For full representation in relation to other housing matters to which specific merits criteria apply (this covers eviction, risk to health or safety in a rented home and harassment, by a landlord or other person, that interferes with the individual's enjoyment of their home).** The Director must be satisfied that the proportionality test is met; the landlord or other person responsible for the matter complained of has been notified of the complaint (an exception is where this is impracticable) and been given a reasonable opportunity to resolve the matter.⁸⁵

⁷⁹ See [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), Regulations 61-63

⁸⁰ See [Civil Legal Aid \(Merits Criteria\) \(Amendment\) Regulations 2014 SI No. 131](#), Regulation 2

⁸¹ Regulation 56

⁸² Regulation 58

⁸³ Regulation 61

⁸⁴ [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), regulation 61

⁸⁵ [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), regulation 62

- **For investigative representation in unlawful eviction cases.** Where the claim is primarily for damages and the damages do not exceed £1,000 the case must be of significant wider public interest.⁸⁶ Where the claim is part of a multi-party action only the lead claim in the action is capable of being of significant wider interest.⁸⁷

Standard Civil Contract 2013

141. Housing is now a stand-alone category of legal aid.⁸⁸ Mortgage repossession cases fall within the Debt contract and are not covered by the Housing contract.

142. The Standard Civil Contract 2013 covers legal help and proceedings in housing law areas specified under LASPO. Where exceptional funding is granted, the contract category definition makes it clear that housing work also includes:⁸⁹

any matters which concern the possession, status, terms of occupation, repair, improvement, eviction from, quiet enjoyment of, or payment of rent or other charges for premises (including vehicles and sites they occupy) which are occupied as a residence, including the rights of leaseholders under the terms of their lease or under any statutory provision (including enfranchisement). Cases including allocation, transfers and the provision of sites for occupation are also included.

Types of cases covered in practice

143. Advocacy for housing work that remains in scope is covered for proceedings in all courts from the County Court to the Supreme Court. Borderline cases are no longer covered in any of the following categories.

Loss of home

144. Loss of home includes possession and eviction proceedings in respect of an individual's home.⁹⁰ Home can include house, caravan, houseboat or other vehicle that is an individual's only or main residence.⁹¹ This includes applications under the *Trusts of Land and Appointment of Trustees Act 1996* by the trustee of a bankrupt's estate and proceedings in relation to bankruptcy or a statutory demand where the individual's estate includes their home. Cases of unlawful eviction and planning eviction are also covered. Cases under the *Matrimonial Causes Act 1973* and under the *Civil Partnership Act 2004* are excluded.

⁸⁶ [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), regulation 63(2)

⁸⁷ [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), regulation 63(3)

⁸⁸ Housing and debt were previously joined in the Standard Civil Contract 2010

⁸⁹ [Standard Civil Contract 2013, Category Definitions](#)

⁹⁰ [LASPO](#) Schedule 1, Part 1, paragraph 33

⁹¹ [LASPO](#) Schedule 1, Part 1, paragraph 33(9)

145. A substantial number of defended possession claims and applications to suspend warrants for eviction involve Housing Benefit issues. Welfare benefits issues, including Housing Benefit, are no longer in scope.⁹² This means that, while loss of home remains in scope, work relating to resolving Housing Benefit issues is outside scope. This means that Housing Benefits issues will have to be dealt with by an advice agency rather than the Solicitor instructed to act in the loss of home case.⁹³ Judicial review challenges to Housing Benefit decisions remain within scope

146. Instances of loss of home include claims in tort for assault, battery and false imprisonment, as well as trespass to goods and land. Damage to property and breach of statutory duty are covered where they relate to counterclaims in proceedings for court orders for possession or sale, or where there has been an unlawful eviction.⁹⁴

Homelessness

147. Legal services for homeless persons or persons threatened with homelessness extend to work under Part 6 (allocation) and 7 (homelessness) of the *Housing Act 1996*.⁹⁵ The terms “homeless” and “threatened with homelessness” have the same meaning as section 175 of the *Housing Act 1996*.

Risk to health or safety in a rented home

148. Civil legal aid will be available for housing disrepair claims brought to reduce or remove a risk to the health or safety of an individual or family member as a result of deficiency in a home that is rented or leased.⁹⁶ The deficiency can be caused by the construction of the building or absence of maintenance and repair. Harm includes temporary harm and health includes mental health.⁹⁷

149. Counterclaims for disrepair and breach of statutory duty are still within scope even though outside scope as a claim. A counterclaim for damages for disrepair remains in scope. A counterclaim for disrepair may be made even where a possession order has already been made.⁹⁸

150. The *Lord Chancellor’s Guidance on Civil Legal Aid* sets out those matters to which the Director must have regard when determining whether legal aid should be made available to

⁹² [LASPO](#) Schedule 1, Part 2 paragraph 15

⁹³ see also [Welfare Benefits](#) section at paragraph 265

⁹⁴ [LASPO](#) Schedule 1, Part 1, paragraph 33(6)

⁹⁵ [LASPO](#) Schedule 1, Part 1, paragraph 34

⁹⁶ [LASPO](#) Schedule 1, Part 1, paragraph 35

⁹⁷ [LASPO](#) Schedule 1, Part 1, paragraph 35

⁹⁸ *RAHMAN v. STERLING CREDIT LIMITED* [2001] 1WLR 496, CA

an individual in regard to housing disrepair.⁹⁹ The *Civil Legal Aid (Merits Criteria) Regulations 2013* provide specific merits criteria for legal representation in disrepair cases.

151. Where there is a credible allegation of disrepair, within the LASPO definition, civil legal services are available from an early stage to fund expert reports. In appropriate cases this will mean not only a report on the state of the property and causation but also medical reports. Joint experts should be instructed in keeping with the Pre-Action Protocol save where an urgent injunction is needed. If after reports are obtained the Director is not satisfied that the case is one of serious risk then funding will cease.

152. The Lord Chancellor's Guidance also sets out factors that the Director may take into account.¹⁰⁰ It is made clear that the Director must take into account all relevant factors and the examples given are not an exhaustive list. Some factors may make the issue clear cut such as where there are gas leaks or dangerous electrical installations. In less clear cut cases there are a number of factors that need to be taken into account. These will include whether there has already been harm to the applicant or a member of the family. Consideration should be given to whether the applicant or those in the applicant's family are members of a high risk or vulnerable group. It will also be relevant if the local authority has identified hazards under the Housing Health and Safety Rating System.

Anti-social behaviour and protection from harassment

153. Legal aid is available to individuals where an order has been sought or made in the County Court under the *Crime and Disorder Act 1998* and under the *Housing Act 1996* for anti-social behavior.¹⁰¹ Civil legal aid is also available for work in relation to injunctions under section 3 or section 3A of the *Protection from Harassment Act 1997* and the variation or discharge of restraining orders under section 5 or section 5A of the same Act.¹⁰²

154. New civil injunctions have been introduced under Part 1 of the *Anti-social Behaviour Crime and Policing Act 2014* (ASBCPA).¹⁰³ These replace anti-social behaviour orders and anti-social behaviour injunctions as well as a number of other orders which were previously used. Application, variation, discharge and appeal of these injunctions will all be covered by civil legal aid. Applications for committal for contempt for breach of these injunctions will not be covered. Committal proceedings are considered to be criminal proceedings for the purposes

⁹⁹ See [Lord Chancellor's Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Part 12

¹⁰⁰ [Lord Chancellor's Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), paragraphs 12.9-12.11

¹⁰¹ [LASPO](#) Schedule 1, Part 1, paragraph 36

¹⁰² [LASPO](#) Schedule 1, Part 1, paragraph 37

¹⁰³ [ASBCPA 2014](#)

of legal aid because of the risk of imprisonment. This means that those representing a client in committal proceedings must be authorised to undertake criminal legal aid. As a result of these changes, the providers who held the civil legal aid certificate for the original proceedings and want to defend the committal or contempt applications will have to:

- Either
 1. hold a criminal contract; or
 2. apply for an individual case contract
- apply for a criminal representation order to cover the committal proceedings

The Legal Aid Agency published guidance in June 2015 for those making applications for an ICC or criminal representation order.¹⁰⁴

155. The knock on effect to the Bar is that there is often very little time between breach of the order and the contempt hearing to get a new or amended Legal Aid Certificate in place. As such, counsel will be called to court to represent the lay client in the breach hearing without a legal aid certificate in place. They will then either be reliant on the Judge to make an order for Legal Aid there and then, or the Legal Aid Agency to grant funding retrospectively. Either way, the barrister may end up with nothing for the court appearance.

Immigration: accommodation for asylum seekers etc.

156. Individuals can seek legal aid for claims in respect of the Secretary of State's powers to provide accommodation for asylum seekers under the *Immigration and Asylum Act 1999* and to provide support for destitute asylum seekers under the *Nationality, Immigration and Asylum Act 2002*.¹⁰⁵

157. Civil legal services are only available for proceedings challenging these specific powers. Any claims for any injury or damage suffered as a consequence of the Secretary of State failing to exercise these powers or an improper exercise of the powers are excluded.¹⁰⁶

Judicial Review and Public Law

158. Challenges by way of judicial review or counterclaim to acts, omissions or decisions of public bodies will be covered by the category in which the main challenge proceeds. Judicial

¹⁰⁴ Apply for Legal Aid in [Civil Contempt-Committal Proceedings, Guidance for Providers](#)

¹⁰⁵ [LASPO](#) Schedule 1, Part 1, paragraph 31

¹⁰⁶ [LASPO](#) Schedule 1, Part 2

review challenges of housing matters within the housing contract are included in that contract. This includes, in the housing context, challenges under the *Human Rights Act 1998*.¹⁰⁷

159. To qualify for legal services for judicial review, an individual must show the judicial review has a potential to produce a benefit for themselves or their family or the environment. This cuts out challenges brought for the benefit of the public but without benefit to the individual seeking the judicial review. The removal of borderline cases further restricts the ability to bring cases in the public interest.

Immigration and asylum

Category definition and scope

LASPO Schedule 1, Part 1

160. LASPO constitutes a significant change in legal aid funding for immigration and asylum work. Most non-asylum immigration work is out of scope, including children's cases. Legal aid is only available in the following circumstances:

- asylum cases¹⁰⁸
- immigration cases involving applications for leave to enter or remain made by a victim of trafficking and applications for indefinite leave to remain under the domestic violence rule¹⁰⁹
- cases relating to immigration detention, including bail applications and matters/conditions relating to temporary admission and release on restrictions¹¹⁰
- habeas corpus¹¹¹
- (in theory) asylum support where accommodation is sought under sections 4 and 95 of the *Immigration and Asylum Act 1999*,¹¹² and
- proceedings before the Special Immigration Appeals Commission.¹¹³

161. All other immigration applications, i.e. most deportations, are out of scope. Significantly, this includes applications on the basis of Article 8 of the European Convention on Human Rights (ECHR),¹¹⁴ or otherwise on grounds of long residence. In practice this means that a

¹⁰⁷ [LASPO](#) Schedule 1, Part 1, paragraph 19

¹⁰⁸ [LASPO](#) Schedule 1, Part 1, paragraph 30(1)

¹⁰⁹ [LASPO](#) Schedule 1, Part 1, paragraph 28, 32(1)

¹¹⁰ [LASPO](#) Schedule 1, Part 1, paragraph 25-27

¹¹¹ [LASPO](#) Schedule 1, Part 1, paragraph 20

¹¹² [LASPO](#) Schedule 1, Part 1, paragraph 31

¹¹³ [LASPO](#) Schedule 1, Part 1, paragraph 24

¹¹⁴ Right to respect for private and family life

person who has committed a crime here will not get legal aid to appeal the deportation decision even if they have well-established private or family life-even if with spouse and children who are themselves British citizens.

Regulations

162. The *Civil Legal Aid (Merits Criteria) Regulations 2013* provide specific merits tests that must be passed to qualify for **full representation** in immigration cases.¹¹⁵ An individual will qualify for full representation in any area of immigration work covered by LASPO if:

- the reasonable private paying individual test is met (if the case is not of significant wider public interest) or if the case is of significant wider public interest, or
- the proportionality test is met and the prospects of success are very good, good or moderate.

Types of cases covered in practice

Asylum cases

163. Asylum cases are covered where they involve rights to enter and remain in the United Kingdom arising from:

- The Refugee Convention
- Articles 2 and 3 ECHR
- The Temporary Protection Directive,¹¹⁶ and
- The Qualification Directive.¹¹⁷

164. Asylum support cases are covered (in theory) where accommodation is sought under sections 4 and 95 of the *Immigration and Asylum Act 1999* and section 17 of the *Nationality, Immigration and Asylum Act 2002* (see also paragraphs 150 & 151 above under Housing). However, as previously, legal aid will not be available for representation before the First-tier Tribunal (Asylum Support).

Immigration cases

165. Immigration cases are only covered where they:

- Involve applications for leave to enter or remain made by a victim of trafficking, where there has been a conclusive determination under the Trafficking Convention, or there are

¹¹⁵ See [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), regulation 60

¹¹⁶ Council Directive 2001/55/EC of 20 July 2001

¹¹⁷ Council Directive 2004/83/EC of 29 April 2004

reasonable grounds to believe that the person is a victim of trafficking and there has not yet been a conclusive determination that they are not.¹¹⁸

- Involve applications for indefinite leave to remain under the domestic violence rule. This only includes people with leave under the immigration rules as partners/spouses who have suffered domestic violence, not children or other family members who have suffered domestic violence.¹¹⁹
- Involve applications and for EU residence permits on the grounds of a retained right of residence arising from domestic violence under regulation 10(5) of the *Immigration (European Economic Area) Regulations 2006*.¹²⁰
- Relate to immigration detention. This includes bail applications and matters/conditions relating to temporary admission and release on restrictions. There is no legal aid for the detainee's substantive immigration application.¹²¹

Judicial review

166. Judicial review remains in scope,¹²² but in immigration cases it is restricted by specific exclusions preventing the provision of civil legal services where judicial review is sought:

- in relation to an issue in respect of which an appeal or judicial review of the same or substantially the same issue was resolved adversely to the applicant/appellant, less than one year previously,¹²³ and
- for 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.¹²⁴

167. It has been the case that legal aid has only been “granted” but not actually paid unless permission for judicial review was granted. However in the recent case of *R (Ben Hoare Bell and Others) v Lord Chancellor*¹²⁵ the court held that this was unlawful because it is contrary to the purpose of the statutory scheme set out in LASPO 2013.

¹¹⁸ [LASPO](#), Schedule 1, Part 1, paragraph 32(1)

¹¹⁹ [LASPO](#), Schedule 1, Part 1, paragraph 28

¹²⁰ [LASPO](#), Schedule 1, Part 1, paragraph 29

¹²¹ [LASPO](#), Schedule 1, Part 1, paragraph 25-27

¹²² [LASPO](#), Schedule 1, Part 1, paragraph 19. See further the relevant chapter of this Guidance on [Public Law and Judicial Review](#).

¹²³ [LASPO](#), Schedule 1, Part 1, paragraph 19(5)

¹²⁴ [LASPO](#), Schedule 1, Part 1, paragraph 19(6)

¹²⁵ *R (Ben Hoare Bell and Others) v Lord Chancellor* [2015] EWHC 523 (Admin)

168. These specific exclusions do not apply to judicial review of a negative decision in relation to an asylum application where there is no right of appeal to the First-tier Tribunal against the decision,¹²⁶ or to judicial review of a certificate under section 94 or 96 of the *Nationality, Immigration and Asylum Act 2002* (NIAA 2002).¹²⁷

169. Surprisingly, ‘asylum application’ is defined by reference to the EU Procedures Directive, which limits the meaning of ‘asylum application’ to claims under the Refugee Convention.¹²⁸

Exceptional cases

170. Section 10 of LASPO allows for “exceptional case determinations” to provide funding for cases which do not fall within Part 1 of Schedule 1 where it is necessary to provide civil legal services to avoid a breach of an individual’s Convention rights or enforceable EU rights, and it is appropriate to do so, having regard to the risk that a failure to provide civil legal services would be such a breach.

171. The government’s view has been that immigration cases will not qualify for this funding, on the basis of established European case law that the right to a fair trial under Article 6(1) of the ECHR does not cover immigration cases.¹²⁹

172. The Ministry of Justice had estimated that in the first year of LASPO there would be 5000-7000 applications for exceptional funding. This estimate had taken into consideration the areas that had been taken out of scope of legal aid and the expected number of litigants who would be unable to represent themselves. The Public Law Project revealed the underuse of exceptional funding, reporting that the LAA received only 223 applications for exceptional funding from April-June 2013, with 83 of these applications being rejected for being incomplete or in relation to areas of law that are covered by legal aid the usual way. It was further reported that only two grants of exceptional funding have been made in non-inquest matters: one in a family law case where the applicant had very serious mental health problems and the other in a particularly complex immigration case. To further highlight the difficulty in obtaining funding, the immigration case was only granted funding when judicial review proceedings were threatened after the initial funding application was refused

173. Not satisfied with the restrictions on access to legal aid achieved by LASPO, the government issued a further consultation paper on 9 April 2013, [Transforming legal aid:](#)

¹²⁶ This will mainly be refusals of further representations under paragraph 353 of the [Immigration Rules](#).

¹²⁷ See [LASPO](#), Schedule 1, Part 1, paragraph 19(7)

¹²⁸ This excludes claims based on Article 2 or 3 ECHR, or humanitarian protection claims under the Qualification Directive

¹²⁹ *Maaouia v France* 39652/98[2000] ECHR 455

[delivering a more credible and efficient system](#). The more pertinent proposals advanced in this paper were:

- introduction of a residence test whereby a person would have to be lawfully resident in the UK at the date of application for legal aid and have had been so for twelve months previously
- synchronization of payments to barristers to that paid to Solicitors
- removal of borderline cases for qualification in legal aid, and
- payment for Judicial Review claims to be made only on permission being obtained from the Administrative Court to bring the claim.

174. First, the residence test has not yet been brought into force. The intention was for it to come into force on 31 March 2014. However, the Public Law Project obtained permission to challenge the lawfulness of the test. In June 2014, the High Court ruled that the Government's original guidance in relation to the granting of legal aid for exceptional immigration cases was unlawful.¹³⁰ The Court of Appeal then confirmed the High Court Judgment in December 2014¹³¹. The Appeal Court ruled that the Lord Chancellor's Guidance was unlawful and failed to state the law accurately, including the effect of the ECHR and the EU Charter of Fundamental Rights. The test for eligibility for legal aid, specifically that it should be granted "only in rare and extreme cases", set the bar too high.

175. The Lord Chancellor's Guidance following on from the Court of Appeal's decision in *Gudanaviciene* is as follows:¹³²

60. *Proceedings relating to the immigration status of immigrants and decisions relating to the entry, stay and deportation of immigrants do not involve the determination of civil rights and obligations.*

61. *However, some immigration proceedings and decision-making processes will engage the substantive right to respect for private and family life conferred by Article 8 ECHR. Caseworkers should therefore consider whether the procedural obligation imposed by Article 8 requires the provision of legal aid (see paragraphs 27 to 29 above).*

62. *When considering applications in relation to immigration proceedings and processes, caseworkers should have regard to the following matters, as relevant to any individual case: (i) there are statutory restrictions on the supply of advice and assistance (see section 84 of the*

¹³⁰ *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin)

¹³¹ *Gudanaviciene & Ors v Director of Legal Aid Casework* [2014] EWCA Civ 1622

¹³² [Lord Chancellor's Exceptional Funding Guidance \(Non-Inquests\)](#), paragraphs 60-62

Immigration and Asylum Act 1999); (ii) individuals may well have language difficulties; and (iii) the law is complex and rapidly evolving.

176. Second, the Court of Appeal disagreed with the High Court and held that refugee family reunion is not within the scope of legal aid (although the individual challenge, in the case of B succeeded on the basis that she should have succeeded herself).

177. Third, the questions of whether: i) the operation of the scheme frustrates the legislative intention and breaches the Equality Act 2010 and ii) the compatibility of the Scheme with the ECHR are due to be heard after Easter 2015.

178. Fourth, in *R (on the application of the Public Law Project) and Secretary of State for Justice*¹³³ [2014] EWHC 2365 (Admin), it was held that the residence test was unlawful:

88] It does not seem to me necessary to choose between the many different ways in which PLP seeks to advance the same argument, whether it is equal treatment under the common law, or a breach of art 14, read with art 6. I conclude that residence is not a lawful ground for discriminating between those who would otherwise be eligible for legal assistance by virtue of Sch 1 LASPO.

179. Unfortunately, in *PLP v Lord Chancellor* [2015] EWCA Civ 1193 it has now been held that the residence test is lawful. This latest Court of Appeal judgment does not discuss the evidence of a number of individual circumstances in the same way as the previous judgment. Instead, its focus is on two narrow legal issues. First, the Court finds that ministers may use secondary legislation to withhold legal aid from particular groups of people on cost-saving grounds alone, regardless of need. Secondly, it holds that legal aid is, in effect, a welfare benefit and so withholding on discriminatory grounds it from some of those who need it just as much as others is justifiable unless ‘manifestly without reasonable foundation’. The Court considered the test could be justified.

Inquests

Category definition and scope

LASPO Schedule 1, Part 1

180. Inquests are covered by LASPO, Schedule 1, Part 1, paragraph 41(1), where the inquest involves “a member of the individual’s family”.

181. However, under the *Civil Legal Aid (Merits Criteria) Regulations 2013*,¹³⁴ regulation 30, legal help is the only form of civil legal services which is appropriate in relation to any matter described in paragraph 41.

¹³³ *R (on the application of the Public Law Project) and Secretary of State for Justice* [2014] EWHC 2365 (Admin)

182. Under the *Civil Legal Aid (Merits Criteria) Regulations 2013*, regulation 19, advocacy for inquests is deemed “other legal services” and therefore falls to be considered for “exceptional” funding.
183. Section 10 of LASPO provides that exceptional funding will be granted where the criteria in either section 10(2) or section 10(4) are met.
184. Section 10(2) applies where it is “necessary to make the services available to the individual under this Part because failure to do so would be a breach of...the individual’s Convention rights (within the meaning of the *Human Rights Act 1998*)”, or where “...it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach”.¹³⁵
185. Section 10(4) applies where a “wider public interest determination” has been made. This is a “determination that, in the particular circumstances of the case, the provision of advocacy under this Part for the individual for the purposes of the inquest is likely to produce significant benefits for a class of person, other than the individual and the members of the individual’s family”.
186. Under paragraph 41(2) and section 10(6) for these purposes an individual is a member of another individual's family if:
- They are relatives (whether of the full blood or half blood or by marriage or civil partnership);
 - They are cohabitants (as defined in Part 4 of the *Family Law Act 1996*); or
 - One has parental responsibility for the other.
187. Under the *Civil Legal Aid (Merits Criteria) Regulations 2013*,¹³⁶ regulation 48, when considering an application for exceptional inquest funding, the Director of Legal Aid Casework must apply the merits criterion in regulation 45. Regulation 45 provides that an individual may qualify for other legal services, i.e. inquest advocacy, only if the Director is satisfied that it would be reasonable in all the circumstances of the case for the individual to be provided with such other legal services.
188. The LAA’s current position is that preparation for inquests cannot be claimed as exceptional funding, meaning that funding for such work will not be available where, for example, families do not qualify under the means test for legal help. The LAA’s *Inquests* –

¹³⁴ [SI No. 104](#)

¹³⁵ [LASPO](#) s 10(3)

¹³⁶ [SI No. 104](#)

Exceptional Cases Funding – Provider Pack states that there is no longer any provision to add the costs of preparatory work to any certificate for “other legal services” for advocacy at an inquest.¹³⁷

189. In order for an exceptional inquest case to be funded the client must in general satisfy the financial eligibility limits as set out in the *Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013*.¹³⁸ This is subject to possible waiver of the eligibility criteria, as set out in the [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#),¹³⁹ which is discussed below.

190. The *Civil Legal Aid (Procedure) Regulations 2012*,¹⁴⁰ regulations 66-69, set out the procedure for applying for exceptional funding.

191. The LAA's *Inquests – Exceptional Cases Funding – Provider Pack* sets out guidance on the procedure for applying for inquest exceptional funding, as well as guidance on, *inter alia*, funding expert reports, remuneration (including increased remuneration for counsel in exceptional circumstances) and the statutory charge.¹⁴¹

Standard Civil Contract (as amended)

192. The amended category definitions state that legal help or exceptional funding in relation to an inquest will fall into the category which relates to the underlying subject matter of the inquest. For example, legal help for an inquest where the client died in prison will be funded in the Actions Against the Police etc Category. Where an inquest does not fall within one of the categories, it will be included in the Miscellaneous Category.¹⁴²

Types of cases covered in practice

193. Caseworkers (on behalf of the Director of Legal Aid Casework) must have regard to the [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#) in determining whether civil legal services in relation to an inquest are to be made available under section 10 of LASPO.¹⁴³ The [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#) was amended in August

¹³⁷ [Inquests – Exceptional Cases Funding – Provider Pack](#), page 4

¹³⁸ [SI No. 480](#). See also [Inquests – Exceptional Cases Funding – Provider Pack](#) page 3

¹³⁹ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraphs 36-37

¹⁴⁰ [SI No. 3098](#)

¹⁴¹ See [Inquests – Exceptional Cases Funding – Provider Pack](#) pages 5-11

¹⁴² <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/legal-aid/civil-contracts/category-definitions-2010.pdf>, paragraphs 17-18; [Standard Civil Contract 2014, category definitions 2014](#), paragraphs 11-12; [Standard Civil Contract 2015, Draft 2015 category definitions](#), paragraphs 12-13

¹⁴³ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 1

2015 in response to the decision of the Administrative Court in *R (Letts) v The Lord Chancellor* [2015] EWHC 402 (Admin).

194. The Guidance sets out some of the factors that caseworkers should take into account in deciding exceptional funding applications in relation to inquests. It is not intended to be an exhaustive account of those factors, nor to replace the need for consideration of representations in individual cases and new case law that arises. The Guidance stresses that applications should be considered on a case by case basis.¹⁴⁴

195. The Guidance states that there are two grounds on which exceptional funding can be made available for inquests:

- Where the failure to provide such assistance would lead to the breach of a family member's rights under Article 2 ECHR¹⁴⁵; and
- If an inquest raises wider public interest issues within the LASPO definition.¹⁴⁶

196. In respect of the Article 2 ground, the Guidance indicates to caseworkers that they need to be satisfied that (i) the procedural obligation under Article 2 ECHR arises, and that (ii) funded representation is required to discharge the procedural obligation under Article 2.¹⁴⁷

197. As to whether the procedural obligation under Article 2 arises, the Guidance provides that:

- There are some categories of case in which the mere fact of death gives rise to a possibility of State responsibility and this suffices to trigger the Article 2 procedural duty. In these categories, the procedural duty is automatically triggered, whether or not the evidence in the case discloses an arguable breach of any of the substantive obligations imposed by Article 2.¹⁴⁸ The categories in which the Article 2 procedural duty will be automatically triggered include at least: all intentional killings by state agents (e.g. a police shooting); all violent deaths and suicides of persons detained in police or prison custody or during the course of arrest or search; all violent deaths and suicides of persons detained in mental hospitals.¹⁴⁹ Practitioners should consider the relevant Article 2 case law when considering whether a case falls within the automatic category.

¹⁴⁴ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 2

¹⁴⁵ The investigative obligation derived from the right to life

¹⁴⁶ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 5

¹⁴⁷ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraphs 6-7

¹⁴⁸ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 10

¹⁴⁹ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 11

- The suicide of a voluntary psychiatric patient is also capable (depending on the facts) of automatically triggering the procedural duty. However, the precise circumstances in which the suicide of a voluntary psychiatric patient will automatically trigger the procedural duty is presently unclear.¹⁵⁰
- If the case falls within one of the categories in which the Article 2 procedural obligation is automatically triggered, or that it arguably does, caseworkers should proceed to the second stage of the test: whether funded representation for the family of the deceased required to discharge the procedural obligation.¹⁵¹
- Where the procedural obligation does not arise automatically, the obligation may still arise if, on the facts of the case, it can be shown that the State was arguably in breach of one of its substantive duties (i.e. the operational duty or the systemic duty).¹⁵²
- It is unlikely that there will be an arguable breach of the substantive obligation where there is no State involvement in the death, for example, the fatal shooting of one private individual by another private individual (where the authorities had no forewarning or other knowledge prior to the death). Another example is a death (in State detention) through natural causes.¹⁵³
- In the context of allegations against hospital authorities (outside of the categories of case where the procedural duty is automatically triggered), there will not be a breach of the substantive obligation where a case involves only allegations of ordinary medical negligence as opposed to where the allegations of negligence are of a systemic nature. Care should be taken to ensure that allegations of individual negligence are not dressed up as systemic failures.¹⁵⁴
- Coroners may express a view as to whether they consider that the procedural obligation automatically arises, or that there has been an arguable breach of the substantive obligation. Should the coroner choose to express their views, they are material and not determinative.¹⁵⁵

198. Where a caseworker decides that the procedural obligation arises, he / she must then consider whether funded representation for the family is required to discharge the

¹⁵⁰ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 12

¹⁵¹ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 13

¹⁵² [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraphs 8, 14

¹⁵³ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 15

¹⁵⁴ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 16

¹⁵⁵ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 17

procedural obligation.¹⁵⁶ The Guidance states that in most cases the coroner can conduct an effective investigation, with the family's participation, without the family of the deceased needing to be legally represented.¹⁵⁷ Practitioners should consider carefully the paragraphs from the authorities relied on in the Guidance in support of this assertion.

199. When determining whether funded representation is required all the individual facts and circumstances of the case must be taken into account by caseworkers, including:¹⁵⁸

- The nature and seriousness of the allegations against State agents (with particular regard being given to allegations based on evidence of gross negligence or systemic failures, for example, closely related multiple and avoidable deaths from the same cause within the same institution; criminal conduct; and attempts to conceal information or otherwise interfere with an investigation into the circumstances surrounding the death);
- The previous investigations into the death and whether the family has been involved in such investigations; and
- The particular circumstances of the family (such as whether the applicant is suffering from severe mental health problems, potentially arising from the circumstances of the death, or has a learning disability).

200. In respect of the "wider public interest" ground, the Guidance provides that:

- A "wider public interest determination" is a determination that, in the particular circumstances of the case, the provision of advocacy for the individual for the purposes of the inquest is likely to produce significant benefits for a class of person, other than the applicant and members of the applicant's family.¹⁵⁹
- In the context of an inquest, the most likely wider public benefits are the identification of dangerous practices, systematic failings or other findings that identify significant risks to the life, health or safety of other persons.¹⁶⁰
- Whether the wider public interest is "significant" will depend on a number of factors: what the benefits are; whether the benefits are more or less tangible; whether they will definitely flow to other persons or whether this is just a possibility; and the numbers of

¹⁵⁶ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 18

¹⁵⁷ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 20

¹⁵⁸ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraphs 21-24

¹⁵⁹ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 27

¹⁶⁰ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 28

people who will benefit (it will be unusual for significant wider public interest to apply to something that benefits fewer than around 100 people, for example).¹⁶¹

- It is not sufficient that there is significant wider public interest in the inquest itself. There must be significant wider public interest in the client being represented at the inquest for the case to qualify for a wider public interest determination. This means that an applicant must be able to demonstrate that representation is necessary to obtain any benefits that may arise, not just that the inquest itself may provide benefits.¹⁶²
- In deciding whether to make a wider public interest determination, caseworkers should consider the nature of any allegations of systemic failings, and whether there are likely to be improvements to systems as a result of the inquest.¹⁶³

201. The Guidance also makes provision for the waiver of the financial eligibility limits relating to inquests if, in all the circumstances, it would not be reasonable to expect the family to bear the full costs of legal assistance at the inquest. Whether this is reasonable will depend in particular on the history of the case and the nature of the allegations to be raised against State agents, the applicant's assessed disposable income and capital, other financial resources of the family, and the estimated costs of providing representation.¹⁶⁴ Provision is also made for the waiver of contributions in whole or part, which again is determined on the basis of the applicant's disposable income and disposable capital in the usual way, ignoring upper eligibility limits.¹⁶⁵ The LAA's *Inquests – Exceptional Cases Funding – Provider Pack* also addresses the waiver of financial contributions.¹⁶⁶

Mental health

Category definition and scope

LASPO Schedule 1, Part 1

202. LASPO Schedule 1, Part 1, paragraph 5(1), defines mental health work as covering three areas of work where matters arise under:

- the *Mental Health Act 1983*
- paragraph 5(2) of the Schedule to the *Repatriation of Prisoners Act 1984*, and
- the *Mental Capacity Act 2005*.

¹⁶¹ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 29

¹⁶² [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 30

¹⁶³ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraphs 31-35

¹⁶⁴ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 36

¹⁶⁵ [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), paragraph 37

¹⁶⁶ [Inquests-Exceptional Cases Funding-Provider Pack](#) pages 7-8

203. There are general exclusions contained in Schedule 1, Part 2 which apply to mental health and mental capacity cases by virtue of Schedule 1, of Part 1, paragraph 5(2) and these broadly exclude damages claims. Funding, if available, for such claims would need to be under a different paragraph of Schedule 1, Part 1.

204. Additionally, there are specific exclusions and the following matters are not covered:¹⁶⁷

- the creation of lasting powers of attorney under the *Mental Capacity Act 2005*, and
- the making of advance decisions under the *Mental Capacity Act 2005*.

205. These exclusions, though, do not exclude services provided in relation to determinations and declarations by a court under the *Mental Capacity Act 2005* as to the validity, meaning, effect or applicability of a lasting power of attorney that has been created, or an advance decision that has been made.¹⁶⁸

206. In relation to Court of Protection Proceedings, (which fall under the *Mental Capacity Act 2005*), advocacy work is only available to the extent that the relevant proceedings concern one of the following:¹⁶⁹

- a person's right to life
- a person's liberty or physical safety
- a person's medical treatment (within the meaning of the *Mental Health Act 1983*)
- a person's capacity to marry, to enter into a civil partnership or to enter into sexual relations, and
- a person's right to family life.

Regulations

207. The Civil Legal Aid (Merits Criteria) Regulations 2013¹⁷⁰ include the standard criteria for legal representation at regulation 39 and provide further information about the extent of legal aid that can be provided for mental health work at regulations 21, 51 and 52.

208. Regulation 21 states that **investigative representation** will not be awarded for Mental Health work where it relates to proceedings before the First-tier Tribunal or the Mental Health Review Tribunal for Wales. This work is covered by Controlled Legal Representation.

¹⁶⁷ [LASPO](#) Schedule 1, Part 1, paragraph 5(3)

¹⁶⁸ [LASPO](#) Schedule 1, Part 1, paragraph 5(4)

¹⁶⁹ [LASPO](#) Schedule 1, Part 3

¹⁷⁰ SI No. 104

209. Regulations 51 and 52 stipulate criteria that must be taken into account when considering determinations for **full representation** in relation to mental health proceedings and mental capacity proceedings.

210. In respect of First Tier Tribunals (Mental Health), Regulation 51(2) replaces the general merits criteria, including prospects of success and cost/benefit. Instead, the Director 'must be satisfied that it would be reasonable in all the circumstances of the case for the individual to be provided with full representation'. Regulation 52(2) provides, in addition to the standard criteria, specific merits criteria for determinations for full representation in relation to mental capacity proceedings in that the Director must be satisfied (a) that the Court of Protection has ordered, or is likely to order, an oral hearing; and (b) it is necessary for the individual to be provided with full representation in the proceedings.

211. Regulation 5(1)(f) and (g) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013¹⁷¹ provides that non-means tested funding is available for full legal representation for mental health and mental capacity cases, respectively, paraphrased as follows;

(f) Legal help or legal representation where the individual's case or application is to be the subject of proceedings before the relevant tribunal (ie the First-Tier Tribunal and the MHRT for Wales, not appeal proceedings in the Upper Tribunal).

(g) Where there are legal proceedings in the Court of Protection under section 21A of the Mental Capacity Act 2005, the individual to whom legal representation may be provided is either the individual in respect of whom an authorisation is in force under paragraph 2 of Schedule A1 to the Mental Capacity Act 2005 or a representative of that individual appointed in accordance with Part 10 of that Schedule (ie the Relevant Person's Representative).

Standard Civil Contract 2014

212. All work under the Mental Health Act 1983 falls under the Mental Health category of law. Work under the Mental Capacity Act 2005 falls primarily under the Mental Health category but is also permitted under Community Care to the extent set out in the category definitions.

¹⁷¹ [Regulation 5\(1\)\(f\) and \(g\) of the Civil Legal Aid \(Financial Resources and Payment for Services\) Regulations 2013](#)

Types of cases covered in practice

213. In practice, funding will be available for medical treatment cases, cases concerning a right to life, deprivation of liberty and cases concerning capacity to marry, enter into a civil partnership or sexual relations.

214. Cases involving liberty will continue to be covered and so will those concerning a person's right to family life. This will mean that there will be funding in cases where there is a deprivation of liberty, and in cases where an incapacitated adult is being removed from their family or where contact with their family is restricted.

215. Further information may be found at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434450/legal-aid-chancellor-non-inquests.pdf

Personal injury

Category definition and scope

LASPO Schedule 1, Part 1

216. There is no separate category for, or definition of, claims involving personal injury in LASPO. Claims for damages arising out of personal injury or death can arise in numerous contexts and as a result of a number of different legal wrongs.

217. Regardless of their basis, the default position is that claims for damages arising out of personal injury or death are excluded from the scope of civil legal aid by paragraphs 1-3 and 8 of Part 2 of Schedule 1 of LASPO.¹⁷²

218. There are a limited number of exceptions to this general position. Part 1 of Schedule 1 sets out a number of categories of claim which remain within the scope of civil legal aid which can involve a claim for damages for personal injury. Those categories are summarised in the paragraphs that follow, but require careful reading.

219. The category of abuse of a child or vulnerable adult relates to claims arising out of the abuse of an individual that took place at a time when they were a child or vulnerable adult.¹⁷³ Clinical negligence claims are excluded from this category.

¹⁷² See the [Ministry of Justice website](#) for further information about changes to civil litigation affecting personal injury claims.

¹⁷³ [LASPO](#) Schedule 1, Part 1, paragraph 3

220. Civil legal aid is available in relation to abuse by a public authority of its position or powers.¹⁷⁴ Again, clinical negligence claims are excluded from this category.
221. Civil legal aid is also available in relation to a claim in tort in respect of an act or omission by public authority that “involves” a “significant breach of Convention Rights” by the authority.¹⁷⁵ Clinical negligence claims are once again expressly excluded from this category of work.¹⁷⁶
222. Civil legal aid is available for specific clinical negligence claims where an infant is left severely disabled.¹⁷⁷ This category is considered in fuller detail in the chapter of this Guidance on [Clinical Negligence](#).
223. A claim for damages by a victim of conduct amounting to a sexual offence under a provision of the *Sexual Offences Act 2003* or section 1 of the *Protection of Children Act 1978*, or their personal representative, will fall within the scope of civil legal aid, regardless of whether there have been criminal proceedings in relation to their conduct, or the outcome of any such proceedings.¹⁷⁸
224. Even if it does not fall within any of the general cases listed above, a claim for damages for personal injury can still secure civil legal aid if the LAA makes an “exceptional case determination” under section 10(2) of LASPO.
225. Section 10(2) applies where it is “necessary to make the services available to the individual under this Part because failure to do so would be a breach of...the individual’s Convention rights (within the meaning of the *Human Rights Act 1998*)”, or where “...it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach”.¹⁷⁹

Regulations

226. If a claim is eligible for civil legal aid under any of these categories, legal aid is available for advocacy services in all courts in which such claims are heard, from the County Court through to the Supreme Court.¹⁸⁰

¹⁷⁴ [LASPO](#) Schedule 1, Part 1, paragraph 21

¹⁷⁵ [LASPO](#) Schedule 1, Part 1, paragraph 22. Further information about the meaning of “significant breach” is provided by the [Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), paragraphs 11.1-11.3.

¹⁷⁶ [LASPO](#) Schedule 1, Part 1, paragraph 22(3)

¹⁷⁷ [LASPO](#) Schedule 1, Part 1, paragraph 23

¹⁷⁸ [LASPO](#) Schedule 1, Part 1, paragraph 39

¹⁷⁹ [LASPO](#) s 10(3)

¹⁸⁰ [LASPO](#), Schedule 1, Part 3

227. Claims under any of these categories which fall within the scope of civil legal aid, or obtain it via an exceptional case determination, still need to satisfy relevant financial eligibility and means criteria before civil legal services will be available for legal representation (either investigative or full representation). The merits criteria are contained in the *Civil Legal Aid (Merits Criteria) Regulations 2013*, as amended.¹⁸¹

228. For claims involving the abuse of a child or vulnerable adult¹⁸² or sexual offences¹⁸³ the 'merits' criteria and 'cost benefit' criteria apply.¹⁸⁴ Essentially, for **investigative representation**, this requires the prospects of success to be unclear and substantial investigative work to be required before the prospects can be determined, but there to be reasonable grounds for believing that once the investigative work is performed, the criteria for full representation will be met, and that (unless the claim is of wider public interest) the likely damages will exceed £5,000.

229. To qualify for **full representation** both the 'cost benefit' criteria in regulation 42 and the 'merits' criteria in regulation 43 must be met. The prospects of success must be at least moderate (50 percent or more) to satisfy the merits criteria. The cost benefit criteria, which relate to likely damages versus likely costs, are in the form of a sliding scale, depending upon whether the merits of the claim are moderate, good or very good. The definitions of likely damages and likely costs are set out in regulations 9 and 10 respectively. In short, likely damages must exceed likely costs by the following ratios:

- moderate prospects of success – 4:1
- good prospects of success – 2:1, and
- very good prospects of success – 1:1.

230. In the case of the abuse of position or powers,¹⁸⁵ or the breach of Convention Rights,¹⁸⁶ by a public authority, the criteria in the *Civil Legal Aid (Merits Criteria) Regulations 2013*, as amended, are a little less exacting.¹⁸⁷

¹⁸¹ [SI No. 104](#)

¹⁸² [LASPO](#), Schedule 1, Part 1, paragraph 3

¹⁸³ [LASPO](#), Schedule 1, Part 1, paragraph 39

¹⁸⁴ See Part 4, and in particular regulations 39-43, of [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#)

¹⁸⁵ [LASPO](#), Schedule 1, Part 1, paragraph 21

¹⁸⁶ [LASPO](#), Schedule 1, Part 1, paragraph 22

¹⁸⁷ See Part 6, and in particular regulations 57-58, of [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#)

231. The minimum £5,000 limit on the likely damages, which would otherwise preclude a case being eligible for **investigative representation**, does not operate where the claim is part of a multi-party action or there was abuse of a child or vulnerable adult.
232. For **full representation**, the “merits” criteria that the prospects of success must be at least “moderate”.
233. The “cost benefit” criterion does not apply. Instead, the “proportionality test” in regulation 8 must be satisfied. The proportionality test is met if the likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case.

Types of cases covered in practice

Abuse of child or vulnerable adult and Sexual Offences

234. Claims involving abuse of children or vulnerable adults arise in a variety of guises, usually as trespass to the person where the abuse may take the form of violence, a sexual assault, or rape. There is a clear overlap with the category of sexual offences. The defendants to such claims may be family members, schools, religious orders, care homes, local authorities, prisons, the police, or similar bodies. Claims can also lie in negligence for neglect, or for failing to detect, prevent, or act upon the abuse. Claimants in such cases are entitled to damages for personal injuries arising out of the physical and psychiatric effects of their experiences.

Abuse of position or powers by a public authority

235. Deliberate or dishonest abuse of position or powers by a public authority so as to cause personal injury to a claimant might arise in a number of contexts. One may be in the use of police or other regulatory powers, where a dishonest or deliberate detention could include the use of force which causes the claimant to suffer physical and/or psychiatric injury. Another area where personal injury can occur in the exercise of statutory powers by a public authority is in the context of the detention and restraint of psychiatric patients. However, it is very unlikely that such claims will fall within this category because of the breadth of the definition of clinical negligence in paragraph 21(5) of Part 1 of Schedule 1, which should exclude such claims from this category.

Breach of Convention rights by public authority

236. A claim in tort against a public authority which involved a “significant breach”¹⁸⁸ of one of the Convention Rights will most frequently occur where the operational obligation in

¹⁸⁸ Further information on the meaning of “significant breach” is provided by the [Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), paragraphs 11.1-11.3

Article 2 of the European Convention on Human Rights¹⁸⁹ is engaged because of the presence of a real and immediate risk of suicide or death on the part of an individual, yet negligence allows the death to occur. In such circumstances, damages for personal injury would be included in the claim on behalf of the estate under the *Law Reform (Miscellaneous Provisions) Act 1934*. A relative may suffer a psychiatric injury (“nervous shock”) as a result of witnessing the immediate aftermath of the death.

237. Paragraph 22 of Part 1 of Schedule 1 of LASPO does not restrict civil legal aid services to the direct victim of the significant breach of the Convention Rights. It is therefore likely that a nervous shock claim could be brought as a result of witnessing the aftermath of a significant breach of Article 2.

238. Although this factual matrix is most likely to occur in the context of mental health patients informally or compulsorily admitted to a hospital for assessment and treatment, such claims are likely to be excluded because they fall within the definition of clinical negligence which is excluded from this category by paragraph 22(3) of Part 1 of Schedule 1. The same exclusion does not apply to other public authorities, such as the police or the prison service. Claims in tort involving serious breaches of Articles 3,¹⁹⁰ and Article 8,¹⁹¹ which encompasses bodily integrity could also give rise to an eligible claim under this category.

239. By necessity, whether a claim involves a “significant breach” of Convention Rights will be highly fact-sensitive.¹⁹²

Public Law and Judicial Review

LASPO Schedule 1, Part 1

240. Under LASPO Schedule 1, Part 1, legal aid is available for “civil legal services provided in relation to judicial review of an enactment, decision, act or omission”.¹⁹³ Legal aid is also available for habeas corpus proceedings.¹⁹⁴

241. Paragraph 18 of Part 2 of Schedule 1¹⁹⁵ excludes judicial review from services for which legal aid is available except as provided under Schedule 1. This is to ensure that judicial

¹⁸⁹ Right to life

¹⁹⁰ Prohibition of torture

¹⁹¹ Right to respect for private and family life

¹⁹² Further information on the meaning of “significant breach” is provided by the [Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), paragraphs 11.1-11.3

¹⁹³ [LASPO](#), Schedule 1, Part 1, paragraph 19

¹⁹⁴ [LASPO](#), Schedule 1, Part 1, paragraph 20

review can only be funded via paragraph 19 of Part 1 of Schedule 1 and not under other paragraphs.¹⁹⁶ The effect is that the limitations contained in that paragraph apply to all judicial review claims, whatever their subject matter.

Regulations

242. **Full representation** will only be granted where the requirements of *Civil Legal Aid (Merits Criteria) Regulations 2013* are met, i.e.:¹⁹⁷

- there has been a letter before claim and reasonable time to respond (except where this is impracticable)
- the proportionality test is met, meaning “the likely benefits of the proceedings to the individual and others justify the likely costs having regard to the prospects of success and all the other circumstances of the case”,¹⁹⁸ and
- the prospects of success are 50 percent or above.

243. For cases where the application for legal aid was made before 27 January 2014 legal aid may also be granted where the merits are borderline and the case is either of significant wider public interest, of overwhelming importance to the individual or “the substance of the case relate to a breach of Convention Rights”. A case is of significant wider public interest for these purposes:¹⁹⁹

if the Director is satisfied that the case is an appropriate case to realise real benefits to the public at large, other than those which normally flow from cases of the type in question; and benefits for an identifiable class of individuals, other than the individual to whom civil legal services may be provided or members of that individual’s family.

244. The borderline category was removed (subject to the following paragraph) with effect from 27 January 2014 by the Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2014.²⁰⁰ Transitional provisions in Regulation 6 have the effect that the category still exists for cases in which the application is made after 27 January 2014 where civil legal services have

¹⁹⁵ Inserted by the [Legal Aid Sentencing and Punishment of Offenders Act 2012 \(Amendment of Schedule 1\) Order SI No. 748](#)

¹⁹⁶ See the [explanatory memorandum](#) to the [Legal Aid Sentencing and Punishment of Offenders Act 2012 \(Amendment of Schedule 1\) Order SI No. 748](#)

¹⁹⁷ [SI No. 104](#), Regulation 60

¹⁹⁸ See [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), regulation 8

¹⁹⁹ [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#), regulation 6

²⁰⁰ [SI No. 131](#)

already been provided pursuant to an earlier application and the new application “relates to the same case”. There are other conditions and reference must be made to the Regulations but the effect will be, for example, that the borderline test will continue to apply to applications for legal aid for an appeal in respect of cases where the initial application was made earlier than 27 January 2014.

245. The borderline test has also been re-instated for some purposes with effect from 27 July 2015²⁰¹. These changes were introduced to address the judgment of the Administrative Court in *IS v Director of Legal Aid Casework* [2015] EWHC 1965 (Admin) in which Collins J held that it was not open to the LAA always to insist on a greater than evens chance of success in human rights cases. The LAA has appealed the decision in *IS* and the impact assessment for the amendment Regulations makes clear that it may re-visit the issue in the light of the judgment on appeal. In the meantime, where a determination is made on or after 27 July 2015 then the merits test is also satisfied if:

“the prospects of successfully obtaining the substantive order sought in the proceedings are borderline or poor but it is—

(i) necessary for the Director to determine that the criterion in this paragraph is met to prevent a breach of—

(aa) the individual’s Convention rights; or

(bb) any rights of the individual to the provision of legal services that are enforceable EU rights; or

(ii) appropriate for the Director to determine that the criterion in this paragraph is met, in the particular circumstances of the case, having regard to any risk that a failure to make such a determination would be such a breach”.

246. Prospects are “poor” if the chances of a successful outcome are above 20% but less than 50%. *IS* makes clear that in assessing whether the prospects of success tests are met the LAA must work on the basis that the applicant has representation.

247. Note that if the application is for **investigative representation** then the proposed defendant must still be notified of the potential claim before legal aid is granted. This need not be a full pre-action protocol letter and is expected to be most relevant in cases of failure to act (such as failure to carry out an assessment) where mere notice of the claim may prompt action.²⁰²

²⁰¹ *Civil Legal Aid (Merits Criteria) (Amendment) (No2) Regulations 2015*

²⁰² See [Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), paragraphs 7.38-7.39

Standard Civil Contract 2010 (as amended) and Standard Civil Contract 2013

248. Public law contracts have not been terminated and continue on the 2010 terms (as amended). At present these contracts have been extended to 31 October 2015. The public law category covers:²⁰³

34. *Legal Help and related proceedings concerning:*

- a. *The human rights of the client or a dependant of the client other than matters which fall within the definition of another category.*
- b. *Public law challenges to the acts, omissions or decision of public bodies, including challenges by way of judicial review or habeas corpus.*

35. *To the extent that any relevant grant of exceptional funding is made (in accordance with section 10 of the Act) this category also include Legal Help and all proceedings concerning data protection and freedom of information issues.*

249. This is narrower than the original category definition in the 2010 contract which covered civil liberties more generally, proceedings under section 222 of the *Local Government Act 1972* and freedom of information. The same language is used in the 2015 draft contract²⁰⁴.

250. The 2010 (as amended) and 2013 contracts and the 2015 draft contract each refer to the relationship between this and other categories in the following terms (added emphasis):²⁰⁵

19 *Public law challenges to the acts, omissions or decision of public bodies (including under the Human Rights Act 1998), in particular challenges by way of judicial review...and habeas corpus... are covered by the Category in which the principal matter or proceedings appear or by the Category which relates to the underlying substance of the case (as referenced by the widest Category Definition incorporating excluded work). **They are also covered by the Public Law Category.***

20 *If arising in respect of matters or proceedings within the Crime Category, these cases will also fall within the Crime Category.*

²⁰³ <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/legal-aid/civil-contracts/category-definitions-2010.pdf>

²⁰⁴ Category definitions at paragraphs 24-5.

²⁰⁵ See [Standard Civil Contract 2013, Category Definitions](http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/legal-aid/civil-contracts/category-definitions-2010.pdf) 2015 Draft Contract category definitions and <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/legal-aid/civil-contracts/category-definitions-2010.pdf>

21 *Note that the fact that a Defendant is a Public Authority does not bring a case within the Public Law Category. For a case to constitute a public law challenge it must be determined according to judicial review principles (limited to paragraph 19 Part 1 of Schedule 1 to the Act). Claims for damages against Public Authorities, other than Human Rights Act claims, do not usually fall within Public Law but may come within Actions Against the Police etc. Claims under the Human Rights Act may well come within both Public Law and Actions Against the Police etc."*

251. As pointed out in the *Bhatia Best* case,²⁰⁶ this is subject to the definition in paragraph 19(10) of schedule 1 to LASPO so, in order to fall within the terms of a public law contract a matter must be both within this definition and within that paragraph.

252. Paragraph 2.28 of the Standard Civil Contract 2013 specification provides that:²⁰⁷

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

253. The effect is that:

- If a judicial review claim arises out of a matter that is in scope in some other category then the solicitor bringing the claim must either have a contract in that category or a public law contract. So, the holder of a community care contract can bring a judicial review claim to challenge an assessment under section 21 of the *National Assistance Act 1948* and a housing contract holder can bring a claim for judicial review to challenge a refusal to accept a homelessness claim.
- If a judicial review claim arises out of a matter that is not within one of the other contract categories then the solicitor must have a public law contract to bring the claim. The important point to note is that the contract categories do not necessarily overlap with the ordinary meaning of the category heading. So, for example, housing does not include non-homeless allocation decisions. A judicial review claim in such a case would have to be brought under a public law contract and not a housing contract.²⁰⁸
- Where a provider does not hold a contract permitting them to undertake work of a particular kind then it may still be possible to enter into an individual contract through

²⁰⁶ [2014] EWHC 746 (QB)

²⁰⁷ [Standard Civil Contract 2013](#). All contract documents are available on the *Ministry of Justice website*.

²⁰⁸ See the Legal Aid Agency's [Frequently Asked Questions for the civil legal aid reforms](#), paragraph 77.

the LAA Special Cases Unit. It will be necessary to satisfy the criteria in Regulation 31(5) of the Civil Legal Aid (Procedure) Regulations 2012,²⁰⁹ namely:

31(5) The effective administration of justice test is satisfied if the Director decides that it is necessary for a provider to provide the services which are the subject of the application under an individual case contract having considered —

- (a) the provider's knowledge of the particular proceedings or dispute and expertise in providing the civil legal services which are the subject of the application;*
- (b) the nature and likely length of the particular proceedings or dispute;*
- (c) the complexity of the issues; and*
- (d) the circumstances of the individual making the application.*

In the *Bhatia Best* case²¹⁰ these criteria seem to have been satisfied because the firm in question had particular expertise in dealing with cases arising from the decision of the ECJ in *Ruiz Zambrano v Office national de l'emploi*.²¹¹

254. Solicitors cannot exercise delegated powers to grant representation in a judicial review case except in homelessness cases and some community care matters.²¹² The LAA has given guidance as to emergency applications and states that it “will” process them within 48 hours. Email applications can be made where work has to be undertaken in less than 48 hours.²¹³

Payment for work at the permission stage

255. The Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014,²¹⁴ amended the Civil Legal Aid (Remuneration) Regulations by inserting a new Regulation 5A to prevent payment for “civil legal services consisting of making” an application for judicial review unless permission was granted. These Regulations were quashed following the decision of the Administrative Court in *R (Ben Hoare Bell & Ors) v Lord Chancellor* [2015] EWHC 523 (Admin). The government then introduced an amended regime in the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015. These apply to any application made (as to which detailed provision is made by Regulation 4) after 27 March 2015. They insert a new

²⁰⁹ SI No. 3098

²¹⁰ [2014] EWHC 746 (QB)

²¹¹ [2011] ECR I-1177

²¹² 2010 Specification, paragraph 5.3(b)

²¹³ See [Applications for emergency funding in Judicial Review cases: Processes and Procedures from 1 April 2013.](#)

²¹⁴ [SI No. 607](#)

paragraph 5A to the effect that where an application for judicial review is issued then the Lord Chancellor must not pay remuneration for legal services consisting of making that application unless:

The court gives permission 5A(a).

The defendant withdraws the decision under challenge and as a result the court either refuses permission or does not give permission (5A(c)).

The court orders a hearing to consider whether or not to grant permission or to decide an appeal against a refusal to grant permission (5A(d)).

The court orders a rolled up hearing (5A(e)).

256. The Lord Chancellor also has a discretion to make payment in cases not caught by the preceding paragraph but where the court does not actually refuse permission. This is governed by Regulation 5A(1)(b) to the following effect:

(b) the court neither refuses nor gives permission and the Lord Chancellor considers that it is reasonable to pay remuneration in the circumstances of the case, taking into account, in particular —

- (i) the reason why the provider did not obtain a costs order or costs agreement in favour of the legally aided person;*
- (ii) the extent to which, and the reason why, the legally aided person obtained the outcome sought in the proceedings; and*
- (iii) the strength of the application for permission at the time it was filed, based on the law and on the facts which the provider knew or ought to have known at that time.*

257. The following points should be noted about the pre-permission costs regime:

The restriction on payment only applies where the application for judicial review has been issued. If it is not issued then all preparatory work will be remunerated in the usual way.

The prohibition on payment only applies to solicitors costs and to counsels fees. It does not apply to disbursements other than counsel's fees.

The exclusion on payment does not apply to the costs of an application for interim relief, even if it is made at the same time as the an application for judicial review.

258. No express exclusion for interim relief was made in the Regulations but the Lord Chancellor has issued guidance²¹⁵ that makes plain that

“6...Regulation 5A does not apply to any work that relates to an application for interim relief in accordance with Part 25 of the CPR, even when that application is made alongside, or in the context of, an application for Judicial Review

“7. Case workers must ensure that, to the extent that work relates to an Interim Relief application, it is remunerated in the usual way, even where the application is made within the context of a substantive Judicial Review application under Part 54 of the CPR or Part 4 of the UTR to which regulation 5A otherwise applies”.

259. Counsel for the Secretary of State relied on this in the *Ben Hoare Bell* case and it was accepted there that it accurately stated the position (see paragraph 24).

260. The exclusion of interim relief can only be because the amended Regulations adopt a narrow meaning of “making an application” for judicial review to cover only those parts of the application that necessarily fall under the Civil Procedure Rules (CPR) Part 54. Other steps (including an application for an injunction) do not fall within that phrase even though they would ordinarily be treated as the costs of those proceedings (for example on a costs order from the opponent). If this is right then it may well be that other ancillary steps not within CPR Part 54 are also excluded from the narrow definition and could also attract payment even if permission is refused. For example, an application for disclosure is not within CPR Part 54 but is made under CPR Part 31.

Types of cases covered in practice

Courts and Tribunals covered

261. LASPO Schedule 1, Part 1, paragraph 19(10) defines judicial review as including “any procedure” in which a court or body in Schedule 3 “is required by an enactment to make a decision applying the principles that are applied by the court on an application for judicial review”.

²¹⁵ [The Lord Chancellor's Guidance on Regulation 5A of the Civil Legal Aid \(Remuneration\) Regulations 2013 and Applications for Interim Relief](#)

262. Various statutes make such provision but the main effect seems to be to include judicial review in the Upper Tribunal under section 15 of the *Tribunals Courts and Enforcement Act 2007*. It is doubtful whether collateral challenges before other statutory Tribunals are covered by legal aid.²¹⁶

263. Where a statute allows for an appeal on a point of law (for example homelessness appeals)²¹⁷ then that normally includes the same grounds as are available on a judicial review but that does not seem to be what is intended here. Otherwise funding would now be available for all appeals on a point of law. In relation to homelessness appeals, this has now been confirmed by *Bhatia Best Limited v Lord Chancellor*.²¹⁸ Silber J held that an appeal on a point of law under s. 204 of the Housing Act 1996 did not fall within paragraph 19. The effect was that the Claimant could not bring such appeals under their public law contract but would have to hold a housing contract to do so (subject to the possibility of entering individual case contracts). An odd consequence of this case is that homelessness appeals in respect of interim accommodation pending appeal under s. 204A will still be within the judicial review category because s. 204A(4) does require that the court apply “the principles that are applied by the court on an application for judicial review”.

264. Paragraphs 1, 18 and 19 of Schedule 3 include legal aid for advocacy services in the Upper Tribunal exercising its judicial review powers.

265. Proceedings will cease to qualify as judicial review if the court orders that they should continue as if brought by ordinary action.²¹⁹ The claim will then have to qualify for funding under a different category.

Personal benefit mandatory

266. LASPO provides that a judicial review claim must “have the potential to produce a benefit for the individual, a member of the individual’s family, or the environment”.²²⁰ Benefit is not defined but this is intended to exclude a pure “public interest” challenge.

267. If proceedings become academic for the individual after legally aided services have been provided then the exclusion does not apply. So, for example, if the individual claimant in a community care claim receives the relief they are seeking then legal aid can continue to allow the claim to proceed for the purpose of pursuing costs or on wider public interest grounds.

²¹⁶ For example, a challenge to the validity of Housing Benefit Regulations in the First Tier Tribunal

²¹⁷ However, homelessness cases are treated as public law cases for the purposes of the application of the [Civil Legal Aid \(Merits Criteria\) Regulations 2013 SI No. 104](#)

²¹⁸ [2014] EWHC 746 (QB)

²¹⁹ See [Civil Procedure Rules](#) Part 54.20

²²⁰ [LASPO](#) Schedule 1, Part 1, paragraph 19(3)

Alternative proceedings

268. Under the *Civil Legal Aid (Merits Criteria) Regulations 2013*, the case must meet the standard criteria under regulation 39. In particular:

the individual has exhausted all reasonable alternatives to bringing proceedings including any complaints system, ombudsman scheme or other form of alternative dispute resolution.

269. In addition, the claim must meet the criteria in regulation 53, meaning the claim must appear to be susceptible to challenge and that:²²¹

there are no alternative proceedings before a court or tribunal which are available to challenge the act, omission or other matter, except where the Director considers that such proceedings would not be effective in providing the remedy that the individual requires.

270. This applies only to alternatives before a court or tribunal, but where such a remedy exists then it must be used first unless it would be ineffective. For example, the alternative procedure might not be mandatory if the case is urgent and the tribunal cannot grant interim relief.²²²

Subject-based limitations

271. As a general rule legal aid for judicial review is not limited to particular subject areas, although contract holders who do not hold public law contracts (see above) will be limited in the kinds of case they can take on. This means that judicial review claims can still be brought in respect of issues that would otherwise be excluded. For example:

- It is still possible to include a claim for damages for most non-defamation torts in a judicial review application where that arises out of the claim. This will include a restitutionary claim provided that it is not based on trust law. The circumstances in which such claims can be made are governed by section 31(4) of the *Senior Courts Act 1981*.
- It is still possible to bring a judicial review for claims in relation to welfare benefits, including those excluded from legal aid generally by paragraph 15 of Part 2 of Schedule 1. However, in most cases a judicial review claim will not be possible because there will be an alternative remedy.

²²¹ Regulation 53(b) as substituted by the [Civil Legal Aid \(Merits Criteria\) Amendment Regulations 2013](#) SI No. 772

²²² See further Lord Chancellor's [Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), paragraph 7.37

272. There are, however, various exclusions. Some general exclusions in LASPO, Schedule 1, Part 2 apply to judicial review claims:

- defamation and malicious falsehood²²³
- in relation to conveyancing²²⁴
- in relation to the making of wills²²⁵
- in relation to matters of trust law²²⁶
- company or partnership law²²⁷
- civil legal services provided to an individual in relation to matters arising out of or in connection with the establishment, carrying on, termination or transfer of their business²²⁸, and
- changing an individual's name.²²⁹

273. If the subject matter of the claim falls within any of the above then it will not qualify for legal aid including for judicial review, although in principle the Director could make an exceptional case determination under section 10 of LASPO.²³⁰

274. In relation to immigration claims, LASPO Schedule 1, Part 1, paragraph 19(5) creates a general rule that legal aid is not available for judicial review in respect of an immigration issue where substantially the same "issue" has been determined against the claimant within the preceding year on an application for judicial review or an appeal to a court of tribunal. Paragraph 19(6) provides that legal aid is not available to challenge removal directions given not more than a year after the making of the relevant decision to remove or the conclusion of any appeal against that decision.

275. The one year rule does not apply to asylum applications where there is no right of appeal²³¹, to certificates under the Nationality Immigration and Asylum Act 2002 sections 94

²²³ [LASPO](#), Schedule 1, Part 2, paragraph 7

²²⁴ [LASPO](#), Schedule 1, Part 2, paragraph 9

²²⁵ [LASPO](#), Schedule 1, Part 2, paragraph 10

²²⁶ [LASPO](#), Schedule 1, Part 2, paragraph 11

²²⁷ [LASPO](#), Schedule 1, Part 2, paragraph 13

²²⁸ [LASPO](#), Schedule 1, Part 2, paragraph 14

²²⁹ [LASPO](#), Schedule 1, Part 2, paragraph 17

²³⁰ The Lord Chancellor's Guidance expressly gives a judicial review claim arising out of a business as an example of a case where a determination might be made. An example might be where statutory powers have been used to close down a business that is the claimant's sole source of income and where a challenge requires extensive expert evidence. See [Lord Chancellor's Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), paragraph 7.10

²³¹ [LASPO](#), Schedule 1, Part 2, paragraph 19(7)

and 96²³², or of removal directions in prescribed circumstances²³³. At the time of writing no such circumstances had been prescribed. An applicant who wishes to challenge a certification decision must make that clear in their application. Otherwise they may find that their application is read as referring to a subsequent removal decision that is not in scope [Rrapaj v Director of Legal Aid Casework [2013] EWHC 1837 (Admin)].

Forthcoming changes

276. The MOJ has proposed to introduce changes by secondary legislation restricting legal aid so that it is not available where the client does not pass a residence test. It was intended that this will apply to all cases and not only judicial review but is likely to have a particularly significant impact on judicial review claims. The status of this proposal is now in doubt because in *R (Public Law Project) v Lord Chancellor* [2015] 1WLR 251 a Divisional Court held that such a change would be ultra vires and unjustifiably discriminatory against foreign nationals. At the time of writing an appeal is outstanding.

Welfare benefits

Category definition and scope

LASPO Schedule 1, Part 1

277. Paragraph 15 of Part 2 of Schedule 1 of LASPO excludes civil aid legal services in relation to a benefit, allowance, payment, credit or pension under any enactment relating to social security as well as tax credits, pension credit and vaccine damage payments.

278. There is an exception to this under paragraph 8 of Schedule 1, Part 1 which allows for civil legal services to be provided on a point of law in the Upper Tribunal (Administrative Appeals Chamber), the Court of Appeal or Supreme Court in relation to a benefit, allowance, credit or pension under enactments relating to social security, tax credits and pension credits.

279. A Welfare Benefits Upper Tribunal (WBUT) Legal Aid contract was awarded to the Law Centres Network from 1 November 2013 for the procurement areas in London & the South East of England and the Midlands & East of England.²³⁴ A further contract was awarded from 1 February 2014 to members of the Law Centres Network and various solicitors firms for the procurement areas in the North and the South West and Wales.²³⁵ For details of how to refer to the service, which includes face-to-face advice as well as remote advice (by telephone), see

²³² [LASPO](#), Schedule 1, Part 2, paragraph 19(7)

²³³ [LASPO](#), Schedule 1, Part 2, paragraph 19(8)

²³⁴ Further information is available on the [Ministry of Justice](#) website

²³⁵ Further information is available on the [Ministry of Justice](#) website

the Law Centres Network website.²³⁶ The WBUT contract permits work to be undertaken under the following categories for Welfare Benefits:

“Legal Help in relation to appeals on a point of law in the Upper Tribunal, Court of Appeal and Supreme Court for all welfare benefits (including housing benefit, war pensions, state pensions and other similar benefits under a social security enactment, the Vaccine Damage Payments Act 1979 or Part 4 of the Child Maintenance and Other Payments Act 2008).

Legal Help in relation to an appeals on a point of law relating to a council tax reduction scheme from the Valuation Tribunal England and the Valuation Tribunal Wales to the High Court, Court of Appeal and Supreme Court.

Legal representation for appeals to the Court of Appeal and the Supreme Court on a point of law in relation to all welfare benefits (including housing benefit, war pensions, state pensions and other similar benefits under a social security enactment, the Vaccine Damage Payments Act 1979 and Part 4 of the Child Maintenance and Other Payments Act 2008), and appeals on a point of law relating to a council tax reduction scheme to the Court of Appeal and Supreme Court.”²³⁷

280. A further important exception is that of judicial review in respect of welfare benefits, which remains in scope under paragraph 19(2)(a) of Schedule 1, Part 1. Challenges by way of judicial review come under the Public Law category, however, the challenge may overlap with other categories if it *“relates to the underlying substance of the case”*.²³⁸ See Public Law and judicial review at 219 above for further details.

281. Funding is also available to judicially review the Upper Tribunal’s decision to refuse permission to appeal to itself. This type of judicial review is subject to the restrictions laid down in *R (Cart) v The Upper Tribunal and ors* [2011] UKSC 28, [2012] 1 AC 663 and it must meet the requirements under CPR 54.7A.

282. Funding is also available for applications for judicial review brought direct to the Upper Tribunal under s.15 of the *Tribunals, Courts and Enforcement Act 2007* (TCEA 2007) in respect of interim decisions of the First-tier Tribunal made under its Procedure Rules where there is no right of appeal to the Upper Tribunal against the decision in question. These are known as “excluded decisions”, which are defined in section 11(5) of TCEA 2007.

²³⁶ [Law Centres Network](#)

²³⁷ [Standard Civil Contract 2013, Category Definitions](#) paragraphs 33-35

²³⁸ [Standard Civil Contract 2013, Category Definitions](#) paragraph 8 and 13

283. Finally, funding is also available for welfare benefits cases which involve a contravention of the *Equality Act 2010*,²³⁹ which includes disability discrimination, especially a failure to make reasonable adjustments.

Regulations

284. The effect of regulation 2 of the *Civil Legal Aid (Preliminary Proceedings) Regulations 2013*²⁴⁰ is that requests to the First-tier Tribunal for permission to appeal a decision of a First-tier Tribunal to the Upper Tribunal are not eligible for legal aid.²⁴¹ This means work undertaken in respect of an appeal to the Upper Tribunal only comes within scope once a First-tier Tribunal Judge has issued a determination on an application for permission (either granting or refusing permission to appeal).²⁴² There is no funding available for any work carried out prior to this stage being reached. It is not permissible to be able to apply to the Upper Tribunal unless an application for permission to appeal has been made to a First-tier Tribunal judge and that application has been refused.²⁴³

285. The WBUT contract provides advice and assistance in the form of Legal Help paid at a fixed rate for appeals on a point of law to the Upper Tribunal. The majority of cases before the Upper Tribunal are decided on the papers, following a round of written submissions, but a Judge can direct that there be an oral hearing.²⁴⁴ Advocacy at an oral hearing is not funded unless the Tribunal is exercising its judicial review functions under section 15 of the TCEA 2007 or it is an exceptional case under section 10 of LASPO and Part 8 of the *Civil Legal Aid (Procedure) Regulations 2012*.²⁴⁵

Exceptional Funding

286. To the extent that any relevant grant of exceptional funding is made in the Welfare Benefits category, it includes:²⁴⁶

(a) *Legal Help in relation to all welfare benefits (including council tax reduction scheme appeals, housing benefit, war pensions, state pensions and vaccine damage payments or similar payments), and in relation to proceedings before any welfare benefit review or appeal body;*

²³⁹ [LASPO](#) Schedule 1, Part 1, paragraph 43(1) and (2)(a)

²⁴⁰ [SI No. 265](#)

²⁴¹ Requests are a requirement under Rule 38 of [The Tribunal Procedure \(First-tier Tribunal\) \(Social Entitlement Chamber\) Rules 2008 SI No. 2685](#)

²⁴² [The Tribunal Procedure \(First-tier Tribunal\) \(Social Entitlement Chamber\) Rules 2008 SI No. 2685](#), rule 39

²⁴³ [The Tribunal Procedure \(Upper Tribunal\) Rules 2008 SI No.2698](#), rule 21(2)

²⁴⁴ [The Tribunal Procedure \(Upper Tribunal\) Rules 2008 SI No.2698](#), rule 34

²⁴⁵ [SI No. 3098](#)

²⁴⁶ [Standard Civil Contract 2013, Category Definitions](#), paragraph 36

(b) any subsequent or related proceedings before a court.

287. An exceptional case is one where the failure to provide legal aid would be a breach of the individual's convention rights or the rights of the individual to the provision of legal services that are enforceable EU rights.

288. Appeals on the right to reside requirement and other determinations concerned with free movement may raise issues of enforceable EU rights. Further, where the decision concerns an assertable right to welfare benefit (i.e. one that does not involve the exercise of a discretion), a claim for exceptional funding could be made under Article 6 of the European Convention on Human Rights.

289. The Lord Chancellor's original *Exceptional Funding Guidance (Non-Inquests)* made clear that in determining whether Article 6 would be breached, what had to be shown is that the failure to fund meant that bringing the case would have been "practically impossible or lead to an obvious unfairness in proceedings".²⁴⁷ The factors that may be particularly relevant include:

- the legal complexity of the matter, i.e. is there a cross over with EU/immigration law?
- the importance of the issue at stake, and
- the inability of the claimant to argue their case, for example, because of vulnerability or disability.

290. In a legal challenge to this *Guidance*, brought in relation to immigration cases, the Court of Appeal found that the guidance interpreted the exceptionality too narrowly, and placed the threshold for granting funding too high.²⁴⁸ The Court's ruling clearly has implications for applications in welfare benefits which have generally been refused based on the criteria in section 10 of LASPO. However, post-the Court's ruling on section 10 there has been a trend of the LAA refusing applications for exceptional funding in cases before the Upper Tribunal based on its view of the merits. This is despite the fact that in appeals in the Upper Tribunal would have been granted permission by a judge sitting in a specialised jurisdiction.

291. The Upper Tribunal has said that the grant of exceptional funding in cases to be heard by a three-judge panel "is likely to be of great assistance to the Upper Tribunal in resolving

²⁴⁷ Lord Chancellor's *Exceptional Funding Guidance (Non-Inquests)*, paragraph 63

²⁴⁸ [*R \(Gudanaviciene & Ors v The Director of Legal Aid Casework & Or \[2014\] EWCA Civ 1622*](#) paragraph 181

difficult and important issues of law”²⁴⁹. The Upper Tribunal has also been critical of the delay in processing applications for exceptional funding in time for the date of the hearing.²⁵⁰

292. Since the Court of Appeal ruled in *Gudanaviciene*, the Lord Chancellor has issued new guidance on exceptional case funding²⁵¹. The new guidance states at paragraph 65 that:

Where a case involves the determination of civil rights and obligations, caseworkers should consider whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to an obvious unfairness in proceedings.

Types of cases covered in practice

293. The stated purpose of the April 2013 legal aid reforms, now enshrined in LASPO, is to exclude welfare benefits from the scope of civil legal aid (with the exception of judicial review). There is no funding for work taken at first instance before the First-tier Tribunals and only a small residual category remains, namely appeals on a point of law before the Upper Tribunal (Administrative Appeals Chamber), the Court of Appeal or Supreme Court and judicial review.

294. In practice funding remains available for the following types of cases:

- For applications for permission to appeal to the Upper Tribunal on a point of law following a refusal of permission by a First-tier Tribunal (under the WBUT contract);
- For applications for permission to appeal to the Court of Appeal or the Supreme Court, as well as for the substantive appeal;
- For appeals to the High Court on a point of law relating to a council tax reduction scheme;²⁵²
- For applications for permission to appeal to the Court of Appeal or Supreme Court relating to a council tax reduction scheme, as well as for the substantive appeal;
- For an application for judicial review of a decision or action by a public body relating to welfare benefits in the Administrative Court (and the Court of Appeal and the Supreme Court)
- For an application for judicial review of a refusal of permission to appeal by the Upper Tribunal (the *Cart*-test).

²⁴⁹ [JC v Secretary of State for Work and Pensions \(ESA\) \[2014\] UKUT 352 \(AAC\)](#) paragraphs 61-63

²⁵⁰ [HB v Secretary of State for Work and Pensions \(IS\) \[2013\] UKUT 433 \(AAC\)](#) paragraph 6

²⁵¹ [Lord Chancellor's Exceptional Funding Guidance \(Non-Inquests\)](#), paragraph 65.

²⁵² [The Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(Amendment of Schedule 1\) Order 2013. No. 748](#)

- For an application for judicial review to the Upper Tribunal relating to an interim decision of a First-tier Tribunal where this is an “excluded decision”.

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