



Ministry
of Justice

Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum

Submitted to the Justice Select Committee
on 30 October 2017

October 2017

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Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

October 2017



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Contents

Introduction	3
Post-Legislative Memorandum: Part 1 LASPO, Legal Aid	5
Introduction	5
Objectives	6
Implementation	10
Secondary Legislation and Legal Issues	17
Other Reviews	31
Preliminary Assessment of the Act	38
Appendix A: List of delegated legislation relevant to LASPO Part 1 (Legal Aid)	64
Post-Legislative Memorandum: Part 2 LASPO, Litigation Funding and Costs	86
Introduction	86
Objectives	86
Implementation	93
Secondary Legislation	93
Legal Issues	95
Other Reviews	95
Preliminary Assessment of the Act	96
Part 3 Sentencing and punishment of offenders	98
Objectives of Part 3	98
Implementation	98
Chapter 1: Sentencing	98
Chapter 2: Bail	104
Chapter 3: Remands of Children otherwise than on bail	104
Chapter 4: Release on licence	108
Chapter 5: Dangerous Offenders	110
Chapter 6: Prisoners etc.	112
Chapter 7: Out of court disposals	113
Chapter 8: Rehabilitation of Offenders	114
Chapter 9: Offences	115

Introduction

1. The Legal Aid, Sentencing and Punishment of Offenders Act 2012, or LASPO, was an Act of Parliament which made broad changes within various areas of the departmental portfolio of the Ministry of Justice. LASPO received Royal Assent in May 2012 and its provisions came into force at varying points thereafter.
2. At the Bill's second reading in the House of Lords, the then Minister of State at the Ministry of Justice, Lord McNally, described the three high-level aims of the Act. These were to 'reform our criminal justice system', to facilitate 'the renewal of our system of civil justice' and to 'make a contribution to unavoidable and necessary reductions in public spending'. The Act was implemented against a wider backdrop of the need to reduce the budget deficit.
3. The Act is split into four Parts. Part 1 replaced Part 1 of the Access to Justice Act 1999 as the statutory framework for legal aid in England and Wales, and implemented a series of substantial changes to the legal aid system, following a consultation in 2010.¹ Part 2 introduced reforms to civil litigation funding and costs, based on the recommendations of Lord Justice Jackson published in 2009² and a consultation in 2010.³ Part 3 introduced a variety of provisions associated with the sentencing and punishment of offenders, and Part 4 covers a number of ancillary provisions associated with the Act as a whole. The Act is underpinned by 27 Schedules and an array of secondary legislation.
4. This document serves as the post-legislative memorandum for Parts 1, 2 and 3 of LASPO.⁴
5. It is being published with regard to the post-legislative scrutiny process set out in Command Paper CM7320: *'Post-legislative scrutiny – the Government's approach'*.⁵ The memorandum was presented to the Justice Select Committee on 30 October 2017.
6. Due to the differing natures of Parts 1, 2 and 3 of LASPO, each Part has been covered separately in the memorandum. Each part is preceded by a short introduction summarising the contents of the Part in more detail. The section of the memorandum covering Part 3 is further split on the basis of the different elements of that Part, as it covers a wide range of topics with little in common between them.

¹ See: <http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-consultation.pdf>

² See: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

³ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238368/7947.pdf

⁴ Part 4 is not covered in the memorandum as this Part includes provisions for the implementation of the other three Parts.

⁵ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228516/7320.pdf

7. Separate to producing this memorandum, the Ministry of Justice has committed to producing post-implementation reviews for various policies contained within Parts 1 and 2 of LASPO. There will be separate reviews for legal aid and for civil litigation funding. The content and purpose of a post-implementation review is different to a post-legislative memorandum: post-implementation reviews are primarily concerned with assessing the reforms from an analytical perspective, in the manner of an impact assessment, rather than reporting certain elements of the Act's implementation and operation. As such, the analysis provided in the preliminary assessment sections of this memorandum is at a high level. The Ministry of Justice intends to undertake a more thorough and substantive analysis in the post-implementation reviews.

Post-Legislative Memorandum: Part 1 LASPO, Legal Aid

Introduction

8. Our legal aid system is a fundamental pillar of access to justice. Last year, the Ministry of Justice spent £1.6bn on legal aid: 24% of its total expenditure. Legal aid spending as a proportion of the Ministry of Justice's budget today is 21%, just 3 percentage points lower than prior to the enactment of the LASPO. Since the introduction of the LASPO reforms we have built on the Coalition Government's objective of discouraging unnecessary and adversarial litigation and delivering better value for money for the taxpayer by reducing the cost of the scheme, while ensuring that legal aid continues to be available for the highest priority cases, for example where life or liberty is at stake, where someone faces the loss of their home, in domestic violence cases, or where their children may be taken into care.
9. In 2010, the incoming Coalition Government sought to reduce public spending to help reduce the budget deficit. In its first year, the Coalition Government published its initial Spending Review which promised to consult on 'major reforms to the legal aid system to deliver access to justice at lower cost to the taxpayer'. This followed the intention set out in the Coalition Programme for Government to 'carry out a fundamental review of legal aid to make it work more efficiently.'⁶
10. In November 2010, the Coalition Government published a consultation paper entitled, '*Proposals for the Reform of Legal Aid in England and Wales*'.⁷ The consultation set out a 'radical, wide-ranging and ambitious programme of reform which aims to ensure that legal aid is targeted to those who need it most, for the most serious cases in which legal advice or representation is justified.' The consultation closed in February 2011 and set out the objectives of discouraging unnecessary and adversarial litigation, re-focussing legal aid at the highest priority cases, and delivering better value for money for the taxpayer by reducing the cost of the scheme.
11. In June 2011, the Coalition Government published its response to the consultation, which set out its finalised proposals for reform to the legal aid system.⁸ Part 1 of LASPO implemented many of these proposals⁹ and became the new statutory

⁶ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/83820/coalition_programme_for_government.pdf

⁷ See: <http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-consultation.pdf>

⁸ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228890/8072.pdf

⁹ Not every proposal from this consultation was implemented through LASPO. Some proposals, such as a 10% reduction in all fees paid to lawyers under the civil and family legal aid scheme, were implemented under the Access to Justice Act 1999 prior to LASPO coming into force. Others, such as the introduction of a 'Supplementary Legal Aid Scheme', were ultimately not implemented.

framework for the provision of legal aid in England and Wales, replacing the Access to Justice Act 1999.

Objectives

12. This section of the memorandum summarises the objectives associated with the changes to the statutory framework for legal aid introduced by Part 1 LASPO and its associated Schedules, delegated legislation, and other supporting documentation.
13. The Coalition Government's response to the '*Reform of Legal Aid in England and Wales Consultation*', published in June 2011, set out the four objectives that the package of reforms implemented by Part 1 LASPO were intended to achieve. These were:
 - a. To discourage unnecessary and adversarial litigation at public expense;
 - b. To target legal aid to those who need it most;
 - c. To make significant savings to the cost of the scheme; and,
 - d. To deliver better overall value for money for the taxpayer.
14. Subsequent amendments to Part 1 and its secondary legislation, most prominently those associated with the '*Transforming Legal Aid*' programme of work (a secondary round of legal aid reform following LASPO's implementation), had objectives that accord with one or more of these four. The main change to legal aid associated with Part 1 LASPO which had objectives beyond these four is the creation of the LAA to replace the LSC; this had its own additional bespoke objectives. Each objective is described in further detail below.

A. Discourage unnecessary and adversarial litigation at the public expense

15. During the passage of the LASPO Bill through Parliament, the Coalition Government argued that the Access to Justice Act 1999 encouraged unnecessary litigation, thereby creating unnecessary costs to the courts and the legal aid system, funded by taxpayers. The then Lord Chancellor and Secretary of State for Justice, Kenneth Clarke QC MP, set out in the foreword to the Legal Aid Reform consultation response that:

“Legal aid often encourages people to bring their problems before courts, even when they are not the right place to provide good solutions, and sometimes for litigation that people paying from their own pocket would not have pursued.”

16. By reforming the scope of legal aid, the Government aimed to encourage people to pursue alternative methods of dispute resolution. This aim was principally directed at private family proceedings (such as those concerning child contact or financial arrangements following a divorce or separation), where it was argued that out of court dispute resolution via mediation was more desirable than lengthy adversarial proceedings. For example, the Legal Aid Reform consultation response stated:

“Legal aid funding can be used to support lengthy and intractable family cases which may be resolved out of court if funding were not available. In such cases, we would like to move to a position where parties are encouraged to settle using mediation, rather than protracting disputes unnecessarily by having a lawyer paid for by legal aid.”

17. Reforms to the scope of legal aid were not the only means by which the Government approached this objective. Part 1 LASPO also increased the proportion of disposable income that clients assessed as eligible for contributory legal aid are required to contribute to the costs of their case. This was, in the words of the Legal Aid Reform consultation response, to increase ‘financial ownership of litigation.’
18. A later amendment to legislation sought to further this objective. For judicial review proceedings where legal aid is available, the law was changed in April 2014 so that funding would only be given to legal aid providers for work carried out on an application for permission to proceed with the judicial review if permission was granted.¹⁰ Prior to this, legal aid was available for such work irrespective of permission being granted. The Transforming Legal Aid consultation,¹¹ set out the aim to ‘build into the civil legal aid scheme a greater incentive for providers to give more careful consideration to the strength of the case before applying for permission for judicial review’ – or rather to discourage the pursuance of weak cases.

B. To target legal aid at those who need it most

19. The Legal Aid Reform consultation launched in 2010 set out the Coalition Government’s ambition to direct legal aid at priority cases. The consultation examined the scope of legal aid across all categories of law under the Access to Justice Act 1999, and assessed whether each legal issue continued to justify publicly funded legal support within the wider context of pressure on the MoJ’s budget and the objective of focussing support on the highest priority cases. The assessment only applied to civil and family matters on the basis that being accused of a criminal offence was enough to justify funding if the interests of justice require it, so criminal matters were retained within scope when LASPO received Royal Assent.
20. In its consultation, the Coalition Government listed the factors that it took into account when deciding what type of issue to retain funding for. These were:
 - a. The importance of the issue, which led to (for example) preserving legal aid for cases where an individual’s life or liberty is at stake;
 - b. The litigant’s ability to present their own case;
 - c. The availability of alternative sources of funding, such as conditional fee arrangements;
 - d. The availability of alternative routes for dispute resolution, such as mediation; and,
 - e. The Government’s domestic, European and international legal obligations to provide legal aid, such as on issues of child abduction.

¹⁰ These changes were challenged in *Ben Hoare Bell and others v the Lord Chancellor [2015] EWHC 523 (Admin)*. The claimants argued that the regulations frustrated the purpose of LASPO, which was to ensure that meritorious judicial review claims on behalf of litigants of limited means would be funded by legal aid. The Court upheld these arguments. In response, the Government brought in new regulations, *Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (S.I. 2015/898)*, which permitted payment for initial work on an application for judicial review proceedings in some prescribed circumstances.

¹¹ See https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaid.pdf

21. Following consultation, and during the passage of the LASPO Bill through Parliament, the Coalition Government refined some aspects of its scope proposals. For example, contrary to the initial consultation's proposals, they decided to retain legal aid for damages claims in respect of clinical negligence causing a neurological injury that leaves a baby severely disabled.
22. Different areas of law were affected by the scope changes to different degrees. In certain areas, such as mediation or protective injunctions for victims of domestic violence, the Government did not reduce the scope of legal aid. Other areas, such as welfare benefits, saw large reductions. Some areas retained within scope became subject to additional requirements in order to access legal aid. For example, legal aid was retained for seeking child contact arrangements following a divorce, but only for victims of domestic violence or in cases of child abuse, with applicants needing to provide evidence of their abuse against a list specified in secondary legislation.¹²
23. The civil and family matters retained in scope are listed in Schedule 1 of LASPO. By listing the matters in scope of legal aid, LASPO represented a change from the approach of its predecessor, the Access to Justice Act 1999, which worked on the basis that legal issues were in scope of legal aid unless specifically excluded by the Act.
24. Alongside the scope changes, Part 1 LASPO introduced a revised Exceptional Case Funding (ECF) scheme under Section 10. The impact assessment that accompanied LASPO at Royal Assent described the purpose of the ECF scheme as being to 'provide legal aid for cases that do not fall within the scope of civil legal aid but where the failure to do so would be a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law, or where there is a significant wider public interest in funding legal representation for inquest cases.'
25. In the Coalition Government's response to the Transforming Legal Aid consultation, the objective of targeting legal aid at those that need it most was further advanced: 'Unless the legal aid scheme is targeted at the persons and cases where funding is most needed, it will not command public confidence or be credible.'¹³ The policy most closely linked with this objective in that consultation was the removal of certain prison law cases from the scope of legal aid.¹⁴

C. To make substantial savings to the cost of the scheme

26. The need to make significant savings to the cost of the legal aid scheme is emphasised throughout the Legal Aid Reform and Transforming Legal Aid consultations. The objective was often discussed in relation to the fiscal climate at the time, the Coalition Government's macroeconomic objective of reducing the budget

¹² The list of qualifying evidence is set out at paragraphs 33 and 34 of the Civil Legal Aid (Procedure) Regulations.

¹³ See <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/transforming-legal-aid-next-steps-respons.pdf>

¹⁴ Prison law proceedings were removed from the scope of legal aid unless they: involve the determination of a criminal charge for the purposes of Article 6 of the European Convention on Human Rights (the right to a fair trial), are proceedings before the Parole Board where the Parole Board has the power to direct release, are sentence calculation matters where the date of release was disputed or when the prisoner requests representation at a prison disciplinary hearing.

deficit, and the consequent pressure on the MoJ's budget. For example, in the Ministerial foreword to the second consultation response¹⁵ aligned with the Transforming Legal Aid programme, Chris Grayling MP (then Lord Chancellor) states:

“By 2015/16 the department’s budget will be reduced by around a third in real terms and, as one of our largest areas of expenditure, I cannot exempt legal aid.”

27. Secondary legislation under LASPO sets out the various fees payable to lawyers and experts providing legal services funded through legal aid. The rates have been altered on multiple occasions in recent years in order to meet this objective. Some changes were made under the Access to Justice Act in 1999, such as a 10% reduction in October 2011 to all fees payable to experts in civil and family cases. Most fee scheme changes have been made by negative statutory instruments subsequent to LASPO, such as the 8.75% cut to solicitors’ fees in criminal cases implemented in April 2014. In October 2017, the Government announced that an additional 8.75% cut to solicitors’ fees would not be implemented.
28. Other changes made by Part 1 LASPO, or in subsequent amendments made to further this objective, include:
 - a. Amendments to the financial eligibility rules, such as no longer exempting legal aid applicants from undergoing a test of capital in civil and family cases if they are in receipt of certain benefits;
 - b. Removing legal aid in cases with ‘borderline’ prospects of success (though this was subsequently amended following litigation); and,
 - c. Reforming payment from central funds, which is the pool of money used to reimburse acquitted defendants who pay privately for their own representation.

D. To deliver better value for money for the taxpayer

29. The final objective was to ‘ensure that we get the best value for money in the way in which legal services are procured’, reflected the aim of targeting taxpayer-funded legal aid at the highest priority cases. This objective underpins the majority of the changes implemented by Part 1 LASPO and subsequent amendments. For example, the response to the 2010 Legal Aid Reform consultation states:

“Given the current fiscal deficit [the Government] considers that it is critical that it ensures that the amount that it pays for any service represents maximum value for money. In this context, the Government considers that it needs to ensure that it only pays those fees that are necessary to secure the level of services that are required.”

30. Policy changes principally related to this objective were the decisions a) to expand the types of legal issue for which advice could be received over the Civil Legal Advice telephone service and b) to make it mandatory that in certain areas of law, such as special educational needs, advice must first be provided over the telephone. The aim was to shift from face to face advice to the more cost-effective telephone service.

¹⁵ Two consultation responses were issued in association with the Transforming Legal Aid Reforms, as the initial consultation was followed up with a second.

E. Establishing the Legal Aid Agency

31. The LASPO reforms also aimed to add clarity and accountability to legal aid decisions. Prior to the LAA's founding, legal aid in England and Wales was administered by the LSC, a non-departmental public body. In the period prior to LASPO, it was felt that a number of problems with the LSC had emerged, as assessed by Sir Ian Magee in his '*Review of Legal Aid Delivery and Governance*'.¹⁶ These included a lack of clarity around the policy role of Ministers and the MoJ, and unclear lines of ministerial accountability. It was therefore decided that the LSC would be abolished and replaced with an executive agency, the LAA.
32. A number of objectives for the creation of the LAA were outlined in the relevant Royal Assent Impact Assessment. These objectives can be grouped under two major categories:
 - a. *Budgetary Objectives*

Aims included tightening financial control of the legal aid budget, and achieving wider utilisation of shared corporate services between the MoJ and the LAA. Using shared corporate services would be part of a structure fostering more joined up working between the two organisations.
 - b. *Objectives relating to Boundaries between the MoJ and the LAA*

Aims included ensuring that case-by-case funding decisions remained at arm's length from Ministers, and that accountability for policy decisions would be improved. It was also thought that legal aid policy would be linked to the context of wider justice policy issues.

Implementation

33. This section of the memorandum provides information on how and when the different elements of Part 1 LASPO and its associated Schedules were brought into operation. It also provides explanations for elements of Part 1 LASPO which have not been brought into force and powers that have not yet been used.
34. The reforms introduced by Part 1 changed the scope of legal aid, to focus on the highest priority cases where life or liberty are at stake, removing certain proceedings that were eligible for funding under the Access to Justice Act from scope, such as legal advice and assistance on issues associated with the receipt of and entitlement to welfare benefits. Other proceedings were retained within scope, such as representation at court in care order proceedings. The reforms also reduced the level of remuneration available to lawyers and experts through the legal aid scheme, tightened aspects of the civil and criminal legal aid financial eligibility tests, and introduced various other modifications (such as requiring individuals in certain areas of law, including debt, to receive legally aided advice remotely over the telephone where assessed as suitable rather than face to face).
35. In addition to reforming the rules governing the provision of legal aid, LASPO also made changes to its administration. The Act led to the abolition of the Legal Services Commission (LSC), a non-departmental government body, and its replacement with

¹⁶ See: <http://webarchive.nationalarchives.gov.uk/20100308101934/http://www.justice.gov.uk/publications/magee-legal-aid.htm>

the Legal Aid Agency (LAA) as an executive agency of the MoJ. Furthermore, it created the position of 'Director of Legal Aid Casework' (DLAC), a statutory office held by a civil servant, who is designated by the Lord Chancellor and who is responsible for taking decisions on whether or not to provide legal aid in individual cases. LASPO prevents the Lord Chancellor from intervening in the DLAC's decisions on individual cases.

36. The operation of Part 1 LASPO is underpinned by the first six of LASPO's 27 Schedules¹⁷ and an array of secondary legislation, such as the *Civil Legal Aid (Merits Criteria) Regulations 2013* and the *Criminal Legal Aid (Remuneration) Regulations 2013*. Since LASPO received Royal Assent in May 2012, there have been multiple amendments both to Part 1 itself and to its delegated legislation. Significant amendments are summarised in the memorandum.
37. The relevant commencement Order for the provisions associated with Part 1 (which covers Sections 1 to 43 of the Act and Schedules 1 to 6) is the *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 6) Order 2013*.¹⁸ The Order commenced the legal aid provisions on two dates:
- a. 4th March 2013 – which commenced Section 38(2) and Schedule 4 of LASPO, both associated with the transfer of employees, property and so forth from the LSC to the LAA.
 - b. 1st April 2013 – which commenced the remaining provisions of Part 1 and Schedules 1 (civil legal services), 2 (criminal legal aid: motor vehicle orders), 3 (legal aid for legal persons), 5 (legal aid: consequential amendments) and 6 (Northern Ireland: information about financial resources).

A. Provisions not brought into force

38. The only provision associated with Part 1 LASPO that has not been brought into force is Section 19(4) which states:
- a. "the regulations must provide that, subject to prescribed exceptions, an appeal lies to such court, tribunal or other person as may be prescribed against a decision by the court that the interests of justice do not require representation to be made available, or to continue to be made available, to an individual under this Part for the purposes of criminal proceedings."
39. This provision is associated with criminal proceedings in instances where the court (rather than the Director of Legal Aid Casework (DLAC)) has the power to determine whether an individual qualifies for criminal legal aid. It states that, if the court decides that the interests of justice are such that representation is not required, then regulations must provide for a route of appeal.
40. The provision has not been brought into force because it has not been necessary to do so. Regulations under subsections 19(1) and (2) have only granted the power to make determinations to the Crown Court (in limited circumstances), the High Court, the Court of Appeal or the Supreme Court and regulations state¹⁹ that in proceedings

¹⁷ A Schedule can be part of an Act of Parliament. Schedules appear after the main clauses in the Act and set out how certain elements of the Act will work in practice.

¹⁸ See <http://www.legislation.gov.uk/ukxi/2013/453/contents/made>

¹⁹ See Regulation 21 of the Criminal Legal Aid (General) Regulations.

before these Courts, the interests of justice limb of the merits test is taken to be met. Therefore, there can be no decision to the contrary that could give rise to an appeal.

B. Enabling powers that have not been used

41. There are many subsections in Part 1 LASPO, and across Schedules 1 to 6, that confer power to the Lord Chancellor to make additional regulations or amendments. Most of these powers have been used since the Part 1 provisions were brought into force, but some have not been used.
42. Many of the unused provisions were carried over unchanged from the Access to Justice Act 1999. The predominant reason for powers remaining unused is that the need to use them has not yet arisen. Despite this, the MoJ considers it useful to retain these powers within legislation, as they provide the Lord Chancellor with flexibility with respect to the legal aid statutory framework and a set of powers that could conceivably be required in the future. The unused powers are listed below.
43. **Section 13(8)** gives the Lord Chancellor the power to make exceptions as to what constitutes 'initial legal advice and assistance' for individuals in custody or other premises following arrest. There has not yet been a reason to make exceptions.
44. **Section 17(3)** gives the Lord Chancellor the power to amend the factors that must be taken into account when determining whether or not someone qualifies for criminal legal aid in the interests of justice. Section 17(2) sets out these factors, which include, for example, whether the individual may be unable to understand the proceedings or to state his or her own case. There has not yet been a reason to add to or vary one of these factors.
45. **Section 18(7)** allows for the creation of exceptions to the right to appeal against a decision by the DLAC not to grant funding or to withdraw funding for representation in criminal proceedings on the basis of the interests of justice. Regulations do allow for the ability to appeal against the DLAC's decision in this regard but there has not yet been a reason to make exceptions to the right to appeal.
46. **Section 19(5)** allows for the regulations made under Section 19 (relating to determinations by the court of eligibility for representation in criminal proceedings) to include consequential provision modifying an Act or instrument. Section 19 has been used to enact the *Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013*²⁰ but it was not necessary to make any consequential amendments to other legislation so there has not yet been a reason to make use of this subsection.
47. **Section 20(1)** allows for the creation of regulations that give the DLAC or the court the power to make a *provisional* determination that an individual qualifies for representation in criminal proceedings in certain circumstances, such as if the individual is involved in an investigation which may subsequently result in criminal proceedings. Subsections (2) and (3) of Section 20 describe the power in further detail. It includes, for example, the ability to include within the regulations a list of the

²⁰ S.I. 2013/614.

circumstances in which a provisional determination would cease to be provisional. No regulations have yet been made using the powers in Section 20.

48. **Section 22(8)** provides definitions for the terms used in Section 22. Section 22 governs the disclosure of information to the ‘relevant authority’ when making determinations about whether an applicant is financially eligible for legal aid. The relevant authority may, for example, seek information on the applicant’s benefit status from the Department of Work and Pensions. Section 22(8) defines ‘the relevant authority’ as *either* ‘a prescribed person’ or ‘the Director’. This power is unused in the sense that there has been no-one defined as ‘a prescribed person’, because in all instances the DLAC is considered to be the relevant authority by default. There has been no need to change these arrangements.
49. **Section 23(3)** is found within the Section of Part 1 LASPO associated with payment for services. Section 23 concerns situations where the Government seeks a contribution towards the cost of providing legal aid from the party in receipt of funding or another party in the case. This might be, for example, where the individual is only entitled to have a proportion of their legal costs covered and is required to pay the rest in contributions because of their financial situation.
50. Section 23(3) allows for regulations to seek costs that *exceed* the cost of the civil legal services provided to the client. No such regulations have been made; currently the Government does not seek to recover costs above the cost of the services provided. This provision was carried over from Section 10(2)(c) of the Access to Justice Act 1999 and was intended to be used to create a ‘Supplementary Legal Aid Scheme’ (SLAS). The intention of the SLAS was to create an additional income stream for the legal aid fund by taking a set proportion (25%) of a legally aided claimant’s award in a successful general damages claim.²¹ So in the hypothetical example of a claimant winning £10,000 in damages, £2,500 would be taken under the SLAS. Section 23(3), if used, would have allowed for this amount to be taken even if it exceeded the cost of providing legal aid to the client. In the event, however, the Government decided after LASPO had received Royal Assent not to proceed with the SLAS proposal and since then the Government has not sought to use this power.
51. **Section 23(10)(a)** allows for any regulations made in relation to the payment of legal services to include provision for payment of interest by an individual, in receipt of a legally aided service, if that individual is given a loan to cover their legal costs. Although under Section 2 of LASPO the Lord Chancellor has the power to make a loan to individuals to enable them to obtain legal services this does not happen in practice. Thus, the question of repaying the loan or of interest payments on that loan does not arise. There has been no reason to change these arrangements yet and therefore no reason to make use of Section 23(10)(a).
52. **Section 23(10)(b)** also allows for regulations to make provision for interest payments on services ‘not required by the regulations to be made by the individual until after the time when the services are provided.’ The need to use this power has not arisen yet.
53. **Section 24(4)** is in the Section of LASPO associated with the power to make regulations regarding enforcement of payments imposed by Section 23. Subsection

²¹ With the exception of damages for future care and loss. The SLAS was included in the 2010 Legal Aid Reform consultation.

(4) allows for these regulations to include a power that requires information and documents to be provided for the purposes of enforcement. There has been no need to make use of this power to require information but a situation could arise where it might be necessary.

54. **Section 26(8)** is part of the Section of LASPO governing costs ordered in civil proceedings against an individual receiving civil legal aid, and what the value of those costs should be. For example, subsection (1) states that a costs order must 'not exceed the amount (if any) which it is reasonable for the individual to pay'. When making an assessment of individual's ability to pay, subsection (8) allows for 'an individual...to be treated as having...financial resources of a person of a prescribed description.' Put more simply, this would for example allow the financial resources of the partner of a legal aid applicant to be treated as the resources of the applicant. The power in Section 26(8) has not yet been used as there has been no reason to do so.
55. **Section 27(7)** and **Section 27(8)** are provisions in the Section of Part 1 governing the extent to which an individual in receipt of legal aid is able to choose their own civil or criminal legal aid provider. Powers under this section could be used, for example, to require that individuals receiving advice and assistance for discrimination, debt and special educational needs matters must receive such advice over the telephone, subject to exemptions.²²
56. Section 27(7) allows regulations to set out the circumstances in which an individual can be treated as having selected a provider of legal advice or assistance. Section 27(8) allows for regulations to list circumstances where the Lord Chancellor is not required to make representation by a particular representative available to an individual. Similar provisions were used under the Access to Justice Act to restrict choice in Very High Cost Cases²³ to members of a particular panel (as a measure to control costs). However, neither power has not currently used as no need to do so has arisen.
57. **Section 30(1)** states that the fact that legal aid is given to someone does not affect the rights of other parties to proceedings or the principles governing the exercise of a court or tribunal's discretion *except* as expressly provided by regulations. Regulations have not been made providing exceptions to this Section as no need to do so has arisen yet.
58. **Section 32(1)(c)** and **(2)(b)** are part of the supplementary provisions in Part 1 and concern the relationship between the legal aid provisions and foreign law. Subsection (1)(c) allows the Lord Chancellor to specify circumstances where the civil legal services in scope of legal aid relate to law other than the law of England and Wales. Schedule 1 of LASPO includes certain proceedings related to EU law, for example, but no new circumstances relating to foreign law have yet needed to be added. This is also the case for subsection (2)(b) which applies to determinations for criminal legal aid.

²² This is often referred to as the 'Mandatory Telephone Gateway'.

²³ Very High Cost Cases are complicated and expensive cases that are managed more closely by the LAA than ordinary proceedings.

59. **Section 33(3)(b)** sits within the Section of Part 1 governing how information about financial resources obtained under Section 22 (disclosure of information) can be used. It restricts the use of this information primarily to making determinations of financial eligibility for legal aid, but there are a few specified circumstances where the information can otherwise be used. One such circumstance at subsection (3)(b) is 'for the purposes of the investigation or prosecution of an offence (or suspected offence) under the law of England and Wales or Northern Ireland or any other jurisdiction, *except* where regulations otherwise provide.' No regulations have been made providing otherwise as the need to do so has not arisen yet.
60. **Section 39(2)** and **(4)** give powers to the Lord Chancellor to make regulations concerning aspects of the transition from the Access to Justice Act 1999 to Part 1 LASPO. Neither power at subsection (2) or (4) was considered necessary at the time of transition and so were not used. Both powers are now extraneous as the transition is complete.
61. **Section 42(1)(b)** is a supplementary provision providing definitions for various terms used repeatedly throughout Part 1 of LASPO, such as 'legal aid' and 'civil servant'. It defines 'representation' as including, amongst other things 'advice and assistance as to any appeal' subject to any time limits which may be prescribed. No time limits have been prescribed using this power as the need has not arisen.
62. There are also a number of unused powers across Schedules 1 to 6.
63. Schedule 1 (Civil Legal Services) Part 1 (Services) **paragraph 11(5)** and **paragraph 15(4)(b)** both give the Lord Chancellor the power to make regulations that define when circumstances or matters 'arise out of a family relationship' in relation to the legal issues covered by the paragraphs. There has thus far been no need for the Lord Chancellor to make use of the powers in paragraph 11(5) or paragraph 15(4)(a) of Schedule 1 Part 1.
64. Paragraph 11 of Schedule 1 Part 1 brings matters regarding individuals seeking protection from domestic violence into the scope of legal aid. In terms of volume, this predominately means protective injunctions such as non-molestation orders. It also means civil legal services in relation to a) an injunction following assault, battery or false imprisonment, and b) the inherent jurisdiction of the High Court to protect an adult, so long as those circumstances 'arise out of a family relationship'. Paragraph 11(5) gives the Lord Chancellor the power to define what is meant by these circumstances.
65. Paragraph 15 of Schedule 1 Part 1 brings legal aid into scope for children who are party to family proceedings, such as in a child contact case where parents are seeking to make contact and custody arrangements following a separation. Proceedings are defined as family proceedings 'if they relate to a matter arising out of a family relationship'. Paragraph 15(4)(b) gives the Lord Chancellor the power to define whether or not matters arise, subject to paragraph 15(4)(a) which states that matters do arise if they arise under a family enactment.
66. **Paragraph 46(2)(b)** of Schedule 1 Part 1 forms part of paragraph 46, which brings civil legal services that are connected to services outlined in all preceding paragraphs of Schedule 1 into scope of legal aid. It may be appropriate for connected services to be covered by legal aid if a case raises a number of legal matters that on their own would not be in scope of legal aid. Paragraph 46(2)(b) confers the power to make

exclusions to this above and beyond the relevant exclusions in Part 2 and Part 3 of Schedule 1. However, the power to make exclusions has not been used as a reason to do so has not yet arisen.

67. Part 4 of Schedule 1 includes a list of paragraphs to facilitate interpretation of Schedule 1. A list of powers is given at **Paragraph 6** to make regulations (for the purposes of Schedule 1 only) about:
 - a. When services are provided in relation to a matter;
 - b. When matters arise under a particular enactment;
 - c. When proceedings are proceedings under a particular enactment;
 - d. When proceedings are related to other proceedings.
 - e. This is a relatively general power to make regulations supporting Schedule 1. It was included within the Schedule as a safety measure in the drafting process in case a general power was needed to clarify what matters were or were not in scope of civil legal aid. This was a reflection of difficulties in the drafting process. There has not yet been a need to use this specific power, though Schedule 1 has been amended by other powers since implementation in April 2013.
68. Schedule 3 (Legal Aid for Legal Persons) provides for the possibility that civil and criminal legal aid can be made available to a 'legal person', which is a legal entity other than an individual, such as a corporation. Paragraph 5 of Schedule 3 makes provision about representation in criminal proceedings for such legal persons. The unused power is at **paragraph 5(12)**. It gives the Lord Chancellor the power to make regulations that prescribe the circumstances where making representation available to a legal person for the purpose of criminal proceedings is to be taken as being in the interests of justice. As of yet there has been no need to use this power.
69. Schedule 4 (Transfer of Employees and Property etc. of Legal Services Commission) covers the transition from the LSC to the LAA. For example, it makes LSC employees civil servants rather than public sector employees. Schedule 4 Part 3 **paragraphs 11(1) and 11(2)** give the Lord Chancellor the power to make regulations to facilitate the transition above and beyond the powers in LASPO initially. At the time of the transition this was not considered necessary, so the power was not used.
70. **Paragraph 12(2)** in Schedule 4 Part 3 further gave the Lord Chancellor the power to make regulations changing the definition of 'the transfer day' from the LSC. This power was not necessary at the time and the transfer took place on the day specified.
71. Schedule 6 (Northern Ireland: Information about financial resources) provides for the disclosure of information to the Chief Executive of the Northern Ireland Legal Services Commission and for restrictions on the use of that information. Legal aid is devolved to Northern Ireland. However, in determining eligibility for legal aid, Northern Irish authorities may need information concerning (for example) an applicant's benefit entitlement. The Northern Ireland Legal Services Commission can therefore request information from the Secretary of State for Work and Pensions under this Schedule. Provisions conferring power under this Schedule include powers to amend the Schedule given to the Department of Justice in Northern Ireland under Paragraph 3. No provisions under this Schedule that confer power have been used yet.

Secondary Legislation and Legal Issues

72. This section of the memorandum summarises the significant legal issues associated with the statutory framework for legal aid that have arisen since LASPO's implementation. A number of legal aid provisions have been the subject of litigation in that time period. Some of this litigation resulted in amendments to the legislation. Legal challenges have also been issued against proposed changes to the legal aid provisions in LASPO which have prevented proposed amendments being made. One example is *Public Law Project v Lord Chancellor* which challenged the proposed residence test.²⁴
73. This section of the memorandum also provides a brief description of significant delegated or secondary legislation associated with Part 1 LASPO, as well as the guidance documents and other relevant material provided in connection with the Act. This has been combined with the legal issues section to improve readability, as there is considerable overlap between the two. Where significant secondary legislation is associated with a legal issue, it is listed in that narrative. Significant secondary legislation not connected to legal issues is listed at the end of this section. A comprehensive list of secondary legislation is provided at Appendix A.

A. Legal Issues

Exceptional Case Funding (ECF)

*Gudanaviciene & others v the Director of Legal Aid Casework and the Lord Chancellor [2014] EWCA Civ 1622*²⁵

74. This case concerned six non-UK nationals, each challenging a decision that had been made not to grant ECF in their respective immigration cases. In June 2014, the High Court found that the test applied for ECF in relation to Articles 6 and 8 of the European Convention on Human Rights (ECHR) was too high, and that aspects of the '*Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)*' were unlawful. The High Court judgment was appealed. In December 2014, the Court of Appeal mainly upheld the High Court's decision, judging that the Lord Chancellor's Guidance was incompatible with Articles 6(1) and 8 of the ECHR.
75. Article 6(1) of the ECHR refers to the right to a fair hearing, including in relation to the determination of civil rights and obligations. The Court of Appeal held that the *cumulative* effect of certain paragraphs of the Guidance could create a situation incompatible with Article 6(1). To ensure that people's Article 6(1) rights are protected, legal aid is more likely to be necessary (subject to reasonable merits and means testing) where:
- a. The procedural rules or legal issues in the case are more complex;
 - b. More is at stake for the applicant;
 - c. The applicant is less able to cope with the demands of the proceedings.
76. The crucial question to consider when making a decision to grant legal aid is whether a litigant in person would be able to present the case effectively, and without obvious

²⁴ For the judgment, see <https://www.supremecourt.uk/cases/docs/uksc-2015-0255-judgment.pdf>

²⁵ See: <https://www.judiciary.gov.uk/wp-content/uploads/2014/12/gudanaviciene-ors-v-dir-of-legal-aid.pdf>

unfairness, considering all the circumstances of the case. Particularly in immigration cases, the client's ability to represent themselves could be limited by statutory restrictions on the supply of advice and assistance, possible language difficulties, and the complex and evolving nature of the area of immigration law.

77. Article 8 of the ECHR refers to the right to respect for private and family life. The Lord Chancellor's Guidance was found to be incompatible with Article 8 in immigration cases. This was because the Guidance could have been read as suggesting that there could not be an ECHR obligation to fund immigration cases under Article 8. Similar to Article 6(1) rights, Article 8 rights needed to be protected by looking at certain aspects of circumstances in individual cases: complexity, importance of the issues and the ability to represent oneself without legal assistance.

78. As a result of this judgment, the Lord Chancellor's Guidance was amended.

*I.S. v the Director of Legal Aid Casework and the Lord Chancellor [2015] EWHC 1965 (Admin) and [2016] EWCA Civ 464*²⁶

79. This case was a general challenge to the operation of the ECF scheme. The High Court held in the claimant's favour on the following three grounds:

- a. The ECF scheme was systemically flawed. Applications took several hours and were prepared at risk, so providers would only be remunerated if the application was successful, but the grant rate was so low as to deter providers from applying. Therefore, there would exist some individuals entitled to ECF who could not find a provider willing to make an application, and the application process was too difficult for an individual to be expected to apply directly.
- b. The general 50% prospects of success test for applications for legal representation for civil matters would result in breaches of the ECHR.²⁷ For example, an individual would narrowly fail the prospects of success test, despite the matter being of overwhelming importance to them. This part of the judgment applied to all types of civil and family legal aid where an application for funding is subject to a prospects of success test, not just ECF applications.
- c. Some passages of the 'Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)' were incorrect and unlawful.

80. This judgment was appealed, but in the meantime changes were made to the Merits Regulations and the ECF scheme on the basis of the High Court judgment. The Merits Regulations were amended so that legal aid may be provided for cases assessed as having "borderline"²⁸ or "poor"²⁹ prospects of success, where legal aid is

²⁶ See: <http://www.bailii.org/ew/cases/EWCA/Civ/2016/464.html>

²⁷ As set out in the Civil Legal Aid (Merits Criteria) Regulations 2013 (Merits Regulations). A prospects of success test means that, to receive legal aid, an applicant's case has to be judged as having a certain degree of likelihood to succeed.

²⁸ In the prospects of success test, cases are judged as 'borderline' where it is not possible, because of disputed law, fact, or expert evidence, to decide that the chance of obtaining a successful outcome is 50% or more, or to classify the prospects as marginal or poor.

²⁹ In the prospects of success test, cases that are, as of present judged as 'poor' have a less than 45% chance of achieving a successful outcome. The definition of poor has changed between the different iterations of the regulations.

necessary to prevent a breach (or risk of breach) of the applicant's rights under the ECHR or enforceable EU rights. Similar substitutions to the prospects of success test were made for other specified categories of case, for example, applications for full representation in domestic violence cases.³⁰

81. A series of procedural and/or administrative changes were also made in response to the High Court judgment. The application forms were simplified and it was made possible to apply for an initial grant of funding to investigate whether an ECF application could be made. Information on the LAA website for direct applicants was improved and training was introduced for ECF staff specifically to deal with phone calls from direct clients.
82. In May 2016, the Court of Appeal overturned the High Court's judgment on all three grounds above, respectively:
 - a. They held that the evidence of individual failings and unfairness did not establish that the scheme was inherently flawed.
 - b. They held that the Merits Regulations offered a balanced and proportionate approach that could not be condemned as arbitrary.
 - c. They held that the contested passages in the Lord Chancellor's ECF Guidance were not unlawful.
83. The Court of Appeal judgment made it possible to go back to the prospects of success test as it existed prior to the changes made following the High Court judgment. The changes made in response to the High Court judgment were revoked, but the Government did not return to its original position. Rather, it moved to a position allowing for an exception to the 50% threshold for prospect of success. Cases which were 'borderline' or 'marginal'³¹ would be eligible for civil legal aid for legal representation where the case is of overwhelming importance to the individual or of significant wider public interest. A 45% threshold would also apply in certain other cases without needing to demonstrate overwhelming importance to the individual or significant wider public interest: this category included domestic violence cases, and cases relating to a breach of ECHR rights.³²

Inquests

*Letts v the Lord Chancellor [2015] EWHC 402 (Admin)*³³

84. This was a challenge to the Lord Chancellor's ECF Guidance for inquests. It led to the court considering how Article 2 of the ECHR applies to the suicide of mental health informal patients (these are patients who have agreed to stay in hospital voluntarily). It also led to an assessment of the adequacy of the Guidance in accurately reflecting the law.

³⁰ The Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015 (S.I. 2015/1571), see: <http://www.legislation.gov.uk/ukxi/2015/1571/made>

³¹ In the prospects of success test, cases that are judged as 'marginal' have more than a 45% chance of obtaining a successful outcome but less than 50%.

³² The Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016 (S.I. 2016/781), see: <http://www.legislation.gov.uk/ukxi/2016/781/contents/made>

³³ See: <https://www.judiciary.gov.uk/judgments/r-letts-v-lord-chancellor-2015-ewhc-402-admin/>

85. The claimant argued that the Guidance was unlawful for:
- a. Failing to set out the operational aspect of the State's substantive duties³⁴ under Article 2 ECHR; and
 - b. Including without qualification a quotation from a pre-LASPO case on inquests.³⁵
86. In response to the challenge, the Lord Chancellor agreed to remove the pre-LASPO case quotation from the guidance. Shortly before the full hearing the claimant changed her claim to challenge the lawfulness of the Guidance's suggestion that, in every application for ECF at an inquest, the LAA must first consider:
- a. Whether there has been an arguable breach of Article 2 ECHR; and
 - b. Whether funded representation is required to discharge the State's procedural obligation to investigate deaths.³⁶
87. The claimant argued that the Guidance was unlawful for failing to mention that, in some types of case, the procedural obligation to investigate deaths is triggered automatically. Therefore, for these types of case there is no need to consider whether there has been an arguable breach of Article 2. The High Court found that the Guidance was unlawful to this extent and it was subsequently amended.
88. Other significant inquest cases include:
- a. *Joseph v Director of Legal Aid Casework [2015] EWHC 2749 (Admin)*³⁷
This effectively confirmed that Article 2 of the ECHR (the right to life) does not generally require the LAA to provide separate representation for multiple family members.
 - b. *RJ v Director of Legal Aid Casework [2016] EWHC 645 (Admin)*³⁸
The Admin Court held that Article 6 of the ECHR did not require representation for a potential suspect at an inquest into the death of a firefighter.

Birmingham pub bombings inquest

89. Further legal issues in relation to inquests arose when families of the victims of the 1974 Birmingham pub bombings applied for legal aid for preparatory and advocacy work at the inquest. A statutory instrument was laid in response to an anomaly that emerged with respect to the way inquests are handled.³⁹ At the time of writing this inquest is ongoing.

³⁴ Where rights are concerned, a substantive duty is the duty to ensure that right is upheld.

³⁵ *Khan v Secretary of State for [2003] EWCA Civ 1129*

³⁶ A procedural obligation is an obligation to make sure a legal case follows a certain procedure.

³⁷ See: <https://www.criminallawandjustice.co.uk/content/R-application-Joseph-v-Director-Legal-Aid-Casework>

³⁸ See: <https://high-court-justice.vlex.co.uk/vid/co-6331-2015-631576338>

³⁹ The Civil Legal Aid (Procedure) (Amendment) Regulations 2017 (S.I. 2017/53), see: <http://www.legislation.gov.uk/ukSI/2017/53/contents/made>

Judicial Review

*Ben Hoare Bell and others v the Lord Chancellor [2015] EWHC 523 (Admin)*⁴⁰

90. The claimants challenged the lawfulness of regulations relating to the payment of legal aid for judicial review proceedings.⁴¹ The regulations had the following effects:
- a. They removed legal aid payment for work done on an application for permission to bring a judicial review claim in cases where permission was refused by the court.
 - b. In cases where a judicial review claim was issued, but did not reach the permission stage (for example, because it settled), payment for work done on the application for permission was made conditional on the Lord Chancellor's discretion.
91. The claimants argued that the regulations frustrated the purpose of LASPO, which was to ensure that meritorious judicial review claims on behalf of litigants of limited means would be funded by legal aid. They argued that the risky and unpredictable nature of judicial review claims meant that the financial risk introduced by the regulations would force providers not to bring meritorious judicial reviews.
92. In March 2015, the court ruled to uphold this contention, holding that the regulations were contrary to the objects and purpose of LASPO, and that for some classes of case there was no rational connection between the effect of the regulations and their stated purpose. The regulations were therefore found to be unlawful and were quashed.
93. To give effect to the judgment, new regulations⁴² were brought in, replacing the earlier ones. The new regulations permitted payment to providers if permission was not granted in judicial review proceedings in the following scenarios:
- a. Cases where the defendant withdraws the decision that is being challenged, leading to permission being either refused or not considered;
 - b. The court orders an oral hearing to consider whether to give permission to bring judicial review proceedings;
 - c. The court orders a "rolled-up hearing" at which the issue of permission is considered at the same time as the actual case.

Family Law

*Q v Q, Re B, Re C [2014] EWFC 31*⁴³

94. The introduction of LASPO resulted in the majority of private law family cases being taken out of scope of legal aid. This means that many litigants in the family courts do not qualify for legal aid unless they come within the limited categories of cases that

⁴⁰ See: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2015/523.html&&query=ben+and+hoare+and+bell&&method=boolean>

⁴¹ Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014 (S.I. 2014/607)

⁴² Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (S.I. 2015/898), see: www.legislation.gov.uk/ukSI/2015/898/pdfs/ukSI_20150898_en.pdf

⁴³ See: <http://www.bailii.org/ew/cases/EWFC/Hcj/2014/31.html>

are within scope (for example, where there is evidence of domestic abuse) or fall within the criteria for ECF.

95. The scope of private family law in LASPO has not been the subject of a successful judicial review challenge, but has been criticised in *Q v Q, Re B, and Re C [2014] EWFC 31*. These were three unrelated cases. Each was a private law case in which a father was seeking to play a role in the life of his child, who lived with the mother. In each case, problems derived from the fact that, while the mother had public funding, the father did not.

- a. In *Q v Q*, the father, a convicted sex offender, had been refused legal aid. He was therefore unable to fund his share of bringing expert witnesses to court and to fund legal representation to cross-examine the experts.
- b. *Re B* and *Re C* were cases involving allegations of rape.

In these cases, the judge expressed concerns that Article 6 or 8 issues might arise if legal representation were not provided. However, in each event ECF was granted.

*Re K and H (Children) [2015] EWCA Civ 543*⁴⁴

96. This case was significant in that the Court of Appeal confirmed⁴⁵ that LASPO provides a complete statutory scheme for the funding of legal representation, and that there is no power for the Courts to order public funding of legal representation for a litigant outside of the scheme.

97. At first instance the court required the Lord Chancellor, through Her Majesty's Court and Tribunal Service (HMCTS), to meet the costs of legal representation of a father. This was in the course of private law family proceedings he brought against his former partner to seek an order for contact with his two children of that relationship. The father appeared to be ineligible for legal aid because his income exceeded the threshold set down in regulations.⁴⁶ The court directed that the legal representation be limited to cross-examining a witness who had accused the father of inappropriate sexual touching.

98. This decision was appealed and the Court of Appeal allowed the appeal holding that the judge had no power to make the order. In particular, it was found that the court had no power to require the Lord Chancellor to provide funding for legal representation in circumstances where such funding was not available under a scheme as detailed and comprehensive as that which had been set up under LASPO. The court must respect the boundaries drawn up by Parliament for public funding of legal representation.

Domestic violence evidence requirements

99. Under LASPO, legal aid is available for private family law cases where a party is/is at risk of being/has been a victim of domestic violence. However, the applicant must provide specific evidence of domestic violence. A list of the acceptable evidence is set out in Regulation 33 of the *Civil Legal Aid (Procedure) Regulations 2012*. Regulation 33 stipulated that any evidence had to date from within two years prior to

⁴⁴ See: <http://www.bailii.org/ew/cases/EWCA/Civ/2015/543.html>

⁴⁵ In *Re K and H (Children) [2015] EWCA Civ 543*

⁴⁶ The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013

the application. Rights of Women, a voluntary campaigning organisation, brought a judicial review to quash the Regulations on the grounds that they exceeded the Lord Chancellor's powers and frustrated LASPO's purpose to provide legal aid for domestic violence survivors.

100. The challenge was successfully defended at first instance but the Court of Appeal found two specific points of the Regulations to be unlawful:
- a. The application of a two-year time limit 'operated in a completely arbitrary manner' and bore no obvious correlation to the harm to the victim.
 - b. On financial abuse, none of the items listed in the Regulations would allow individuals to demonstrate they were at risk of being or had been victims of such abuse.
 - c. The Court of Appeal confirmed that the regulations were, nevertheless, within the Lord Chancellor's powers to make under LASPO.
101. In response, the regulations were amended⁴⁷ to increase the time limit from two to five years. The Lord Chancellor decided not to appeal the Court of Appeal's decision, and instead to gather evidence for other changes to the regulations to ensure that victims of domestic violence were receiving legal aid as intended. This evidence was gathered through focused engagement with key stakeholders, including the Law Society and voluntary sector organisations that provide support to victims.
102. The evidence gathering process has now concluded and Ministers are considering the findings.

Mental capacity

103. There have been two judicial review challenges in relation to the exceptions from means-tested legal aid set out in regulations.⁴⁸
104. Non-means tested legal aid is available for legal help⁴⁹ and representation before the relevant tribunal for cases under the Mental Health Act 1983. Non-means tested legal aid is also available for legal representation only (not legal help) in challenges under Section 21A of the Mental Capacity Act 2005 where an individual is deprived of their liberty under the provisions outlined in Schedule A1 to that Act. The Means Regulations therefore draw a distinction, for the purpose of means testing, between (1) legal help for deprivation of liberty under the Mental Capacity Act 2005 and (2) legal help for detention under the Mental Health Act 1983: non-means tested legal aid is available for the latter but not the former.

⁴⁷ The Civil Legal Aid (Procedure) (Amendment) Regulations 2016 (S.I. 2016/516)

⁴⁸ Regulation 5 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 ('the Means Regulations')

⁴⁹ The term 'legal help' refers to initial advice and assistance with a legal problem. It differs to representation at court though; for billing purposes the LAA include representation at a mental health or immigration tribunal within the definition of legal help.

*Switalskis Solicitors v Lord Chancellor CO/4459/2016*⁵⁰

105. Solicitors brought a judicial review arguing that Regulation 5 of the Means Regulations is irrational and inconsistent with the statutory purpose of LASPO and Articles 5(4)⁵¹, 6 and 14 of the ECHR. They argued that there was no rational reason to distinguish between those detained in a hospital under the 1983 Act, and those detained in a hospital or care home under the 2005 Act. They contended that it is an arbitrary omission not to include legal help from non-means tested legal aid for cases dealt with under the 2005 Act. Permission for this judicial review was refused on 26 January 2017.

*Briggs v Briggs (by his litigation friend, the Official Solicitor) and others [2016] EWCOP 48*⁵²

106. The claimant in the case, Mrs Briggs, had obtained non-means tested legal aid to challenge the authorisation detaining her husband in hospital to receive medical treatment. The decisions she sought from the Court of Protection, however, were not directly about her husband's detention, but focused on issues about his care and treatment. Nevertheless, the court found that the proceedings were properly brought under Section 21A of the 2005 Act and that non-means tested legal aid was available, even if detention was not the main issue at stake.

107. The Lord Chancellor, Department of Health and LAA argued that the Court of Protection did not have jurisdiction to deal with issues of care and treatment under Section 21A of the 2005 Act. The Court disagreed, and gave Section 21A a wider interpretation that could have opened up the use of Section 21A, and therefore the use of non-means tested legal aid, to all care and welfare issues where there is a standard authorisation of detention in force under the 2005 Act. The Lord Chancellor, Department of Health and LAA appealed against the decision, arguing that where the central issue is one of medical treatment Section 21A is not the proper route. On 31 July 2017, the Court of Appeal found in the Government's favour and concluded that the application in this case was not properly brought⁵³.

Prisons

R on the application of the Howard League for Penal Reform and another v the Lord Chancellor [2014] EWHC 709 (Admin)

108. In early 2017 the Court of Appeal heard a challenge by way of judicial review to the Criminal Legal Aid (General) Regulations 2013 as amended.⁵⁴ The substance of the claim was that removal of criminal legal aid in some areas of prison decision-making has led to inherent unfairness in the decision-making process in the areas under consideration. On 10 April 2017, the Court gave its judgment in this case, finding that the removal of legal aid from three of the areas under consideration had led to a system that was inherently unfair, leading to an unacceptably high risk of unfair, and

⁵⁰ This was an unreported permission decision.

⁵¹ "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

⁵² See: <https://www.judiciary.gov.uk/wp-content/uploads/2016/12/l-briggs-v-p-briggs-others.pdf>

⁵³ *Director of Legal Aid Casework (and others) v Briggs [2017] EWCA Civ 1169*

⁵⁴ The Criminal Legal Aid (General) (Amendment) Regulations 2013 (S.I.)

therefore unlawful, decision-making. These areas were: a) Pre-tariff reviews – regarding a decision to remove a prisoner serving an indeterminate sentence from closed to open conditions (or vice versa), and other “advice cases”; b) Category “A” decisions and c) Placement in Close Supervision Centres. In relation to the other two categories under consideration (suitability for Offender Behaviour Programmes and Disciplinary Proceedings) the Court of Appeal found that there was no inherent unfairness. The Court of Appeal emphasised that there may be safeguards other than legal aid and advice that will prevent inherent or systemic unfairness by enabling a prisoner to participate effectively in a category of decision-making.

Crime competition

*London Criminal Courts Solicitors Association (LCCSA) and Criminal Law Solicitors Association (CLSA) v the Lord Chancellor [2014] EWHC 3020 (Admin)*⁵⁵

109. This was a challenge to the Lord Chancellor’s decision to reduce the number of criminal legal aid contracts in order to enable the market to absorb the two 8.75% cuts planned as part of the Transforming Legal Aid programme. The final decision to tender for 525 slots for duty provider work had factored in financial modelling by KPMG. This modelling was based on assumptions developed by the MoJ. The claimants argued that there ought to have been a consultation on the assumptions underlying the financial modelling, in addition to the consultation regarding the initial proposal. The claim succeeded and a further consultation was held, delaying the planned tender process. In response to the consultation, the Lord Chancellor decided to award 527 duty provider contracts, and a tender process began for them.

*LCCSA, CLSA and the Law Society v the Lord Chancellor [2015] EWCA Civ 230*⁵⁶

110. This second challenge to the reduction in criminal legal aid contracts was principally brought against the assumptions in the analysis in the KPMG report that informed the Lord Chancellor’s new decision to award 527 duty provider contracts. The claim was unsuccessful before both the Divisional Court and the Court of Appeal, but the claimants had successfully secured an injunction on the tender until the proceedings were concluded. Although proceedings had been expedited, this injunction resulted in significant delay to the second tender. Following this second delay to the tender, the then Lord Chancellor (Michael Gove) decided to abandon the dual contract model.

Residence Test

111. In March 2014, the then Lord Chancellor (Chris Grayling) laid a draft Order before Parliament to introduce a residence test as a criterion for legal aid eligibility. The Order would have inserted a new paragraph into Part 2 of Schedule 1 of LASPO that would have restricted the scope of civil legal services described in Part 1, so that those who did not fulfil the residence test would generally be ineligible for legal aid.

112. To satisfy the residence test, an individual would have to be lawfully resident in the UK, Channel Islands, Isle of Man or a British Overseas Territory on the day the

⁵⁵ See: <http://www.bailii.org/ew/cases/EWHC/Admin/2014/3020.html>

⁵⁶ See: <https://www.judiciary.gov.uk/wp-content/uploads/2015/03/law-society-v-lord-chancellor-judgment.pdf>

application for civil legal services was made, and have been so for a 12-month period at some time in the past.⁵⁷

113. There were proposed exceptions to the test. Applicants pursuing certain types of proceedings were not required to satisfy the test: for example, domestic violence cases, human trafficking and challenges to the lawfulness of detention. Furthermore, regardless of residence, a claimant who failed the residence test would have been entitled to apply for legal aid under ECF.

114. In *Public Law Project v Lord Chancellor*,⁵⁸ the draft order was challenged on the grounds that it was a) an ultra vires application of the particular enabling power in LASPO;⁵⁹ and b) unlawful discrimination and a breach of Article 14 (prohibition of discrimination) taken with Article 6 of ECHR. After the Order was debated in the House of Commons but before it was debated in the House of Lords, the Divisional Court handed down judgment against the Lord Chancellor. The Public Law Project succeeded on the discrimination ground but lost the ultra vires argument. The Lord Chancellor withdrew the draft Order from Parliament.

115. The Court of Appeal overturned the High Court's judgment and found in favour of the Lord Chancellor on both the ultra vires and discrimination grounds. The Lord Chancellor prepared an updated draft of the instrument following the judgment. Before it was laid, the Supreme Court found that the proposal was ultra vires.⁶⁰

116. In light of the judgment of the Supreme Court in this case, it is clear that if a residence test were to be introduced in the future it would have to be by way of primary legislation. Doing so would, however, bring the argument on discrimination (as it was presented before the Court of Appeal) back into the frame. Public Law Project claimed that the residence test breached the right of potential applicants for legal aid to equal treatment directly on the grounds of their residence status and indirectly on the grounds of their race and nationality.

117. In the Court of Appeal, the Lord Chancellor accepted that the residence test was discriminatory but that it had an objective and reasonable justification. The test pursues a legitimate aim, and is a proportionate way of achieving that aim, not exceeding the Lord Chancellor's wide margin of appreciation applicable to decisions of this kind. The Court of Appeal accepted the Lord Chancellor's arguments and concluded that the residence test was compatible with Article 14 taken with Article 6.

A. Secondary Legislation

118. Twenty-five key statutory instruments (S.I.s) were made directly under LASPO. These, along with S.I.s that amended them, are all listed in Appendix A. The most significant S.I.s made directly under the Act are as follows:

⁵⁷ Unless they were under 12 months old or a particular kind of asylum claimant or involved in the UK Armed Forces, and excluding absences of up to 30 days.

⁵⁸ See: <https://www.supremecourt.uk/cases/docs/uksc-2015-0255-judgment.pdf>

⁵⁹ See: <http://www.legislation.gov.uk/ukpga/2012/10/section/9/enacted>

⁶⁰ The Supreme Court did not need to consider the discrimination grounds. The Court of Appeal's judgment, in favour of the Secretary of State, still stands on that point.

- a. *The Civil Legal Aid (Procedure) Regulations 2012 (S.I. 2012/3098)*:⁶¹ explains the procedures for the making and withdrawal of determinations that an individual qualifies for civil legal services under sections 9 and 10 of LASPO.
- b. *The Criminal Legal Aid (General) Regulations 2013 (S.I. 2013/9)*:⁶² concerns determinations in relation to whether an individual qualifies for criminal legal aid under Part 1 of LASPO.
- c. *The Civil Legal Aid (Merits Criteria) Regulations 2013 (S.I. 2013/104)*:⁶³ sets out the criteria which the DLAC must apply when determining whether an individual or legal person qualifies for civil legal services under Part 1 of LASPO.
- d. *The Civil Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/422)*:⁶⁴ sets out remuneration arrangements for civil legal services under Part 1 of LASPO.
- e. *The Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435)*:⁶⁵ sets out the arrangements for funding and remuneration of advice, assistance and representation for criminal proceedings under Part 1 of LASPO.
- f. *The Criminal Legal Aid (Financial Resources) Regulations 2013 (S.I. 2013/471)*:⁶⁶ sets out the rules and criteria for determining the financial eligibility of individuals for criminal legal aid under Part 1 of LASPO.
- g. *The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (S.I. 2013/480)*:⁶⁷ sets out the rules and criteria for determining the financial eligibility of individuals for civil legal aid under Part 1 of LASPO.
- h. *The Criminal Legal Aid (Contribution Orders) Regulations 2013 (S.I. 2013/483)*:⁶⁸ sets out the liability of individuals who are in receipt of representation for criminal proceedings to make a payment in connection with the provision of such representation, based on an assessment of the financial resources of the individual.
- i. *The Civil Legal Aid (Statutory Charge) Regulations 2013 (S.I. 2013/503)*:⁶⁹ sets out the statutory charge, which arises over money and other property preserved or recovered by a legally aided party in civil proceedings, and over costs payable to the legally aided party by another party to the proceedings.

119. Where amendments to secondary legislation arose from the legal issues described above, this has been noted. Other significant secondary legislation did not arise from litigation or the threat thereof, and this is summarised below. Also summarised are guidance documents issued by the Lord Chancellor in connection with LASPO Part 1.

⁶¹ See: <http://www.legislation.gov.uk/uksi/2012/3098/contents/made>

⁶² See: <http://www.legislation.gov.uk/uksi/2013/9/contents/made>

⁶³ See: <http://www.legislation.gov.uk/uksi/2013/104/contents/made>

⁶⁴ See: <http://www.legislation.gov.uk/uksi/2013/422/made>

⁶⁵ See: www.legislation.gov.uk/uksi/2013/435/contents/made

⁶⁶ See: <http://www.legislation.gov.uk/uksi/2013/471/contents/made>

⁶⁷ See: <http://www.legislation.gov.uk/uksi/2013/480/made>

⁶⁸ See: <http://www.legislation.gov.uk/uksi/2013/483/contents/made>

⁶⁹ See: <http://www.legislation.gov.uk/uksi/2013/503/part/3/made>

Fees

120. A variety of Statutory Instruments (S.I.s) were laid relating to changes to remuneration for legal aid providers. Changes were made with amending S.I.s to *The Civil Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/422)* and *The Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435)*.

121. Significant secondary legislation⁷⁰ regarding fees under *The Civil Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/422)* includes:

- a. S.I. 2013/2877⁷¹ harmonises the basis of payment to self-employed barristers with those of other advocates in civil non-family cases; removes the 35% uplift which was paid in cases in the Immigration and Asylum Upper Tribunal at the time; and reduced fees paid to most expert witnesses involved in civil and family cases by 20%. This S.I. was brought into force on 2 December 2013.
- b. S.I. 2014/586⁷² amends remuneration for family legal aid services to reduce the fixed representation fees paid to solicitors in care proceedings by 10% and changes the basis of advocacy fees from tier of court to the level of judiciary hearing the case. This S.I. was brought into force on 22 April 2014.

122. Significant secondary legislation regarding fees under *The Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435)* includes:

- a. S.I. 2013/2803⁷³ amends the regulations to set out reduced fees for work undertaken on or after 2 December 2013 in Very High Costs Cases (VHCCs) which are the subject of a 2013 VHCC contract; and reduce most expert fees by 20%. This S.I. was brought into force on 2 December 2013.
- b. S.I. 2014/415⁷⁴ makes provision for the reduction of litigators' fees by 8.75% in cases in the Crown Court (other than VHCCs), in the Court of Appeal, and in other cases covered by the Standard Crime Contract. This S.I. was brought into force on 20 March 2014.
- c. S.I. 2015/1369⁷⁵ reduced litigator's fees by a further 8.75% and introduced some new fixed fee schemes. This S.I. was brought into force in two stages, on 1 July 2015 and on 11 January 2016. A second S.I., S.I. 2016/313,⁷⁶ provides that the new fixed fees would not come into force, and amends the existing fee schemes by increasing fees for advice, assistance and representation made

⁷⁰ Changes made to judicial review payment arrangements are not listed here as they are discussed in the Legal Issues Section above.

⁷¹ The Civil Legal Aid (Remuneration) (Amendment) Regulations (S.I. 2013/2877), see: www.legislation.gov.uk/uksi/2013/2877/pdfs/uksi_20132877_en.pdf

⁷² The Civil Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2014 (S.I. 2014/586), see: www.legislation.gov.uk/uksi/2014/586/pdfs/uksi_20140586_en.pdf

⁷³ The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013 (S.I. 2013/2803)

⁷⁴ The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014 (S.I. 2014/415), see: <http://www.legislation.gov.uk/uksi/2014/415/made>

⁷⁵ The Criminal Legal Aid (Remuneration etc) (Amendment) Regulations 2015 (S.I. 2015/1369), see: www.legislation.gov.uk/uksi/2015/1369/pdfs/uksi_20151369_en.pdf

⁷⁶ The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2016 (S.I. 2016/313), see: www.legislation.gov.uk/uksi/2016/313/pdfs/uksi_20160313_en.pdf

available under sections 13, 15 and 16 of LASPO. This second S.I. was brought into force on 31 March 2016.

Mediation

123. S.I. 2014/2701,⁷⁷ which amends *The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (S.I. 2013/480)*, ensures that the financial means test does not apply to the second party in respect of the first mediation session which takes place following a Mediation, Information and Assessment Meeting (MIAM), where the first party is financially eligible for legal aid for such matters. This S.I. was brought into force on 3 November 2014.
124. S.I. 2016/561,⁷⁸ which amends *The Civil Legal Aid (Procedure) Regulations 2012 (S.I. 2012/3098)*, provides that where one party is financially eligible for funding of a MIAM, a determination that the other party also qualifies for legal aid funding for that meeting may be backdated if certain criteria apply. This S.I. was brought into force on 30 May 2016.

Guidance

125. All statutory guidance documents issued by the Lord Chancellor and the LAA in relation to LASPO Part 1 are listed on gov.uk.⁷⁹ Some of these documents advise how the DLAC is to take decisions on whether to award legal aid funding, while others inform members of the public about legal aid. They are categorised according to whether they relate to civil or criminal legal aid. Brief summaries of some of these documents are provided below.

Civil

126. “*Guidance on authorities and legal aid for cases in courts outside England and Wales*”⁸⁰ provides information about funding for cases outside England and Wales, and prior authorities (which legal representatives must apply for when claiming costs unusual in their nature or amount).
127. “*Paying for your civil legal aid*”⁸¹ is a guide explaining legal aid contributions to members of the public.
128. “*Evidence requirements for private family law matters guidance*”⁸² explains what types of evidence of domestic violence are required when applying for private family law matters.

⁷⁷ The Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) (No. 2) Regulations 2014 (S.I. 2014/2701)

⁷⁸ The Civil Legal Aid (Procedure) (Amendment) (No. 2) Regulations 2016 (S.I. 2016/561)

⁷⁹ See: <https://www.gov.uk/guidance/funding-and-costs-assessment-for-civil-and-crime-matters>

⁸⁰ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/543186/legal-aid-narrative-guidance.pdf

⁸¹ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/572927/paying-for-your-civil-legal-aid-leaflet.pdf

⁸² See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523451/evidence-requirements.pdf

129. “*Lord Chancellor’s guidance (under section 4 of LASPO)*”⁸³ is issued to the DLAC by the Lord Chancellor, and sets out some of the factors that caseworkers should take into account in deciding applications for civil legal services.
130. “*Lord Chancellor’s guidance – determining eligibility (means)*”⁸⁴ is issued to the DLAC by the Lord Chancellor under Section 4 LASPO, and sets out key elements that must be considered by the DLAC in determining an individual’s financial eligibility for certain forms of civil legal services.
131. “*Lord Chancellor’s guidance – exceptional case funding (inquests)*”⁸⁵ is issued to the DLAC by the Lord Chancellor under Section 4 LASPO, and sets out factors that caseworkers should take into account in deciding exceptional funding applications in relation to inquests.
132. “*Lord Chancellor’s guidance – exceptional case funding (non-inquests)*”⁸⁶ is issued to the DLAC by the Lord Chancellor under Section 4 LASPO, and sets out factors that caseworkers should take into account in deciding exceptional funding applications under section 10(2) and 10(3) of LASPO.
133. “*Post-judgment notice to Director of Legal Aid Casework (DLAC): IS v DLAC and The Lord Chancellor: ECF Guidance (non-inquests)*”⁸⁷ was issued to the DLAC by the Lord Chancellor to ensure LAA caseworkers began making decisions with respect to the outcome of the *IS* case (see above).
134. Two versions of costs assessment guidance have been published: one for use with the 2010 Standard Civil Contract,⁸⁸ and one for use with the 2013, 2014 and 2015 Standard Civil Contracts.⁸⁹ This guidance details remuneration that can be claimed by civil legal aid providers.
135. The “*Civil Finance Electronic Handbook*”⁹⁰ is a guide to assist LAA caseworkers with their everyday work, having been created from caseworker queries and requests for clarification on specific issues.

⁸³ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/540158/lord-chancellor_s-guidance.pdf

⁸⁴ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332853/legal-aid-guide-to-determining-eligibility-certificated-work.pdf

⁸⁵ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454835/legal-aid-chancellors-guide-exceptional-funding-inquests.pdf

⁸⁶ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/433502/legal-aid-chancellors-guide-exceptional-funding-non-inquests.pdf

⁸⁷ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445592/notice-director-legal-aid-case-work.pdf

⁸⁸ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427328/legal-aid-costs-assessment-guidance-2010.pdf

⁸⁹ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/481752/legal-aid-costs-assessment-guidance-2013-2014-2015.pdf

⁹⁰ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553824/civil-finance-electronic-handbook.pdf

136. *“The statutory charge manual”*⁹¹ is designed to give guidance to caseworkers in the LAA who deal with finance and make decisions on statutory charge matters. It serves to illustrate the general principles which arise in cases concerning the statutory charge and to give guidance on resolving cases using those principles.

Criminal

137. The *“Crown Court Fee Guidance”*⁹² exists to provide guidance to complement the Remuneration Regulations which detail legal aid fee schemes for Crown Court Cases. It provides information as to how the LAA will process claims for payment.
138. *“The criminal bills assessment manual”*⁹³ sets out the LAA’s approach to costs assessment where work is undertaken in the magistrates’ court under a representation order.
139. *“Offence classification and type for AGFS and LGFS claims”*⁹⁴ is a guidance document covering all aspects of Crown Court legal aid fees under the Advocates’ Graduated Fee Scheme (AGFS) and Litigators’ Graduated Fee Scheme (LGFS).

Other Reviews

140. This section of the memorandum highlights some of the reviews or assessments that have been made of the legal aid changes brought in by LASPO and its subsequent amendments. The MoJ is aware of a number of these assessments outside Government and Parliament, and this section is therefore not an exhaustive list.
141. In accordance with the guidance on producing memorandums, this section serves to provide an overview of the topics raised in the reviews of recent legal aid changes. The section’s purpose is not to provide a Government response to the conclusions of each report. Citing a report in this section should not be taken to imply that the Government agrees or disagrees with the conclusions. The Government’s own assessment of the reforms and of how they relate to conclusions reached in other reviews will be explored substantively in the forthcoming post-implementation review of the changes made to legal aid by Part 1 LASPO and subsequent amendments.

A. Reviews by Parliamentary Committees or Government organisations

142. In March 2015, the Justice Select Committee published a report looking at the civil and family legal aid changes made by LASPO in their report entitled *‘Impact of Changes to Civil Legal Aid under the Legal Aid, Sentencing and Punishment of Offenders Act (2012)’*.⁹⁵ Their aim was ‘to examine the success of the legal aid reforms in protecting access to justice while addressing issues of cost, and to make

⁹¹ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324163/legal-aid-stat-charge-manual.pdf

⁹² See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523831/crown-court-fee-guidance.pdf

⁹³ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496737/criminal-bills-assessment-manual.pdf

⁹⁴ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390213/offence-classification-and-type-for-agfs-and-lgfs-claims.xls

⁹⁵ See: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>

recommendations where we believe access to justice has been compromised.’ The Government published a response to this report in July 2015.⁹⁶ Topics considered included:

- a. The extent of the Coalition Government’s research into the legal aid system and general evidence base before implementing Part 1 LASPO.
- b. Public awareness of civil legal services within the scope of legal aid following the changes, including mediation and the Civil Legal Advice (CLA) telephone advice gateway.
- c. The number of debt cases that received legal aid following the reforms.
- d. The number of cases granted legal aid under the new ECF scheme.
- e. Decision-making and caseworker knowledge in the LAA.
- f. The drop-in spending on legal aid after the reforms.
- g. Whether it was worth pursuing an appeal to a recent judgment on the proposed residence test for legal aid (see legal issues section).
- h. The experience of children as parties to proceedings following the reforms, including separated and trafficked children.
- i. The suitability of the evidence test for legal aid in private family cases which involve domestic violence.
- j. The sustainability of the legal aid sector following the changes, particularly the not for profit sector.
- k. The experience of litigants in person (those who represent themselves) at court, including the ability of the courts to access evidence, arrangements for those lacking capacity, and cross-examination of victims by alleged abusers.
- l. The impact of the reforms on the take-up of publicly funded family mediation.
- m. Whether or not removing legal aid funding for initial legal advice and assistance constituted value for money.
- n. The LAA’s approach to means-testing with regards to investigating small sums of money.

143. In November 2014, the National Audit Office published the report, *‘Implementing reforms to civil legal aid’*.⁹⁷ They gave their view of the value for money of the reforms by examining performance against the objectives stated in the Government response to the Legal Aid Reform consultation. Their report focused on:

- a. *Delivering savings*: Topics included the likely reduction in legal aid expenditure following the reforms; the possibility that the reforms would create additional cost burdens to the MoJ and wider government; the impact of the increasing number of litigants in person on the courts system and on individuals’ health; and the extent to which the evidence base for the reforms considered wider costs.

⁹⁶ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444939/response-to-justice-committee.pdf

⁹⁷ See: <https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>

- b. *Discouraging unnecessary litigation*: Topics included the reduction in cases funded following the reforms; the reduction of litigation in areas of family law removed from scope; the reduction in the numbers using mediation for family law matters following the reforms; and the extent to which the MoJ understood why people go to court before implementing the reforms.
- c. *Targeting civil legal aid*: Topics included whether it was known if all those eligible for legal aid are able to access it; the extent to which it was understood before the reforms; how changes to fees would impact the market; impacts of the reforms on the legal aid market; the extent to which the ECF scheme was used; and the quality of service of the LAA's telephone helpline.
- d. *Value for money*: Topics included whether value for money can be determined based on the fall in civil legal aid spend alone, and recommendations for areas which the MoJ should consider researching in future.

144. The Public Accounts Committee published the report, *'Implementing reforms to civil legal aid'*,⁹⁸ in February 2015. This was based on evidence collected from the MoJ and the LAA, and contained within the National Audit Office report of November 2014. Topics considered included:

- a. The extent of research into the legal aid system and general evidence base before implementing Part 1 LASPO.
- b. Access to mediation for family law cases following the reforms.
- c. The accessibility of legal aid for those who are eligible.
- d. The complexity of the justice system for litigants in person (with particular reference to the ECF scheme).
- e. The impact of increasing numbers of litigants in person on the courts service following the reforms.
- f. The quality of face-to-face legal services funded through legal aid, and the link between legal aid fees and quality of service.
- g. The wider cost impact of the reforms above and beyond the impact on the legal aid fund.

145. In December 2013, the Joint Committee on Human Rights published the report, *'The implications for access to justice of the Government's proposals to reform legal aid.'*⁹⁹ This report scrutinised three legal aid policy proposals due for implementation as part of the Transforming Legal Aid reform package. The Coalition Government published a response to this in February 2014.¹⁰⁰ The Committee's report looked at the following topics with respect to human rights:

- a. The proposed residence test for legal aid, its impact on asylum seekers, refugees and children, and whether it should be introduced by secondary legislation.

⁹⁸ See: [https://www.parliament.uk/documents/commons-committees/public-accounts/HC%20808%20civil%20aid%20final%20\(web%20version\)%20v2.pdf](https://www.parliament.uk/documents/commons-committees/public-accounts/HC%20808%20civil%20aid%20final%20(web%20version)%20v2.pdf)

⁹⁹ See: <https://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/100/100.pdf>

¹⁰⁰ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285666/8821-government-response-to-jchr.pdf

- b. The proposed amendments to the scope of criminal legal aid for prison law cases with regard to the right of access to court, with particular note of prisoners with mental health difficulties, cases involving Mother and Baby Units, and the needs of young offenders.
- c. Whether the ECF scheme was operating as intended.
- d. The proposal that legal aid should be removed for cases assessed as having “borderline” prospects of success, and whether it sufficiently safeguards against the risk that the reform will lead to cases not being brought where human rights law requires that they should be.

146. Then, in June 2014, the Joint Committee on Human Rights published another report entitled, *‘Legal Aid, Children and the Residence Test,’*¹⁰¹ which further elaborated on their views regarding the proposed residence test, but with a particular focus on children’s rights. Other topics considered in this report were the functioning of the ECF scheme as well as legal aid for unaccompanied children, undocumented children, and children with special educational needs and disabilities. The Government responded to this second report in September 2014.¹⁰²

147. In January 2016, the House of Commons Library published, *‘Civil legal aid changes since 2013: the impact on people seeking help with legal problems.’*¹⁰³ The purpose of this note was to offer an overview of the available evidence of the impact of LASPO’s Legal Aid provisions. The report considers the following topics:

- a. The reforms’ impact on women and families.
- b. The rate of use of mediation following the reforms.
- c. Whether the ECF scheme is operating as intended.
- d. Whether the reforms have yielded savings when potential costs to wider society are considered.
- e. The reasons for legal aid spending falling more than was forecast at the time of the original reforms.

148. In September 2014, the Office of the Children’s Commissioner published the report, *‘Legal Aid Changes since LASPO: Child Rights Impact Assessment.’*¹⁰⁴ Its aim was to examine ‘the impact on the rights of children and young people within the remit of the Children’s Commissioner of changes to civil and prison law legal aid since April 2013.’ Topics covered included:

- a. Whether there were changes in behaviour in children and young people around legal issues following the reforms.
- b. The impact on children of the rise in litigants in person in private family law proceedings following the reforms, and the impact on children of being

¹⁰¹ See: <https://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/14/14.pdf>

¹⁰² See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/350592/cm8936-government-response-to-jchr-legal-aid-children-and-residence.pdf

¹⁰³ See: <http://researchbriefings.files.parliament.uk/documents/SN06645/SN06645.pdf>

¹⁰⁴ See: https://www.childrenscommissioner.gov.uk/sites/default/files/publications/Child_Rights_Impact_Assessment_on_changes_to_Legal_Aid_since_2013.pdf

litigants in person themselves (including the way in which administrative decision-makers respond to children without legal support).

- c. Whether it is possible for young offenders to resolve problems through the use of advocates and the complaints system, following reductions in scope of legal aid for prison law matters.
- d. Changes in demand for pro bono or voluntary sector services from children and young people following the reforms, and whether this demand is met.
- e. Whether children and young people can pay privately for legal advice, assistance or representation.
- f. The impact of ceasing to attempt to resolve a legal problem on the mental health of children and young people.

149. In October 2015, the Equality and Human Rights Commission published, *'Equality, human rights and access to civil law justice: a literature review.'*¹⁰⁵ The report explores recent changes to civil law justice, and their effect on access to advice and redress for human rights breaches. These topics were discussed with reference to numerous reforms impacting on access to civil justice, not just LASPO Part 1. Key topics discussed relating to LASPO Part 1 included:

- a. Impact on access to justice for disabled people in welfare benefits, community care, housing and discrimination cases.
- b. Impact on access to justice for women regarding the domestic advice evidence requirements.
- c. Impact on ethnic minority groups regarding changes in scope for immigration cases.
- d. The impact on non-British nationals of the proposed residence test.
- e. Impacts of the reforms on those seeking access to advice regarding discrimination, including the number of discrimination inquiries handled by the mandatory telephone gateway.
- f. The accessibility of ECF when seeking redress for reaches of Article 8 ECHR in relation to family, housing or immigration cases.
- g. The impact of recent reforms on children, particularly unaccompanied migrant children and children in family cases.
- h. Gaps in evidence regarding the impact of recent legal aid reforms, including: rates of use of legal aid that is still in scope, impact of legal aid reforms on judicial review cases, and rates of use of mediation.

B. Reports from Other Interested Parties

150. A large number of reports have also been published by interested parties across the legal aid sector. The issues covered by some of the major reports are summarised below.

¹⁰⁵ See: <https://www.equalityhumanrights.com/sites/default/files/research-report-99-equality-human-rights-and-access-to-civil-law-justice.pdf>

151. In February 2014, the Low Commission published the report "*Tackling the Advice Deficit*."¹⁰⁶ Their goal was largely strategic: they sought "to develop a fresh approach, which involves measures to reduce the need for advice and legal support in the first place, while developing more cost-effective approaches to services provision... and drawing on a wider range of funding sources than hitherto."¹⁰⁷ They based these recommendations on extensive research which included an investigation of the impact of the LASPO Part 1 reforms. Their recommendations included:

- a. Improving access to advice using public legal education, national telephone helplines and websites, local advice networks, and specialist support for frontline advice services.
- b. Working with central and local government to reduce preventable demand for legal aid.
- c. Increases in efficiency and effectiveness of courts and tribunals.
- d. Local authorities should produce local advice and legal support plans.
- e. Ensuring that the ECF scheme is functioning as intended.
- f. Improving the accessibility of affordable advice and legal support.
- g. Legal aid for early intervention.
- h. Checking whether removing certain areas of law from scope (particularly housing and social welfare law) constitutes value for money.

152. In March 2015, the Low Commission published a follow-up to this report expanding on their strategies to improve access to social welfare law: "*Getting it Right in Social Welfare Law*."¹⁰⁸ This report expanded on some concerns they had about the legal aid reforms, as well as welfare reform more generally. Topics raised regarding the impacts of LASPO included:

- a. Whether the reforms have created costs for other parts of the public sector.
- b. Whether the gateways to legal aid are sufficiently accessible.
- c. Impacts of the reforms on the non-profit advice sector, including the accessibility of specialist advice.
- d. The reduction in welfare appeal volumes following the reforms.
- e. The rise in litigants in person volumes in the Family Courts.

153. The Low Commission further expanded on their strategy, with the goal of improving health outcomes using welfare advice, in a further report with the Advice Services Alliance: "*The Role of Advice Services in Health Outcomes*."¹⁰⁹

¹⁰⁶See: www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf

¹⁰⁷Tackling the Advice Deficit, page viii.

¹⁰⁸See: http://www.lowcommission.org.uk/dyn/1435772523695/Getting_it_Right_Report_web.pdf

¹⁰⁹See: http://asauk.org.uk/wp-content/uploads/2015/06/ASA-report_Web.pdf

154. In September 2014, the Bar Council published *'The Legal Aid, Sentencing and Punishment of Offenders Act (2012): One Year On'*.¹¹⁰ The Bar Council expressed a number of concerns about LASPO during its passage through Parliament, and undertook the report 'to establish whether, and to what extent, the Bar's concerns were justified in the light of subsequent experience since the relevant parts of the legislation came into force'. Topics covered included:

- a. The impact of the increase in litigants in person on the courts.
- b. Impact of the reforms on frontline providers offering free legal support, advice or representation.
- c. Viability of careers at the Bar, and the diversity of the legal profession, in light of the reforms.
- d. Accessibility of the courts following the reforms.
- e. Resourcing of the courts and judiciary following the reforms.
- f. Whether ECF is operating as intended.
- g. The viability of alternative dispute resolution methods following the reforms.

155. In June 2017, the Law Society published a report assessing the impact of changes made to legal aid by LASPO four years on from the Act's legal aid provisions coming into force. The report was entitled *'Access Denied?'*.¹¹¹ The report made 25 recommendations and covered the following topics:

The exceptional case funding scheme (with respect to several points such as access for children and complexities with the application process).

- a. The impact of the reforms on access to justice for children.
- b. The income and capital means tests.
- c. The impact of the reforms on access to housing advice, including geographical differences in service provision, and the sustainability of civil legal aid more generally.
- d. The operation of the telephone advice service, including the mandatory gateway for debt, discrimination and special educational needs issues.
- e. The scope changes, including their impact on family mediation take-up and the family justice system more generally.
- f. The wider impact of legal aid changes, such on health and social care provision.

156. In September 2017, the Bach Commission published its review of the legal aid system. The report considered the impacts of recent legal aid changes and made a large number of recommendations, including:

¹¹⁰See: www.barcouncil.org.uk/media/303419/laspo_one_year_on_-_final_report_september_2014_.pdf

¹¹¹See: <https://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/>

- a. The introduction of a new individual Right to Justice, consisting of ‘the right to receive reasonable legal assistance, without costs they cannot afford’, which would be enforceable in the courts.
- b. Establishment of a new Justice Commission, which would be responsible for enforcing and providing guidance on interpretation of the Right to Justice.
- c. Reform of legal aid eligibility rules, including changes to make the means test simpler and more generous, to make all recipients of means-tested benefits automatically eligible for legal aid and to scrap capital assessments for legal aid.
- d. Review and reform of Exceptional Case Funding.
- e. Changes to the legal aid domestic violence evidence requirements and to the domestic violence gateway.
- f. Abolition of the Legal Aid Agency, and the creation of an independent body charged with administering the legal aid budget.
- g. An expansion of provision of legal help and legal education.

Preliminary Assessment of the Act

157. This section of the memorandum provides an initial high-level assessment of how the Act has worked in practice relative to the objectives as set out above. The MoJ intends to conduct a full, substantive assessment of recent legal aid reforms in its forthcoming post-implementation review. The MoJ aims to publish this review by summer 2018 and the Department intends to work collaboratively with key parties across the sector to inform its findings.

158. This section is organised by each of the four objectives for Part 1 LASPO described earlier in the memorandum, with an additional segment covering the bespoke objectives associated with the creation of the LAA.¹¹²

Objective 1 – Discourage unnecessary and adversarial litigation at the public expense

159. By withdrawing legal aid for certain types of legal matters and changing the eligibility rules, Part 1 LASPO sought to reduce the levels of ‘unnecessary and adversarial’ litigation being brought to court. It was argued that this litigation was creating an unnecessary cost to the taxpayer, not just in relation to legal aid funding, but also in relation to wider costs to government associated with running court proceedings.

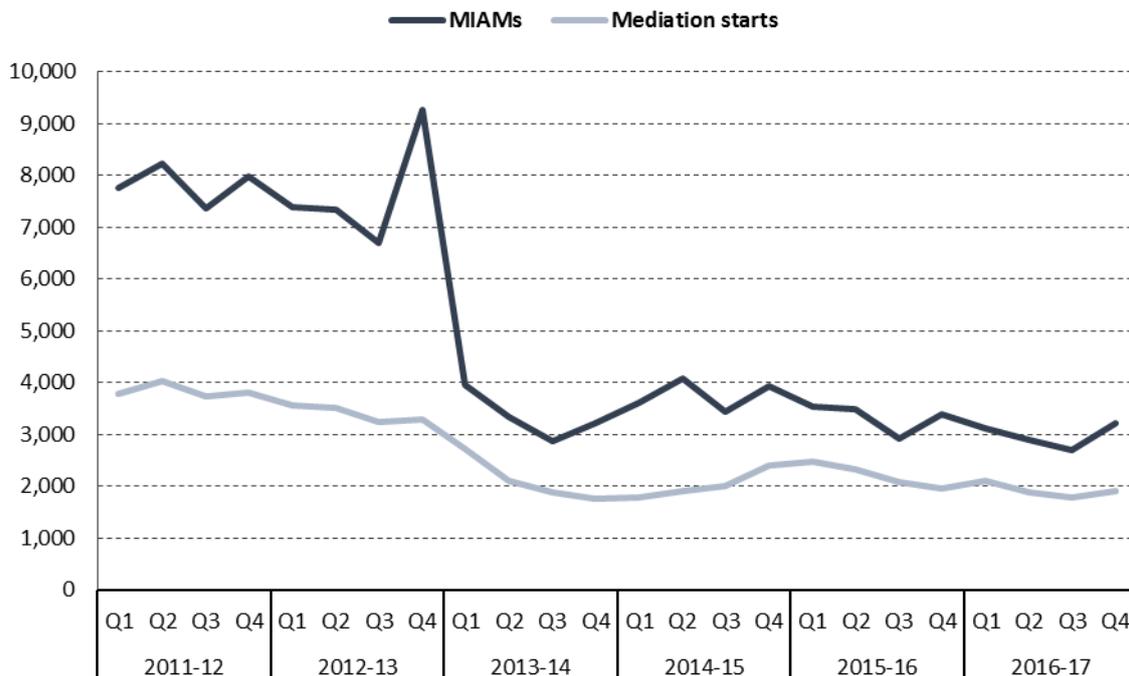
160. The main area where the Coalition Government sought to discourage litigation was in private family law proceedings, such as those concerning child custody and financial arrangements following a divorce or separation. The scope of legal aid for private family proceedings was reduced by LASPO and in the absence of legal aid it was

¹¹²Volume figures have been rounded to the nearest 10 from 100 – 1,000, nearest 100 from 1,000 – 10,000, nearest 1,000 from 10,000 – 100,000 and nearest 5,000 for anything above 100,000. Expenditure figures have been rounded to the nearest £m for spend up to £100m and the nearest £10m for anything above £100m.

anticipated that there would be increased uptake of family mediation. Family mediation is where an impartial and independent professional mediator helps divorcing or separating couples work out solutions to their issues in an environment that is less adversarial than the court room. LASPO made no changes to the scope of legal aid for facilitating mediation; it remained available after the reforms, subject to eligibility testing. Legal aid was also retained for facilitating Mediation Information and Assessment Meetings (MIAMs), which take place before mediation and attempt to establish whether mediation would be the appropriate form of dispute resolution given the circumstances and attitudes of the couple. Part 1 LASPO did, however, remove legal aid funding for lawyers to conduct the ‘willingness test’, which involved mediators contacting someone’s partner to see if they were prepared to participate in mediation with the other party.

161. The implementation of LASPO did not lead to increased take-up of either MIAMs or family mediation sessions, as anticipated. Instead, the opposite occurred, with the number of people attending publicly funded MIAMs and mediation falling (see Figure 1 below). In 2012–13, the year prior to LASPO, there were 31,000 MIAMs¹¹³ and 14,000 mediation starts. By 2016–17, these figures had fallen to 13,000 MIAMs and 7,700 mediation starts, reductions of 61% and 44% respectively.

Figure 1: Volume of publicly funded MIAMs and mediation starts in family law 2011–12 to 2016–17



Source: Legal Aid Statistics, January to March 2017

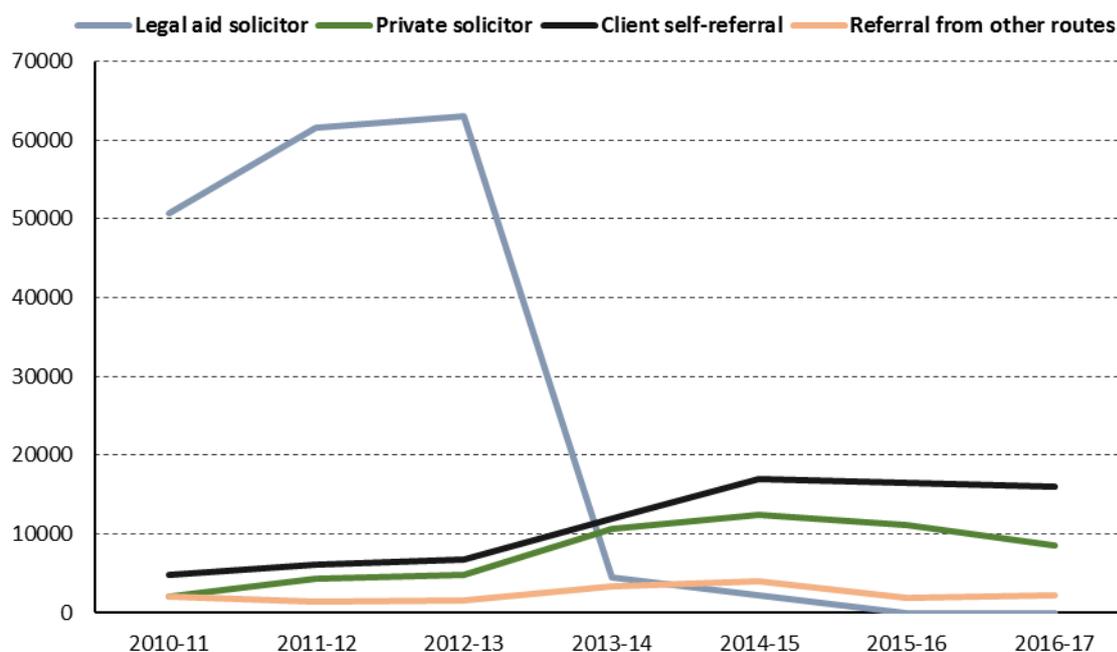
162. Prior to LASPO, clients (whether the applicant or the respondent) could not receive a legal aid certificate to cover the cost of their representation at court unless they had

¹¹³Consistent with the Department’s published legal aid statistics, the MIAM figures presented in this memorandum are a count of MIAMs where both parties attend and half of those where both parties attend separately. MIAMs where only one party attended are not included, as the non-attendance of the other party does not constitute a substantive MIAM.

first considered mediation (subject to certain exceptions, such as being a domestic violence victim). The scope changes reduced the opportunities for contact between clients and law firms. This therefore reduced the potential for clients to be told about mediation and to be referred to it and is likely to have contributed to the decline in mediation take-up following the scope changes. This is borne out by the LAA’s figures, as outlined in the next paragraph.

163. Before LASPO, the vast majority (over 80%) of referrals to publicly funded MIAMs were made by solicitors holding a legal aid contract. Following LASPO this dropped substantially. Other sources of referral have become proportionately more prominent since the reforms. For example, the proportion of self-referrals to MIAMs has risen consistently, from below 10% of referrals prior to LASPO to around 60% in 2016-17. Referrals from solicitors without a legal aid contract now make up around 32% of referrals. Referrals from other sources, such as the NHS, charities and the courts, have risen from less than 5% prior to LASPO to just under 10%. This information is displayed in Figure 2.

Figure 2: Volume of publicly funded MIAMs by referral route 2010–11 to 2016–17



Source: Legal Aid Statistics, January to March 2017

164. In responding to the unintended fall in mediation volumes following LASPO, the Coalition Government set up a Family Mediation Task Force to assess the situation and make recommendations that would increase take-up. Subsequently, several changes were made to the arrangements for mediation to incentivise its use. From April 2014, the Children and Families Act 2014¹¹⁴ introduced a statutory requirement that individuals applying to the court to commence certain types of private family proceedings had to first attend a MIAM to consider if mediation was appropriate. This requirement was subject to certain exemptions, such as a party being a victim of

¹¹⁴See: <http://www.legislation.gov.uk/ukpga/2014/6/contents>

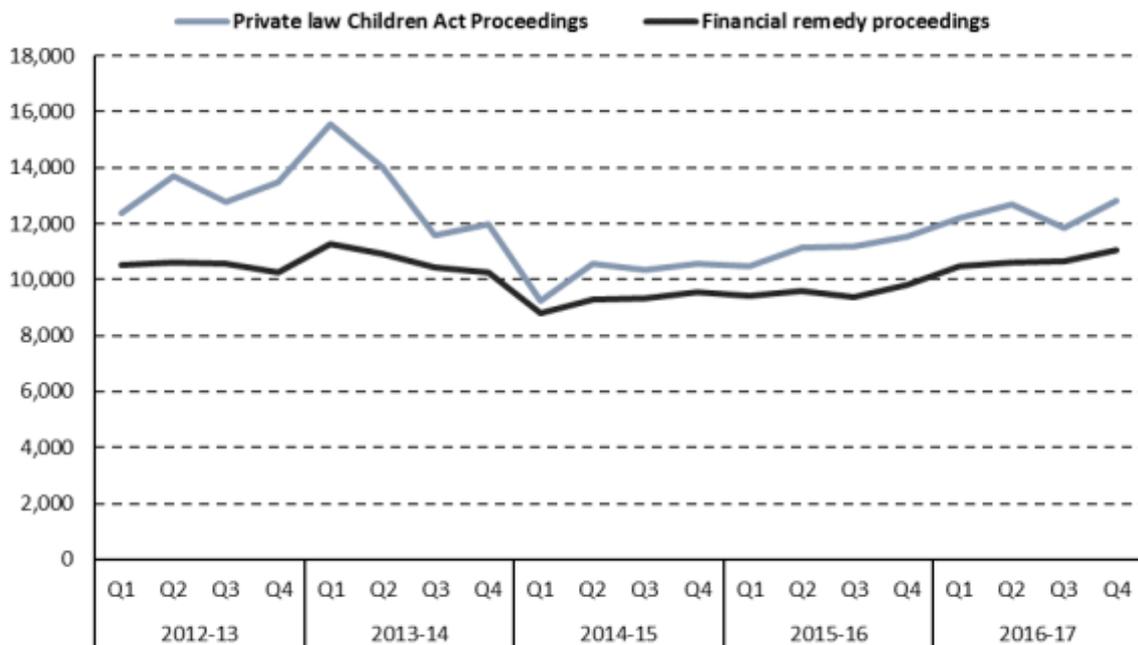
domestic violence. The Coalition Government also amended LASPO's delegated legislation so that, from April 2014, eligibility for legal aid funding to cover the costs of attending a MIAM would exist for a financially ineligible party so long as the other party was eligible.¹¹⁵ A further amendment was made to LASPO in October 2014 which meant that the financial eligibility test did not apply to the second party in relation to the first mediation session following a MIAM.¹¹⁶ This had the effect of funding the first session for both parties even if one party would, previously, have been financially ineligible for legal aid.

165. Both of the post-LASPO amendments to financial eligibility for family mediation were intended to increase take-up of the service. However, the trends in MIAM and mediation volumes displayed in Figure 1 show that the effect has been minimal. MIAM and mediation volumes remain below pre-LASPO levels. The withdrawal of legal aid for representation at court in private family law proceedings has therefore coincided with a drop-in take-up of publicly funded mediation.
166. The introduction of Part 1 LASPO coincided with a reduction in the number of court proceedings commencing in the Family Courts in the areas of law most affected by the scope cuts. The scope of legal aid in public family law proceedings, such as those where the State seeks to take a child into care, or domestic violence proceedings, such as those where a non-molestation order is sought, was not altered by LASPO, but scope was reduced for private family proceedings. Figure 3 shows that following the reforms there was a decline both in the number of private law Children Act cases and in financial remedy cases starting in court. In 2012, 94,000 cases of this nature started in the Family Courts. In 2016, this had fallen by 2% to 92,000, though recent trends show a steady increase. This fall cannot be wholly attributed to the legal aid reforms, but they are likely to have had an impact. Difficulties with attributions of this nature are discussed in more detail in the value for money section below.

¹¹⁵This was accomplished by the Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2014. See: <http://www.legislation.gov.uk/uksi/2014/812/introduction/made>

¹¹⁶This was accomplished by the Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) (No.2) Regulations 2014. See: <http://www.legislation.gov.uk/uksi/2014/2701/made>

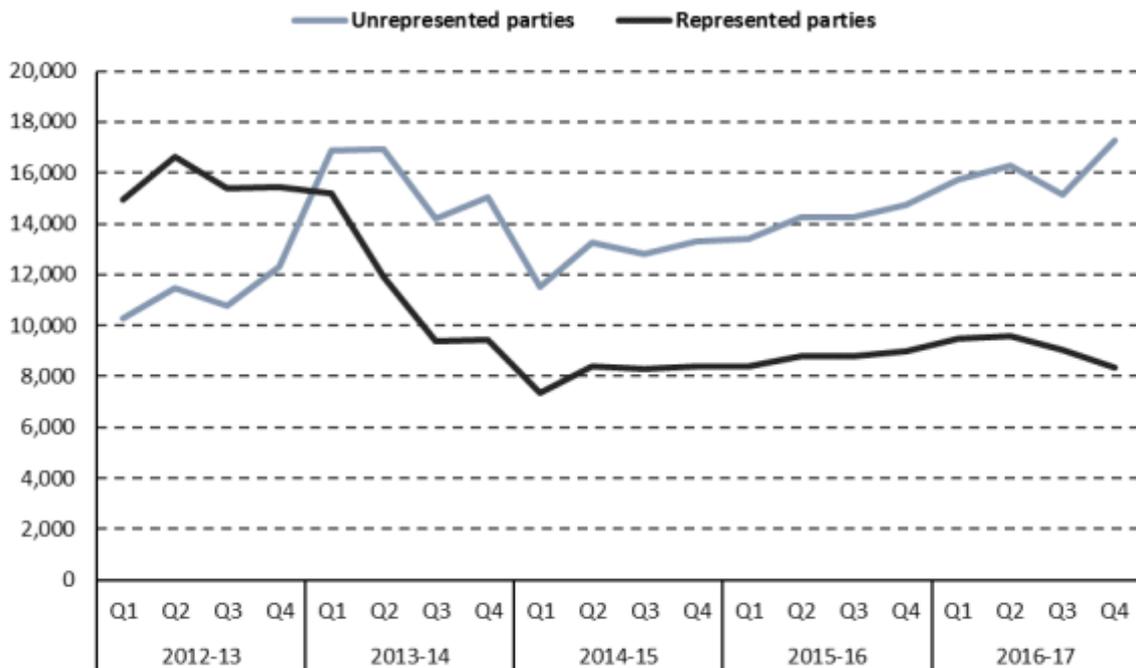
**Figure 3: Private family law proceedings starting in the Family Courts in England and Wales
2012-13 to 2016-17**



Source: Family Court Statistics Quarterly, January to March 2017

167. The family legal aid scope cuts also coincided with an increase in the number of litigants in person in family proceedings. Trends in representation status in private family law proceedings are displayed in Figure 4 below. In 2012-13, 62,000 parties (both applicants and respondents) were represented in private family law proceedings and 45,000 (or 42%) were unrepresented. Representation could have been provided either by a lawyer funded through legal aid or privately; the statistics do not separate the two. In 2016-17, 36,000 parties were represented and 64,000 (or 64%) were unrepresented.

Figure 4: Representation status of parties in private family law proceedings with at least one hearing in the Family Courts in England and Wales 2012-13 to 2016-17



Source: Family Court Statistics Quarterly, January to March 2017

168. In addition to the scope changes, LASPO also introduced a change to the financial eligibility test for civil and family cases, with the intended effect of reducing litigation. The change concerns the disposable income test. Under this test, applicants with disposable income of less than £316 per month are eligible for legal aid without needing to make a contribution, those with income above £733 per month are ineligible for legal aid, and those with income between these figures are eligible for contributory legal aid – this means that the Government provides a proportion of the client’s funding but the client must provide the remainder.¹¹⁷ Part 1 LASPO did not change the intermediate thresholds determining the rate of contribution or the upper limit of financial eligibility, only the level of contribution required of the client within each intermediate threshold. Figure 5 shows how the rates changed.

¹¹⁷In certain types of proceeding, such as those involving domestic violence protective injunctions, it is possible for the upper eligibility threshold of £733 per month to be waived. That means applicants with disposable income higher than £733 can remain eligible for contributory legal aid.

Figure 5: Disposable income contributory rates in civil/family legal aid, before and after LASPO

For disposable income between...	Contribution rate	
	Pre-LASPO	Post-LASPO
£316 and £465	25%	35%
£466 and £616	33%	45%
£617 and £733	50%	70%

169. Under the pre-LASPO contributory rates, clients would not be required to contribute more than 20% of their disposable income per month to the cost of their legal representation (a disposable income of £733 would result in a contribution of £146 per month, which is 20%). Post-LASPO this figure rose to 30%, due to the increased rates. The post-implementation review will explore what effect this policy is having.

170. The Legal Aid Transformation package of reforms included a policy designed predominately to discourage litigation. The policy was to change legal aid funding in judicial review proceedings to provide funding for work carried out on an application for permission only if permission for the judicial review was granted. This change was implemented in April 2014 via the *Civil Legal Aid (Remuneration) (Amendment) (No.3) Regulations 2014*. Prior to the change legal aid would be provided, subject to other eligibility, even where permission to judicial review was not granted. Following implementation, the policy was successfully litigated against at the High Court in *R (Ben Hoare Bell and others) v Lord Chancellor*¹¹⁸ and the regulations were quashed. However, the Government re-introduced an amended version of the policy from March 2015 via the *Civil Legal Aid (Remuneration) (Amendment) Regulations 2015*¹¹⁹ which continued to restrict payment unless permission was granted save in three scenarios:

- a. Cases where the defendant withdraws the decision that is being challenged before a permission decision is made, which therefore means permission is refused or not considered;
- b. Cases where the application for permission is adjourned by court order to an oral hearing and then refused permission or a decision is not made;
- c. Cases where the court orders a ‘rolled-up hearing’ at which the issue of permission is considered at the same time as the substantive case.

The post-implementation review will assess the judicial review permissions changes.

¹¹⁸For the judgment, see: <http://www.bailii.org/ew/cases/EWHC/Admin/2015/523.html>

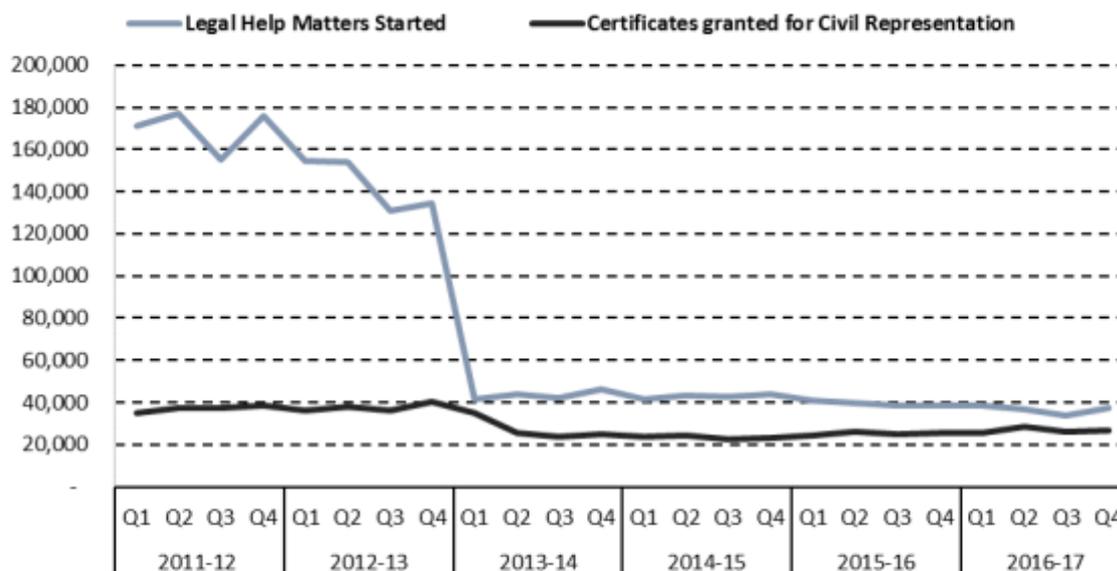
¹¹⁹See: <http://www.legislation.gov.uk/ukxi/2015/898/contents/made>

Objective 2 – To target legal aid at those who need it most

171. Part 1 LASPO reconfigured the scope of the civil and family legal aid scheme to focus legal aid funding on cases that the Coalition Government, and subsequently Parliament, deemed to most strongly justify funding. As a result, some proceedings were totally withdrawn from the scope of legal aid, some became subject to additional requirements before funding could be accessed, and some were retained within scope.
172. Funding was preserved for proceedings that were deemed to be of the highest priority including care order cases, mental health cases and protective injunction proceedings. In these areas, the LAA continues to fund a high volume of cases. For example, in 2016–17 over 61,000 legal aid certificates were issued in special Children Act proceedings¹²⁰ – 27% higher than the 48,000 in 2012–13.
173. In other areas of law cases were not considered a high enough priority to justify taxpayer funding. In these areas, the numbers in receipt of legal aid have fallen. For example, prior to LASPO, advice for legal issues associated with the payment of welfare benefits was in scope of legal aid. LASPO removed this from scope, with a few small exceptions. As a result, the numbers in receipt of legal aid for advice and assistance on welfare benefits issues has fallen from 83,000 in 2012–13 to 440 in 2016–17.
174. Overall, fewer individuals are in receipt of legal aid in civil and family cases following the reforms, as Figure 6 shows. In 2012–13, prior to LASPO's implementation, the Government provided funding for 575,000 new legal help matter starts (i.e. providing advice and assistance) and 150,000 new certificates for civil representation (i.e. representing someone at court). By 2016–17 the legal help figures had fallen by 74% to 145,000 and the civil representation figures by 29% to 105,000. Since LASPO, quarterly volume trends have been relatively flat.

¹²⁰Under LASPO, 'special Children Act cases' refer to specified matters relating to the care, supervision and protection of children under the Children Act 1989.

Figure 6: Civil legal aid workload summary, legal help and civil representation 2011–12 to 2016–17



Source: Legal Aid Statistics, January to March 2017

175. The Government’s assessment of who most needs legal aid has not been static since LASPO. Amendments have been made that expand scope. For example, the Serious Crime Act 2015 introduced legal aid funding for civil legal services in relation to female genital mutilation protection orders.¹²¹ The Modern Slavery Act also made legal aid available to victims of modern slavery, servitude or forced or compulsory labour for certain types of matter.¹²² Both amended Schedule 1 via primary legislation.

176. Successive changes have also been made to the domestic violence and child abuse evidence requirements in private family law. LASPO retained legal aid funding for civil legal services in private family matters such as child contact arrangements if the applicant is, or is at risk of being, a victim of domestic violence or child abuse. Funding is subject to the applicant providing objective evidence of the abuse. The list of permitted evidence is set out in the *Civil Legal Aid (Procedure) Regulations 2012*.

177. In April 2014 this list was expanded in several ways, for example to allow psychologists to provide evidence, and to accept the fact that the other party is on police bail for a domestic violence offence as evidence.¹²³ In June 2015 a number of further, relatively small changes were made, including the removal of the requirement previously placed upon the LAA to reassess evidence when the client moves

¹²¹ See Schedule 4, Paragraph 87 of the Serious Crime Act 2015:
<http://www.legislation.gov.uk/ukpga/2015/9/schedule/4>

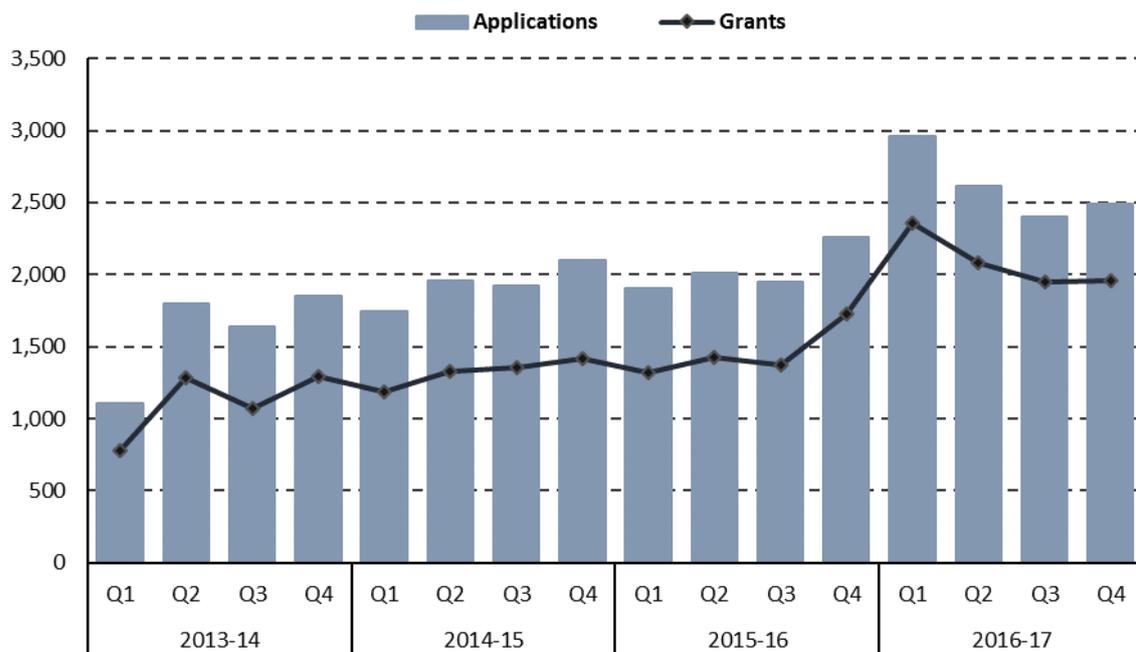
¹²² See Section 47 of the Modern Slavery Act 2015:
<http://www.legislation.gov.uk/ukpga/2015/30/section/47>

¹²³ See the Civil Legal Aid (Procedure) (Amendment) Regulations 2014:
<http://www.legislation.gov.uk/uksi/2014/814/contents/made>

between forms of service.¹²⁴ Then, in April 2016, the time limit placed upon evidence was increased from two to five years and provision was included for the DLAC to say the evidence requirements are met if the applicant can provide evidence that they have been a victim of financial abuse.¹²⁵ This amendment followed the judgment of the Court of Appeal in the case of *Rights of Women vs the Lord Chancellor* which challenged the evidence requirements.¹²⁶

178. Over time the number of individuals in receipt of legal aid for private family matters, where evidence of domestic violence or child abuse is provided, has increased. This is likely to be a result of the aforementioned changes to legislation, which all had the effect of making it easier to provide the required evidence. In 2013–14 there were 6,400 applications for civil representation in private family law where such evidence was provided, of which 4,400 were granted. In 2016–17 the number of applications had risen to 10,000 (an increase of 64% on 2013–14) and the number of grants to 8,300 (an increase of 89%). Figure 7 shows these trends over time.

Figure 7: Applications received via the domestic violence and child abuse evidence gateway, and of those applications the number that were granted 2013–14 to 2016–17



Source: Legal Aid Statistics, January to March 2017

¹²⁴ See the Civil and Criminal Legal Aid (Amendment) Regulation 2015: <http://www.legislation.gov.uk/uksi/2015/1416/contents/made>

¹²⁵ See the Civil Legal Aid (Procedure) (Amendment) Regulations 2016.

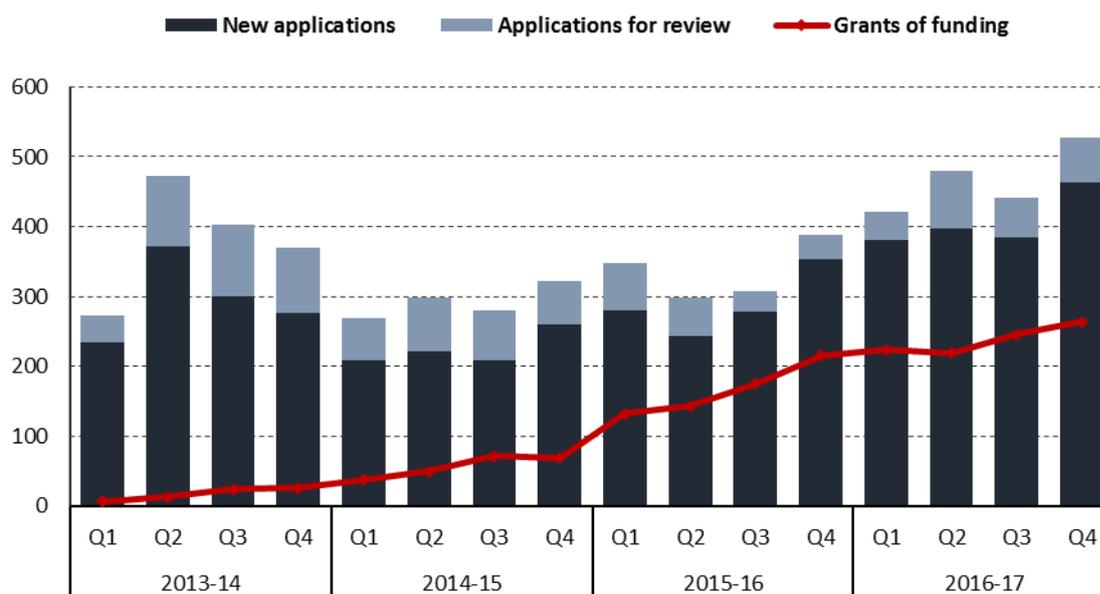
¹²⁶ For the judgment, see <http://www.bailii.org/ew/cases/EWCA/Civ/2016/91.html>

179. Accompanying the changes to the scope of legal aid, LASPO Part 1 Section 10 introduced the new Exceptional Case Funding (ECF) scheme. The purpose of the scheme is to provide legal aid for cases that do not fall within Schedule 1 but where failure to provide funding would be a breach of the individual's rights under the Human Rights Act 1998 or EU law, or where there is a significant wider public interest in funding legal representation for inquest cases. The LAA are responsible for administering the scheme and making determinations as to whether an applicant should receive funding.

180. Since the implementation of LASPO, the number of funding grants under the scheme has increased. In 2013–14, the first year of the scheme, there were 70 grants out of around 1,500 applications (a grant rate of 5%). The number of grants rose to around 230 in 2014–15 (a grant rate of 20%), 670 in 2015–16 (50%) and 950 in 2016–17 (51%). Trends in grant numbers and applications are displayed in Figure 8.

181. The nature of applications and grants has also changed over the lifetime of the scheme. In 2013–14, for example, over half of applications (820; 54%) were in family cases but by 2016–17 this had fallen to around 16% (300). Although the number of family applications has fallen, the number of grants and the grant rate have increased substantially: from 1% of applications in 2013–14 (9 out of 820) to 32% in 2016–17 (100 out of 300). Early on, inquests represented the majority of funding grants (54 out of all 70 grants in 2013–14, or 77%) but now represent a smaller proportion (150 of 950 grants in 2016–17, or 15%). Immigration now represents the most applied for and most granted category of law (1000 applications and 690 grants in 2016–17, a 68% grant rate), but in 2013–14 there were only 4 applications granted.

Figure 8: Legal aid applications and grants under the Exceptional Case Funding scheme 2013–14 to 2016–17



Source: Legal Aid Statistics, January to March 2017

The primary reason for the changes in application and grant volumes is likely to be the impact of two court judgments following legal challenges against the operation of the

scheme. The first of these, *Gudanaviciene and others v Director of Legal Aid Casework*, concerned six non-UK nationals each challenging the decision not to grant ECF funding in their respective immigration cases. Following the Court of Appeal's decision on the interpretation and application of the ECHR rights as found in the Lord Chancellor's Exceptional Funding Guidance (Non-Inquests), the Guidance was amended to, in effect, lower the threshold for legal aid eligibility in ECF cases. Since December 2014 there has been a substantial increase in immigration ECF applications and grants, and to a lesser extent in family cases which would have been affected by the guidance changes.

182. The second major ECF legal challenge, *I.S. v The Director of Legal Aid Casework & Anor*, focused more broadly on the operation of the scheme. In July 2015, the High Court's judgment in this case stated that there was an 'unacceptable risk' that the ECF scheme was not able to provide legal aid in those cases it had been designed to provide it in.¹²⁷ In particular, the judgment was critical of:

- a. The complexity of the application forms acting as a barrier to lay applicants (i.e. applicants who are not legal aid providers);
- b. The lack of funding available for providers to undertake work with the client in order to see whether they would meet the criteria for funding;
- c. The merits test criteria for cases to have 50% or greater prospects of success, described as unreasonable; and,
- d. The Lord Chancellor's guidance.

183. The MoJ made a series of changes in response to the High Court judgment in *I.S.* The application forms were simplified, the possibility to apply for funding to investigate whether an ECF application could be made was introduced, and the merits criteria were amended so that cases could have "poor" or "borderline" prospects of success if failure to provide funding breached or risked breaching the applicant's rights under the ECHR or enforceable EU law – although this was later changed further (this latter change is discussed in more detail in the section of this preliminary assessment devoted to Objective 3). The Government appealed the High Court judgment in *I.S.* and the Court of Appeal handed down judgment in May 2016 overturning the decision of the High Court.

184. The ECF scheme will be considered as part of the post-implementation review.

185. LASPO did not change the scope of legal aid for criminal matters at the time of implementation, but criminal scope was amended subsequently for cases falling under the prison law category of work as part of the Transforming Legal Aid programme of reforms. This was accomplished via the *Criminal Legal Aid (General) (Amendment) Regulations 2013*¹²⁸ and the changes came into force in January 2014. Certain types of prison law case were not affected by the changes, including cases related to parole board hearings and disciplinary hearings in a prison where proceedings involve the determination of a criminal charge for the purposes of Article 6(1) of the ECHR. Areas removed from scope included all matters related to an

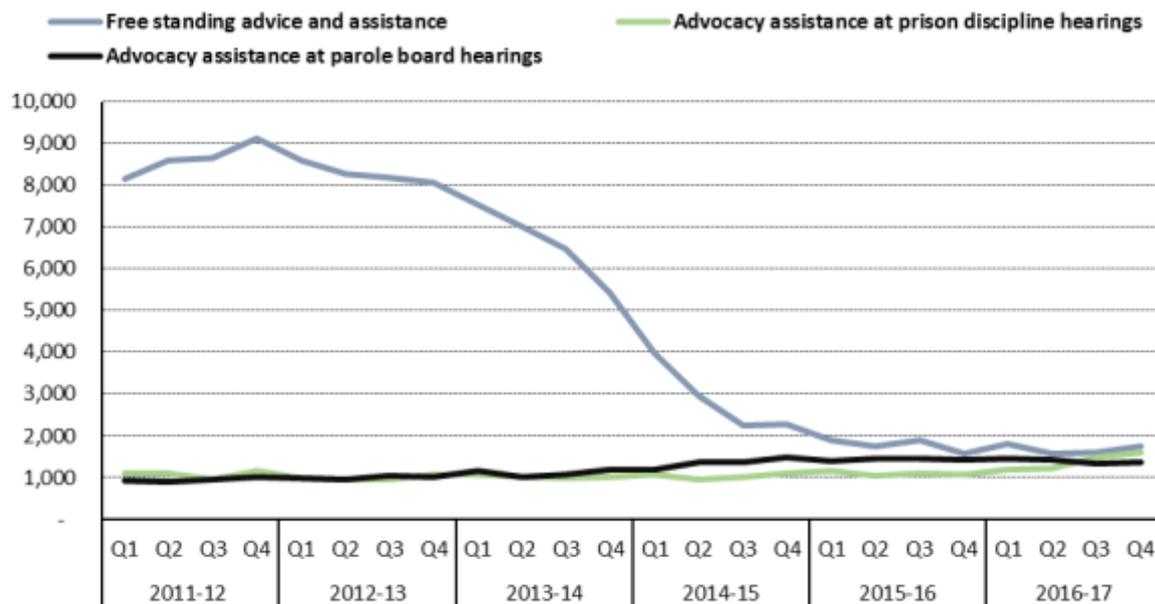
¹²⁷ For the full judgment of the High Court see <http://www.bailii.org/ew/cases/EWHC/Admin/2015/1965.html>

¹²⁸ See: <http://www.legislation.gov.uk/ukxi/2013/2790/contents/made>

individual’s treatment in a prison and most matters related to an individual’s sentence, such as issues around licence conditions and prison categorisation.

186. Since LASPO, there has been a reduction in the amount of legal aid provided for prison law matters. In 2012–13, 41,000 claims were made for legal aid payment in prison law. In 2016–17 this had fallen by 57% to 18,000. The fall has been driven predominately by a reduction in the amount of free standing advice and assistance claims; claims for advocacy assistance at prison discipline hearings and at parole board hearings have increased slightly since 2012–13 (see Figure 9). The post-implementation review will look at changes to legal aid entitlement for prison law proceedings. It should be noted that the Court of Appeal has issued a judgment in relation to a judicial review brought against the changes to legal aid for prison law by the Howard League for Penal Reform and the Prisoners’ Advice Service.

Figure 9: Claims for legal aid in prison law proceedings 2011–12 to 2016-17



Source: Legal Aid Statistics, January to March 2017

187. The delivery objective of targeting legal aid at those who need it most is difficult to evaluate. LASPO lists the type of proceedings in scope of legal aid, and this has been amended since implementation to reflect the Government’s assessment of who needs legal aid most. However, whether legal aid can be accessed will also depend on other factors, such as whether individuals are eligible on financial means and merits grounds, the availability of providers to individuals with a legal problem and the way in which services are administered by the LAA. The post-implementation review will assess the changes to legal aid outlined in this section.

Objective 3 – To make substantial savings to the cost of the scheme

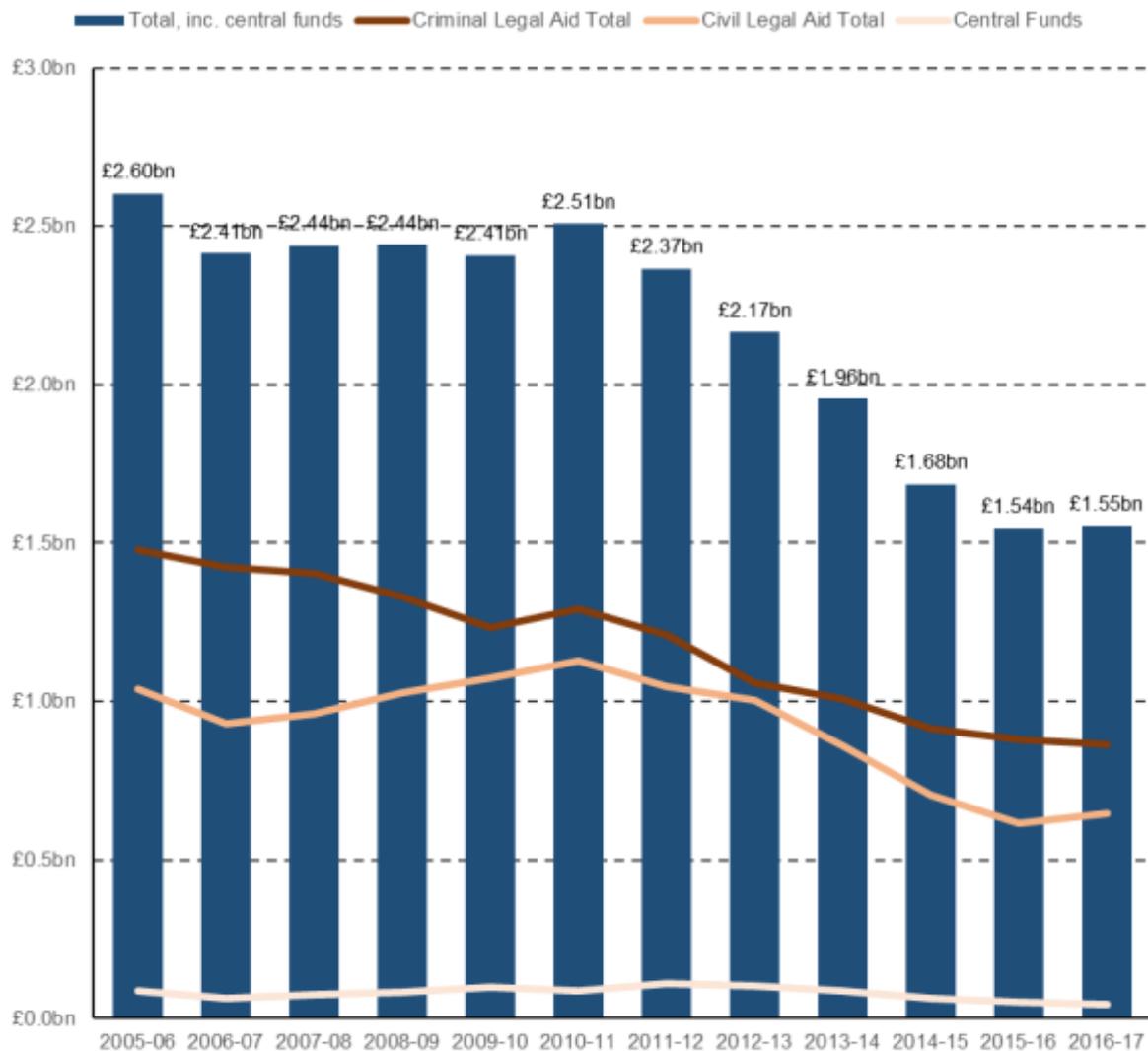
188. A core objective of recent changes to legal aid was to reduce the amount of expenditure on the scheme. This objective has clearly been achieved – the Government is now providing legal aid funding for fewer cases and paying less for cases that are funded. Between 2010–11 and 2016–17 annual legal aid fund expenditure fell by £950m, or 38%, in real terms at 2016–17 prices. This fall followed a five-year period between 2006–07 and 2010–11 where annual expenditure was broadly flat in real terms at around £2.4bn per year. These expenditure figures are presented on a Resource Departmental Expenditure Limit (RDEL) basis.^{129 130}
189. In 2010–11 the Government spent £2.51bn on legal aid, in real terms, of which £1.13bn (45%) was on civil and family legal aid, £1.29bn (52%) was on criminal legal aid and £86m (3%) was on central funds. By 2016–17, total legal aid expenditure had fallen to £1.55bn, of which £650m (42%) was on civil and family legal aid, £860m (56%) was on criminal legal aid and £45m (3%) was on central funds. Therefore, expenditure has fallen in the distinct areas of civil/family legal aid, criminal legal aid and central funds. These falls can be primarily attributed to the large-scale changes to legal aid brought on by the two reform programmes undertaken by the Coalition Government, most of which were implemented by LASPO Part 1 and subsequent amendments though other factors also have an impact, such as falling court volumes. Figure 10 shows changes in legal aid expenditure over the last decade, in real terms.

¹²⁹ RDEL expenditure is the government spend category that reflects annual accruals based legal aid expenditure with the greatest level of certainty. RDEL spend is recognised when a bill is submitted to the LAA. RDEL expenditure excludes Annually Managed Expenditure, or AME. AME reflects an estimate of legal aid work in progress but not yet billed, due to a) the degree of uncertainty over the amount and b) the fact that this amount is ultimately reflected in RDEL when the LAA receive the bill. The LAA fund does not incur capital spend.

¹³⁰ RDEL fund spend on legal aid for 2016-17 will be published shortly.

Figure 10: Historic expenditure on legal aid over the past decade (in £bn, real terms at 2016–17 prices)¹³¹

Historic RDEL¹³² Expenditure from 2005–06 to 2016–17



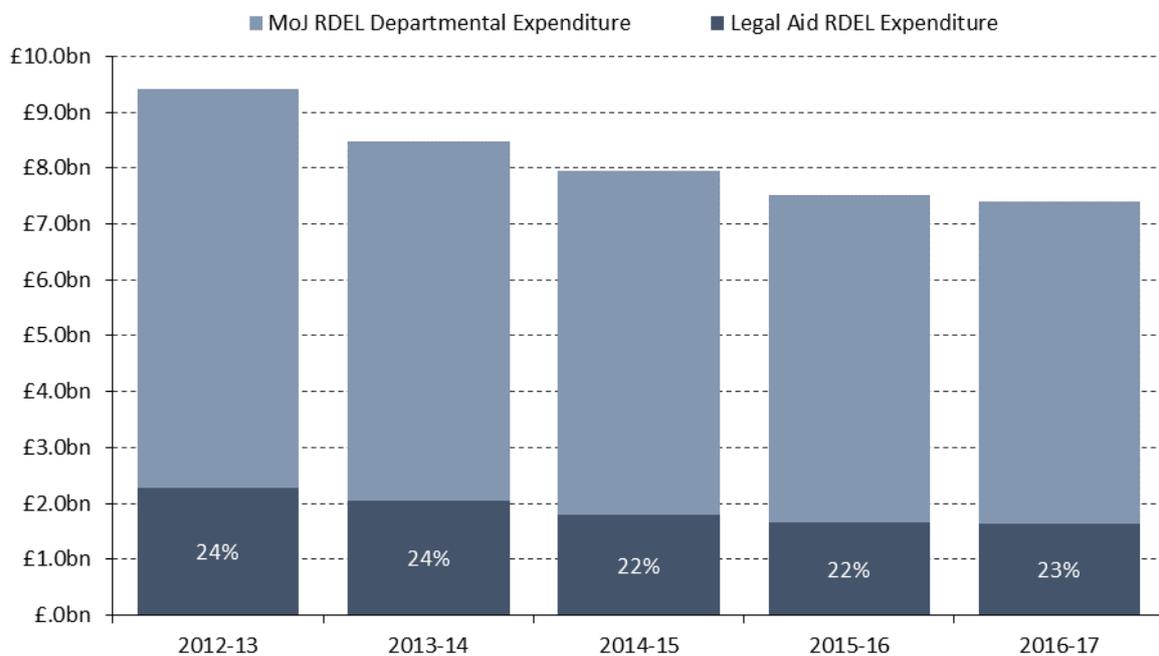
Source: MoJ Annual Accounts and GDP Deflators at market prices and money GDP September 2017

¹³¹Source MoJ Annual Report and Accounts 2017 and HMT GDP Deflator.

¹³²Within the Government Resource Accounting and Budgeting model, legal aid is determined as RDEL expenditure, meaning that the MoJ has an allocated overall budget for Legal Aid each year.

190. Despite falling expenditure on legal aid over the past few years, there has been only a small change in the proportion of MoJ departmental expenditure that goes on legal aid. Between 2012–13 and 2016–17, the MoJ’s RDEL departmental spending fell by £1.46bn, or 17%, in nominal terms from £8.87bn in 2012–13 to £7.41bn in 2016–17. Translated into real terms, this represents a reduction in spending of £2.02bn, or 21%. In 2012–13 around a quarter (24%) of the department’s expenditure was on legal aid. In 2016–17 this figure was 23%. As such, legal aid expenditure has consistently represented between a fifth and a quarter of departmental expenditure over the past few years, though there has been a small decline in the %, as Figure 11 shows.

**Figure 11: Legal aid expenditure as a proportion of Ministry of Justice departmental expenditure (in £bn, real terms at 2016–17 prices)
RDEL Expenditure only – from 2012–13 to 2016–17**



Source: MoJ Annual Report and Accounts 2017 and HMT GDP Deflator

191. Although most of the changes to legal aid have led to a reduction in expenditure, not all of them have had as their central objective to reduce spend. The scope changes, for example, have been considered against the ‘targeting legal aid at those who need it most’ objective, and are thus covered above. Outlined below are those changes most closely aligned with the objective of reducing legal aid fund spend.

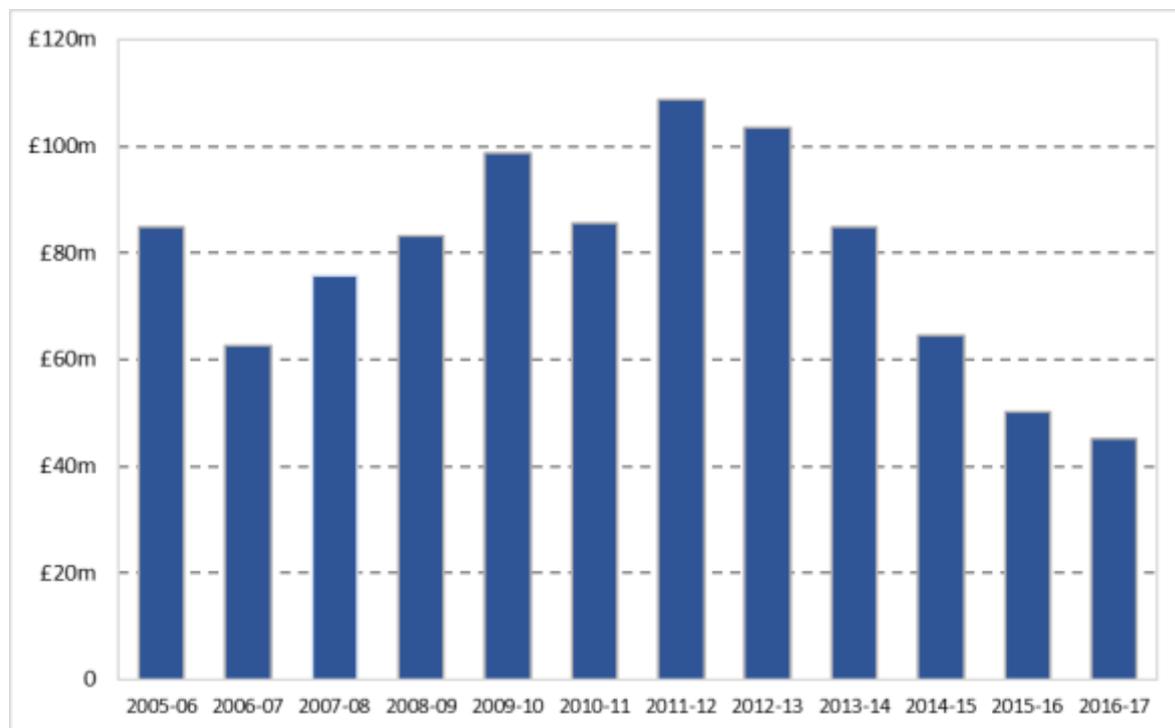
192. The changes principally concerned with reducing expenditure have generally focused on the fee schemes used to remunerate lawyers and experts for legal services funded through legal aid. Some changes included within the ‘Legal Aid Reform’ programme was made under the Access to Justice Act 1999 rather than LASPO; these include a 10% reduction in civil, family and expert fees as well as a package of changes to the criminal legal aid fee schemes. The Government is committed to exploring these pre-LASPO fee changes in its forthcoming post-implementation review of legal aid reforms.

193. At the time of LASPO’s implementation in April 2013 the fee schemes were not substantially altered, with the exception of the rules governing repayments from central funds made to acquitted defendants in criminal cases who paid privately for their representation. Here, repayments were restricted in the following ways:

- a. Acquitted defendants who were eligible for legal aid but chose not to access it were made ineligible for repayments, as were companies (for example, in corporate manslaughter cases);
- b. Acquitted defendants paying privately would have their repayments capped at the relevant legal aid rates for the work undertaken rather than the private rates paid.

194. As a side note, the changes to central funds were not implemented within Part 1 LASPO and LASPO itself is not the statutory framework that governs repayments from central funds. Central funds repayments are covered by the Proceeds of Crime Act 2002, and the changes were made by Part 2 LASPO, but they are mentioned here because of their relationship to legal aid. The changes coincided with a reduction in the LAA’s expenditure on central funds. In 2012–13 the MoJ spent £104m in real terms on central fund repayments. This fell to £45m in 2016-17, a reduction of £58m (or 57%). Figure 12 shows changes in central funds expenditure over the last decade – expenditure is now at its lowest level over that period.

Figure 12: Central Funds expenditure (in real terms, at 2016-17 prices) 2005–06 to 2016-17 RDEL Expenditure



Source: Legal Aid Published Statistics April-June 2017

195. Changes to legal aid fees have been made through amendments to LASPO's delegated legislation following its implementation. In December 2013, a 30% reduction was made in fees for new and existing very high cost criminal cases and the rules governing what constitutes a very high cost case (and thus entitling the legal aid providers to higher fees) were tightened. Furthermore, December 2013 also saw a 20% reduction in expert fees in both civil/family and criminal law with a few exceptions such as fees paid to neurologists and changes to the rules on individual defendants being able to instruct multiple advocates in criminal cases.
196. Additional fee changes took place in later years. In April 2014, the fees paid to solicitors for litigation work (but not advocacy) in public family law proceedings were reduced by 10% to coincide with the introduction of the new Public Law Outline.¹³³ Also in April 2014, the fees for self-employed barristers in civil (non-family) proceedings in the County Court, Upper Tribunal and High Court were aligned with the fees for other advocates (for example, solicitor advocates) and the 35% uplift in fees that could be accessed for work on immigration and asylum Upper Tribunal appeal cases was removed. In criminal law, solicitor's fees for police station and subsequent litigation work were reduced by 8.75%. They were then reduced by a further 8.75% in July 2015, but this was reversed in April 2016. Throughout the period in which the recent legal aid reforms have taken place (and for a period prior to it), fees were frozen each year and did not increase in line with inflation. These fee changes will have each reduced the amount of money spent by the Government on legal aid in both real and nominal terms, thereby reducing the cost of the schemes: in the absence of the fee changes, expenditure on legal aid would have been higher.
197. The changes to legal aid made by Part 1 LASPO have led to reductions in the amount of work available to legal aid providers and the amount of money available for the remaining work.
198. Aside from the fee changes, LASPO made a number of other amendments to the legal aid scheme with the principal objective of reducing expenditure on legal aid. Several changes were made to the financial eligibility tests that applicants must satisfy when applying for legal aid in certain proceedings. These are outlined below.
199. Prior to LASPO, applicants for civil and family legal aid were not required to undergo any of the three financial eligibility tests – the gross income, disposable income and capital tests – if they were in receipt of certain benefits. An applicant for legal aid with these benefits is described in the system as being 'passported'. The passporting benefits are income-based Jobseekers Allowance (JSA), income-based Employment Support Allowance (ESA), Income Support (IS) and State Guarantee Pension Credit.¹³⁴ LASPO changed the passporting arrangements by requiring applicants on a passported benefit to undergo the capital test. Applicants continue to be passported through the gross and disposable income tests.

¹³³The Public Law Outline is the protocol by which public family law proceedings should be resolved.

¹³⁴Universal Credit is a new welfare benefit that was introduced in 2013 and is being rolled out nationally. It replaces six existing welfare payments and was added to the list of passporting benefits as an interim measure. At the time of writing the memorandum, the Department is consulting on future means test arrangements following the roll out of Universal Credit.

200. Another change to the civil and family capital test concerned the ‘subject matter of dispute disregard’. When assessing financial eligibility for legal aid through the capital test, the value of the applicant’s relevant assets is summed and then a series of disregards are applied before the final value is compared with the funding thresholds. These disregards can include, for example, the value of household furniture in the applicant’s main dwelling and up to £100,000 for the applicant’s equity in their house. Up to £100,000 can also be disregarded in relation to assets that are contested between the parties, such as a home; this is known as the subject matter of dispute, or SMOD, disregard.
201. Prior to LASPO, in applications for civil representation the SMOD disregard was capped at £100,000. For the purpose of assessing eligibility for ‘controlled work’¹³⁵ and family mediation, however, the entire value of the contested asset was disregarded. LASPO changed this by extending the £100,000 cap to include all forms of legal service, not just civil representation. This had the effect of making it harder to qualify for legal aid in those forms of service.
202. In criminal legal aid an amendment was made to LASPO’s delegated legislation by the *Criminal Legal Aid (Financial Resources) (Amendment) Regulations 2013*¹³⁶ which introduced a maximum disposable income threshold of £37,500 per year for defendants in the Crown Court. If applicants for legal aid are assessed under the disposable income test as having income higher than this amount they are no longer eligible for legal aid. The change was implemented in January 2014.
203. For the three changes to eligibility outlined above, the forthcoming post-implementation review will analyse each change where possible. It is possible to say however that, to the extent that the changes prevent an application for legal aid from succeeding where prior to the change the application would have been successful, eligibility changes will have led to savings to the legal aid scheme. That does not mean they have been value for money overall, however: the additional administrative burden on providers and the LAA from performing the capital test may outweigh the savings made, for example.
204. The final change to legal aid provision of primary relevance to this objective concerns the ‘merits’ test which applicants for legal aid in civil and family proceedings need to satisfy. The merits test establishes whether or not the applicant’s case merits funding through legal aid based on a variety of factors set out in regulations. One factor in many cases is how likely it is for a case to be successful in a court or other final hearing in the proceedings to which the application relates (the ‘prospects of success’ test). Prior to January 2014, in general, applications for legal aid subject to this test had to have at least a 50% chance of success to receive legal aid, though in certain proceedings legal aid could also be provided if the prospects were ‘borderline’.¹³⁷

¹³⁵The term ‘controlled work’ covers services where the responsibility for assessing an applicant’s financial eligibility has been delegated to providers by the LAA. This includes the following forms of civil legal aid services: Legal Help, Help at Court, Help with Family Mediation; Family Mediation and Controlled Legal Representation.

¹³⁶See: <http://www.legislation.gov.uk/ukxi/2013/2791/contents/made>

¹³⁷‘Borderline’ in this context means that it is not possible, by reason of disputed law, fact or expert evidence, to decide that the chance of obtaining a successful outcome is 50% or more or classify the prospects as being lower than 50%.

Legal aid was withdrawn for cases with ‘borderline’ prospects in January 2014 via the *Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2014*.¹³⁸

205. However, following this change, the prospects of success criteria were changed two more times. First, in July 2015, the High Court judged in *I.S. v The Director of Legal Aid Casework and the Lord Chancellor* that ‘the requirement that in all cases there must be an even or greater than even chance of success is unreasonable’. This judgment applied to the prospects of success test across the board and not just in applications under the ECF scheme, which was the subject of the *IS* litigation.¹³⁹ This led to the *Civil Legal Aid (Merits Criteria) (Amendment) (No.2) Regulations 2015*, which allowed for the funding of cases with ‘borderline’ and ‘poor’¹⁴⁰ prospects of success where failure to do so would breach or risk breaching the applicant’s rights under the European Convention of Human Rights or enforceable European Union law.¹⁴¹ This had the effect of partially reversing the change made in January 2014.
206. The High Court gave the Government permission to appeal its judgment in *I.S.*, which the Government did. The Court of Appeal handed down its judgment in May 2016, overturning the High Court judgment and holding that the previous Merits Regulations were lawful.¹⁴² Following this, the Government again amended the merits criteria via the *Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016*.¹⁴³ This change meant that the LAA would be able to fund cases assessed as having borderline prospects (effectively undoing the change made in January 2014 despite it being held to be lawful) and ‘marginal’¹⁴⁴ prospects (effectively increasing entitlement to legal aid beyond that when LASPO Part 1 was implemented). The Government made this change in light of the arguments presented in the two court cases. As a result of the changes, however, the original intention to make £1m worth savings per year by removing funding cases with borderline prospects will not be achieved in the long run, though savings to the legal aid fund will have been made in the intervening period between the January 2014 and May 2016 changes.

Objective 4 – To deliver better value for money for the taxpayer

207. Though most changes to the provision of legal aid brought in by LASPO more closely accord with the previously mentioned objectives, a change made to the Civil Legal Advice (CLA) telephone service was implemented in April 2013 with value for money in mind. The CLA service consists of two tiers – an operator tier and a specialist tier. When a potential client contacts the service, they are connected to the operator tier, where it is determined whether or not they are likely to be eligible for legal aid. If they are likely to be eligible, the client will be forwarded to the specialist tier and will receive remote advice and assistance for their legal problem, subject to more detailed checks as to whether they are eligible and their issue is in scope. Specialist advice can be provided for a variety of legal matters, such as family or housing problems,

¹³⁸ See: <http://www.legislation.gov.uk/ukxi/2014/131/contents/made>

¹³⁹ For the full judgment of the High Court see <http://www.bailii.org/ew/cases/EWHC/Admin/2015/1965.html>

¹⁴⁰ ‘Poor’ in this context meant cases with between a 20% and 49% chance of success.

¹⁴¹ See: <http://www.legislation.gov.uk/ukxi/2015/1571/contents/made>

¹⁴² See: <http://www.bailii.org/ew/cases/EWCA/Civ/2014/1622.html>

¹⁴³ See: <http://www.legislation.gov.uk/ukxi/2016/781/introduction/made>

¹⁴⁴ ‘Marginal’ in this context means that the case has a 45% or more chance of success, but less than a 50% chance, of obtaining a successful outcome.

but LASPO made it mandatory for individuals seeking advice for in-scope debt, discrimination and education issues to receive that advice over the telephone first (this is often referred to as ‘the mandatory gateway’). In non-mandatory categories, like family law, individuals have a choice – they can choose to receive advice over the telephone or with a provider face to face. Clients with debt, discrimination or educational issues can be exempted from the mandatory gateway in certain circumstances, for example if they are a child. By introducing the mandatory gateway the Coalition Government intended to improve value for money on the grounds that it would be cheaper to provide advice over the telephone than face to face.

208. The post-implementation review will examine the creation of the mandatory gateway for telephone advice in debt, discrimination and special educational needs matters.
209. Value for money cuts across all the reforms. There are several levels at which it might be assessed in relation to Part 1 LASPO. The first is at the level of the legal aid fund: i.e. is the statutory framework for legal aid in and of itself good value for money? The second is at the MoJ departmental level: this assessment would entail looking at how the legal aid cuts have affected other parts of the department’s business. This might include, for example, the impact on the family courts of more litigants in person. The third level is the cross-government level: this would require consideration of how the legal aid scheme interacts with the business of other government departments, such as the Department of Work and Pensions and the Department of Health. The fourth and final level is society as a whole: this would require looking at the overall impact of the reforms, on organisations such as charities, advice providers, individuals with a justice problem and so on.
210. Establishing empirically whether or not the reforms have delivered better value for money for the taxpayer at any of these levels is a difficult task. In order to make an assessment, a cost-benefit analysis would need to be conducted. Cost-benefit analysis is a method used to estimate the monetary value of the benefits and costs of a policy or set of policies to determine whether they have had a net positive impact. Making these estimations, and attributing them specifically to the legal aid reforms made by Part 1, is challenging. Part 1 LASPO represented a large and cross-cutting change to the statutory framework governing the provision of legal aid. The changes affected an extensive number of interested parties both directly and indirectly. These interested parties include: individuals with a justice problem, providers of civil legal services holding a legal aid contract, third party service organisations such as the Citizen’s Advice Bureau, the LAA, the MoJ and other Government departments. Whilst it is possible to measure some of the legal aid impacts reliably, such as the change in Government expenditure on legal aid, the wider impacts are much more difficult to measure. To measure the specific impact of the legal aid changes on wider areas would require the legal aid changes to be isolated from other reforms that could have had an impact.
211. The impact of the legal aid changes on court volumes provides a good illustration of the problem of isolating the effect of legal aid reforms from other changes. Following the withdrawal of legal aid from certain types of proceedings, individuals with a relevant legal problem would need to find another way of resolving the issue. This might mean attending court as a litigant in person, paying for private representation, resolving their issue out of court through other means such as mediation, or not resolving their issue at all. The latter two approaches would result in a fall in court volumes, the former two would not. But looking at court volume statistics would not be enough to make judgments about how individuals were resolving their problems in

the absence of legal aid. One would have to consider other factors at play, such as any changes to court fees making court more expensive, and changes made by other Government departments (for example, to the benefits system), that might affect the number of people with a legal problem. Societal trends would also need to be accounted for, such as changes in the divorce rate potentially affecting demand for court services. Isolating the impact of the legal aid changes amidst all this and measuring their impact is very difficult – and that is before encountering additional difficulties associated with interpreting the impact's monetary value.

212. As an indication of the difficulty in accurately estimating wider costs, it is interesting to note that the National Audit Office, in their audit of the changes published in November 2014, were only able to estimate one wider cost (a provisional estimate of the cost impact to the courts from increased litigants in person in private family proceedings). This estimate was primarily based on anecdote rather than detailed analysis and represented a very small fraction (roughly 1%) of the legal aid savings they estimated. The National Audit Office were not able to meaningfully quantify the impact of wider costs outside of the justice system.¹⁴⁵

Establishing the Legal Aid Agency to replace the Legal Services Commission (LSC)

213. The LAA is an executive agency of the MoJ, established in 2013 following the implementation of LASPO. Its main purpose is to commission and administer legal aid services in England and Wales, taking account of the relevant provisions in LASPO and its delegated legislation as well as the policy and strategy set by Ministers within the Department. Before the establishment of the LAA, legal aid services in England and Wales were administered by the LSC, which was a non-departmental public body.
214. As outlined earlier in the memorandum, the objectives for the replacement of the LSC with the LAA can be broadly categorised under the following:
- a. Objectives relating to boundaries between the MoJ and the LAA

Aims included ensuring that case-by-case funding decisions remained at arm's length from Ministers, and that accountability for policy decisions would be improved. It was also thought that legal aid policy would be better aligned with the context of wider justice policy issues.
 - b. Budgetary objectives

Aims included tightening financial control of the legal aid budget, and achieving wider utilisation of shared corporate services between the MoJ and the LAA. Using shared corporate services would be part of a structure fostering more joined up working between the two organisations.

¹⁴⁵See <https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>

Boundaries

215. The Royal Assent Impact Assessment for the abolition of the LSC noted that various reports had been published criticising the LSC, but only cited Sir Ian Magee's review, *Review of Legal Aid Delivery and Governance* which had been commissioned by Ministers under the last Labour Government.¹⁴⁶ This document has been re-assessed to gain an appreciation of the challenges around boundaries with the MoJ in the LSC's operation prior to the changes brought in by LASPO.

216. Sir Ian found that the legal aid policy making process and the roles, responsibilities and accountabilities within the LSC were not clearly defined. There were two sets of teams involved in legal aid policy making, one in the MoJ and one in the LSC. The policy making process, and the roles and responsibilities of each body, varied depending on the particular policy concerned. This division of policy responsibilities was confusing and posed a risk of duplication on some issues and lack of coverage on others.

217. Furthermore, the LSC's framework document was criticised as not providing clarity. In particular:

- a. The framework was unclear as to how the decision-making process worked between the LSC Board and the MoJ – especially with regard to the mechanism through which any urgent problem could be escalated appropriately.
- b. The framework did not define the respective policy responsibilities of the two bodies. It also did not clarify how the MoJ would set the policy direction from which the LSC would develop its approach.
- c. The framework contained no explicit arrangement for how the LSC and the MoJ would work together to meet objectives.

218. Changes were made to this arrangement¹⁴⁷ when setting up the LAA to make lines of accountability for policy making clearer. The Lord Chancellor is ultimately accountable for the LAA's business in Parliament and determines policy on legal aid. This means that legal aid policy is developed in the MoJ with policy makers directly considering proposals within the wider policy context such as changes to the courts system. Those developing legal aid policy in the MoJ consult with the LAA on the impact of policy changes that may affect the operation and delivery of legal aid services, but unlike the LSC the LAA does not write policy. The Lord Chancellor also publishes guidance documents regarding the administration of legal aid.¹⁴⁸

219. The Lord Chancellor does not make determinations in individual legal aid cases. This is the responsibility of the Director of Legal Aid Casework (DLAC), who is a civil

¹⁴⁶ See: <http://webarchive.nationalarchives.gov.uk/20100308101934/http://www.justice.gov.uk/publications/magee-legal-aid.htm>

¹⁴⁷ The new arrangements are laid out in the LAA framework document: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/372206/laa-framework-document.pdf

¹⁴⁸ For example the Lord Chancellor publishes guidance on determining financial eligibility for legal representation in civil and family cases: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332853/legal-aid-guide-to-determining-eligibility-certificated-work.pdf

servant designated by the Lord Chancellor. Section 4(4) of LASPO directs that the Lord Chancellor must not give direction or guidance about the carrying out of the DLAC's functions in relation to an individual legal aid application. It is the Lord Chancellor's responsibility to ensure that the DLAC acts independently of the Lord Chancellor when applying a direction or guidance to an individual case. Under the Access to Justice Act 1999, the Lord Chancellor was permitted to authorise individual legal aid grants following a request by the LSC.

220. This division of responsibility between the Lord Chancellor and DLAC has been tested where funding decisions in individual cases have been subject to judicial review, and this judicial review has led to changes in the policy or guidance underlying legal aid decisions. We would expect action to be taken against two parties in these cases: against the DLAC where the individual case is concerned, and against the Lord Chancellor where the policy or guidance is challenged.

221. This was the case in *I.S. v Director of Legal Aid Casework and the Lord Chancellor*.¹⁴⁹ It was judged that there was an unlawful failure to provide funding, which was the responsibility of the DLAC. However, the case also included the contention that there was systematic failure to comply with the requirements of LASPO in the guidance issued by the Lord Chancellor. Therefore, action was taken against each party, reflecting the division in accountability of the two roles.

222. The above arrangements mean that the LAA objectives relating to boundaries have been met.

- a. Accountability for policy decisions is clearer: policy decisions are ultimately the responsibility of the Lord Chancellor, and the LAA does not write policy (although it may be consulted on service and operation impacts). This means that legal aid policy is formulated in the MoJ, along with policy regarding wider justice issues.
- b. The differences in responsibility of the Lord Chancellor and the DLAC are detailed in the LAA Framework and are adhered to when policy is tested via challenges of individual cases.

Budget

223. In addition to boundary concerns, Sir Ian Magee's review identified issues with the LSC around financial accountability. Financial management arrangements were judged to be insufficiently transparent. It was also noted that establishment of an Executive Agency could increase savings through use of shared services with the MoJ.

224. Control over the LAA's finances was in part established by creating clear lines of financial accountability in the LAA's Framework Document. The Permanent Secretary of the MoJ is accountable to Parliament for the public funds delegated to the LAA, and advises the Lord Chancellor on three areas of concern:

- a. How well the LAA is achieving its strategic objectives, and whether it is delivering value for money;

¹⁴⁹*I.S. v the Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin) and [2016] EWCA Civ 464

- b. How the LAA's strategic aims and objectives contribute to the Department's wider strategy and priorities;
- c. An appropriate budget for the LAA in the light of the MoJ's overall public expenditure priorities.

The Chief Executive of the LAA works with the MoJ to put in place and maintain appropriate management systems that hold all providers accountable for delivering outcomes within agreed resources. This includes agreeing input and impact indicators, and which cost and performance data for the LAA will be made available to ensure transparency.

225. Other factors improving financial control of the legal aid budget include:

- a. The LAA have strengthened their core testing and assurance functions relative to those of the LSC. This has had positive results. In the LSC's last two years, its accounts were qualified on regularity and debt. In contrast, the LAA's accounts have not been qualified.
- b. Executive Agency status has enabled the LAA to work more closely with MoJ analysts. This has helped the LAA to understand the factors that drive costs in the provision of the legal aid system. When consulted on policy decisions, the LAA make sure that these factors are considered.
- c. LAA financial management meet with MoJ financial management each month to discuss current issues, including the latest financial position, risks and opportunities. This enables the LAA to keep up to date with the latest cross-MoJ guidance, ensuring consistency of the accountancy position.
- d. The LAA has strengthened its business partnering model to replicate that of other parts of the MoJ and across the Government more widely. This has provided insight into the financial control of the LAA's administrative budget.
- e. Under the LSC, the meeting to oversee management of the legal aid fund was quarterly, but under the LAA it is monthly. More frequent meetings have led to the availability of better information for decision making, budget management and forecasting.
- f. The publication of the annual report and accounts is now done on a timelier basis. In 2011, the annual report was not published until November, whereas the report for 2014–15 was published first across Whitehall.

226. The establishment of the LAA as an Executive Agency has led to the increased use of shared services between the LAA and the MoJ as compared to the LSC. The LAA uses products from Liberata (a business process services company) for administration, similar to other parts of the MoJ, and shares Human Resources, Legal, Digital, Press, Procurement, Estates and Finance services with the MoJ. The LAA has also moved from the former LSC headquarters in Abbey Orchard to be based in the MoJ Estate in 102 Petty France.

227. These changes have meant that the LAA is able to undertake joined-up working with the MoJ. The LAA is an integral part of MoJ-wide projects, with representation at all levels of larger projects and their concerns considered. The work between LAA and MoJ analysts on use of analysis in policy making has meant that LAA data is

available to those making policy recommendations in the MoJ. The LAA also has monthly representation at a cross-MoJ meeting discussing the management accounts position, which enables the LAA to work with and learn from different areas of the business.

Appendix A: List of delegated legislation relevant to LASPO

Part 1 (Legal Aid)

228. Below is listed the delegated legislation¹⁵⁰ of LASPO Part 1. ‘Parent’ statutory instruments (S.I.s) are listed with amending S.I.s below them. All parent S.I.s came into force on 1 April 2013 unless otherwise specified.

229. Some amending S.I.s amend more than one parent S.I. They are listed below each parent S.I. they amend. The first time they appear, it is noted what date they came into force and how many parent S.I.s they amend.

230. Where S.I.s came into force and were then revoked, this is noted. S.I.s that were revoked before coming into force are not listed.

231. This list does not include amendments made to other legislation as a result of the changes in LASPO Part 1. Neither does it cover transitional provisions under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Consequential, Transitional and Saving Provisions) Regulations 2013 (S.I. 2013/534), as this S.I. was primarily to make transitional arrangements for legal aid cases that had already started before the commencement of LASPO.

Secondary Legislation	Brief description
<p>1. The Civil Legal Aid (Immigration Interviews) (Exceptions) Regulations 2012 (S.I. 2012/2683)</p> <p>Amended by</p> <p>The Civil Legal Aid (Immigration Interviews) (Exceptions) (Amendment) Regulations 2017 (S.I. 2017/192)</p> <ul style="list-style-type: none"> • 16 March 2017 	<p>Sets out where legal aid may be available for individuals attending an asylum application interview.</p> <p>Enables civil legal services to be available for an individual aged 18 or over at an immigration interview, other than a screening interview, where the individual is detained in one of the three specified immigration removal centres.</p>
<p>2. The Civil Legal Aid (Family Relationship) Regulations 2012 (S.I. 2012/2684)</p>	<p>Sets out when matters “arise out of a family relationship” for the purpose of <u>paragraphs 12 and 14 of Part 1 of Schedule 1 to LASPO 2012</u>.</p>
<p>3. The Civil Legal Aid (Prescribed Types of Pollution of the Environment) Regulations 2012 (S.I. 2012/2687)</p>	<p>Details the types of pollution for which civil legal services may be available under <u>paragraph 42(1) of Part 1 of Schedule 1 to LASPO 2012</u>.</p>
<p>4. The Civil Legal Aid (Procedure) Regulations 2012 (S.I. 2012/3098)</p>	<p>Explains the procedures for the making and withdrawal of determinations that an individual qualifies for civil legal services under <u>sections 9 and 10 of LASPO 2012</u>.</p>

¹⁵⁰ Statutory instruments that were revoked before they came into force have not been listed.

Secondary Legislation	Brief description
<p>Amended by</p> <p>The Civil Legal Aid (Procedure) (Amendment) Regulations 2014 (S.I. 2014/814)</p> <ul style="list-style-type: none"> • 22 April 2014 	<p>Adds to and expands the acceptable forms of evidence for establishing domestic violence or risk thereof, for eligibility to legal aid for victims of domestic violence.</p>
<p>The Civil Legal Aid (Procedure, Remuneration and Statutory Charge) (Amendment) Regulations 2014 (S.I. 2014/1824)</p> <ul style="list-style-type: none"> • 1 August 2014 • Amends three SIs 	<p>Ensures that existing procedures for legal aid apply in relation to work carried out under the <u>2014 Standard Civil Contract</u>.</p>
<p>The Civil and Criminal Legal Aid (Amendment) Regulations 2015 (S.I. 2015/1416)</p> <ul style="list-style-type: none"> • 17 July 2015 except for regulations 2(3)(b), 2(5)(b), 3(b) and (c) and 6(3) on 31 July 2015 • Amends five SIs 	<p>Ensures provision of civil legal aid in relation to: Female Genital Mutilation Protection Orders (FGMPOs) introduced by the <u>Serious Crimes Act 2015</u>; victims of trafficking and slavery; and certain proceedings in the youth court.</p> <p>Extends and clarifies evidential requirements in applications regarding trafficking, domestic violence and child abuse cases.</p>
<p>The Civil and Criminal Legal Aid (Amendment) (No. 2) Regulations 2015 (S.I. 2015/1678)</p> <ul style="list-style-type: none"> • Regulations 3, 5, 6, and 8 to 10 on 5 October 2015, and Regulations 2, 4 and 7 on 1 November 2015. • Amends seven SIs [plus the Criminal Legal Aid Remuneration Amendment Regulations 2015/1369, see below] 	<p>Ensures that existing procedures for applications for civil legal aid apply in relation to work carried out under the <u>2015 Standard Civil Contract</u>.</p>
<p>The Civil Legal Aid (Procedure) (Amendment) Regulations 2016 (S.I. 2016/516)</p> <ul style="list-style-type: none"> • 16 May 2016 except for regulation 2(2) on 25 April 2016 	<p>Makes changes to the requirements for evidence of domestic violence for legal aid eligibility:</p> <ul style="list-style-type: none"> • increasing the period of time during which evidence of domestic violence should be provided from 24 to 60 months; and • providing that the evidence requirement will be met if an applicant provides evidence which the DLAC is satisfied shows that they have been, or are, at risk of being a victim of domestic violence in the form of financial abuse.
	<p>Extends the list of evidence that can be accepted to include Violent Offender Orders and FGMPOs.</p>

Secondary Legislation	Brief description
<p>The Civil Legal Aid (Procedure) (Amendment) (No. 2) Regulations 2016 (S.I. 2016/561)</p> <ul style="list-style-type: none"> • 30 May 2016 	<p>Provides that where one party is financially eligible for funding of civil legal services, in the form of a Mediation, Information and Assessment Meeting (MIAM), a determination that the other party also qualifies for legal aid funding for that meeting may be backdated if certain criteria apply.</p>
<p>The Civil Legal Aid (Procedure) (Amendment) Regulations 2017 (S.I. 2017/53)</p> <ul style="list-style-type: none"> • 27 January 2017 	<p>Enables the DLAC to waive one of the requirements about the content of an application for Controlled Work in relation to an inquest in certain circumstances. Where the DLAC has waived that requirement, provides that a determination about Controlled Work may be conditional on the provider entering into an individual case contract with the Lord Chancellor and that the determination may be backdated.</p>
<p>5. The Criminal Legal Aid (General) Regulations 2013 (S.I. 2013/9)</p>	<p>Concerns determinations in relation to whether an individual qualifies for criminal legal aid under <u>Part 1 of LASPO 2012</u>.</p>
<p>Amended by</p>	
<p>The Financial Services Act 2012 (Consequential Amendments and Transitional Provisions) Order 2013 (S.I. 2013/472)</p> <ul style="list-style-type: none"> • 1 April 2013 	<p>Makes amendments consequential to the <u>Financial Services Act 2012</u>, renaming the Financial Services Authority as the Financial Conduct Authority, and transferring a number of functions of the Financial Services Authority to the Prudential Regulation Authority</p>

Secondary Legislation	Brief description
<p>The Criminal Legal Aid (General) (Amendment) Regulations 2013 (S.I.)</p> <ul style="list-style-type: none"> • <i>2 December 2013 except for Regulations 3, 5, 6 and 8 on 27 January 2014</i> 	<p>Implements changes to the scope of criminal legal aid for prison law.</p> <ul style="list-style-type: none"> • Amends the conditions that must be met before advice and assistance for criminal proceedings may be made available to an individual under section 15 of LASPO to restrict the scope of criminal legal aid for cases falling under the prison law category of work. Amendments consequential to this instrument are made in the Criminal Legal Aid (Financial Resources) (Amendment) Regulations 2013 (S.I. 2013/2791) and the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013 (S.I. 2013/2803) – detailed below. • Also makes changes resulting from the introduction of a financial eligibility threshold for criminal legal aid in Crown Court cases. These changes are made in conjunction with the Criminal Legal Aid (Financial Resources) (Amendment) Regulations 2013 (S.I. 2013/2791) and Criminal Legal Aid (Contribution Orders) (Amendment) Regulations 2013 (S.I. 2013/2792) – detailed below.
<p>The Criminal Legal Aid (General) (Amendment) Regulations 2015 (S.I. 2015/326)</p> <ul style="list-style-type: none"> • <i>23 March 2015</i> 	<p>Reflects the introduction of new powers to tackle anti-social behaviour and orders to prevent sexual harm under the <u><i>Anti-Social Behaviour, Crime and Policing Act 2014 (ASBCPA)</i></u>.</p>
<p>The Civil and Criminal Legal Aid (Amendment) Regulations 2015 (S.I. 2015/1416)</p>	<p>Ensures provision of criminal legal aid in relation to proceedings under the <u><i>Female Genital Mutilation Act 2003</i></u> and the <u><i>Modern Slavery Act 2015</i></u>.</p>
<p>The Civil and Criminal Legal Aid (Amendment) (No. 2) Regulations 2015 (S.I. 2015/1678)</p>	<p>Amends this and other regulations (referenced in this Table) governing the provision and remuneration of criminal legal aid as needed, as a result of</p> <ol style="list-style-type: none"> the abolition of committal and transfer proceedings, and the introduction of new case management provisions in the <u><i>Criminal Procedure Rules 2015</i></u>.

Secondary Legislation	Brief description
<p>The Legal Aid, Community Legal Service and Criminal Defence Service (Amendment) Regulations 2015 (S.I. 2015/838)</p> <ul style="list-style-type: none"> • 13 April 2015 except for regulation 7 on 24 March 2015 • Amends five SIs 	<p>Brings proceedings for breach of an injunction under <i>Part 1 of the ASBCPA</i> (against a person under the age of 14) in scope of the criminal legal aid scheme.</p>
<p>The Criminal Legal Aid (Standard Crime Contract) (Amendment) Regulations 2017 (S.I. 2017/311)</p> <ul style="list-style-type: none"> • 1 April 2017 • Amends three SIs 	<p>Amends regulations to refer to the new <i>2017 Standard Crime Contract</i> in place of the <i>2010 Standard Crime Contract</i>.</p> <p>Makes two other minor changes:</p> <ul style="list-style-type: none"> • provides for an upper limit for payment to providers in respect of work done in connection with proceedings that are designated as criminal proceedings in the High Court, Family Court or County Court, and • clarifies the arrangements for payment for advocacy assistance in the Magistrates' Court in relation to new hearings on police bail arising from the <i>Policing and Crime Act 2017</i>.
<p>6. The Civil Legal Aid (Merits Criteria) Regulations 2013 (S.I. 2013/104)</p>	<p>Sets out the criteria which the DLAC must apply when determining whether an individual or legal person qualifies for civil legal services under <i>Part 1 of LASPO 2012</i>.</p>
Amended by	
<p>The Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2013 (S.I. 2013/772)</p> <ul style="list-style-type: none"> • 1 April 2013 	<p>Substitutes <i>regulation 53(b) of the Merits Regulations</i> to give the DLAC the discretion to grant legal aid for public law claims if the DLAC is satisfied that alternative court or tribunal proceedings would not be effective in providing the remedy that the individual requires.</p>
<p>The Civil Legal Aid (Merits Criteria) (Amendment) (No. 3) Regulations 2013 (S.I. 2013/3195)</p> <ul style="list-style-type: none"> • 1 January 2014 	<p>Provides for a specific merits test for a judicial review of a transfer decision within the meaning of <i>Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 ("Dublin III")</i> to bring it in line with the test in <i>Dublin III</i> (applications for international protection lodged in one of the Member States by a third-country national or a stateless person).</p>

Secondary Legislation	Brief description
<p>The Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2014 (S.I. 2014/131)</p> <ul style="list-style-type: none"> • 27 January 2014 	<p>Amends the merits criteria so that, where an application for full representation is subject to an assessment of its prospects of success, it will no longer be eligible for legal aid where it is assessed as having only a “borderline” prospect of success.</p> <p>Ensures that a prospects of success test applies to cases in <u>paragraph 15 of Part 1 of Schedule 1 to LASPO</u> (children who are parties to family proceedings).</p>
<p>The Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2015 (S.I. 2015/1414)</p> <ul style="list-style-type: none"> • 31 July 2015 except for regulation 2(2) on 17 July 2015 	<p>Amends provisions regarding merits criteria in line with amendments to <u>Schedule 1 of LASPO</u> made by the <u>Serious Crimes Act 2015</u> and the <u>Modern Slavery Act 2015</u>:</p> <ul style="list-style-type: none"> • Merits criteria to be applied to FGMPOs same as applies to domestic violence and certain family disputes • Merits criteria to be applied to applications for civil legal services for victims of slavery same as applies to civil legal services for victims of trafficking
<p>The Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015 (S.I. 2015/1571)</p> <ul style="list-style-type: none"> • 27 July 2015 	<p>This S.I. was laid following the High Court judgment and pending the Court of Appeal judgment in the <i>I.S.</i> case (see the section of the memorandum on Legal Issues for discussion).</p>
<p><i>Ceased to have effect with coming into force of S.I. 2016/781 below</i></p>	<p>Ensures that, in cases where an application for full representation is subject to an assessment of its prospects of success, legal aid may be provided for cases assessed as having “borderline” or “poor” prospects of success, where it is necessary to prevent a breach (or risk of breach) of the applicant’s rights under the European Convention on Human Rights or enforceable EU rights.</p> <p>Makes similar substitutions to the prospects of success test for other specified categories of case, for example, applications for full representation in domestic violence cases.</p> <p>This change was later replaced with the coming into force of S.I. 2016/281.</p>

Secondary Legislation	Brief description
<p>The Civil Legal Aid (Merits Criteria and Information about Financial Resources) (Amendment) Regulations 2015 (S.I. 2015/2005)</p> <ul style="list-style-type: none"> • 10 December 2015 • Amends two SIs 	<p>Expands the definition of “private law children case” to include certain proceedings under <u>Section 51A of the Adoption and Children Act 2002</u> (brought into force on 22 April 2014) and provides for the application of specific merits criteria when determining an individual’s eligibility for legal representation in such proceedings.</p>
<p>The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) (Secondary Legislation) Regulations 2016 (S.I. 2016/211)</p> <ul style="list-style-type: none"> • 6 April 2016 • Amends six SIs 	<p>Makes consequential and incidental amendments required as a consequence of the commencement of the <u>Social Services and Well-being (Wales) Act 2014</u>.</p>
<p>The Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016 (S.I. 2016/781)</p> <ul style="list-style-type: none"> • 22 July 2016 	<p>This S.I. was laid following Court of Appeal judgment in the <i>I.S.</i> case and removes the exception introduced by S.I. 2015/1571 (above).</p> <p>In cases where an application for full legal representation is subject to an assessment of its prospects of success, a case must in general have 50% or higher prospects of success to receive legal aid.</p> <p>Adds a new exception for certain such applications, where the prospects of success are “borderline” or just below 50%, and where the case is of overwhelming importance to the individual or of significant wider public interest (the standard prospects of success test).</p> <p>Adds other exceptions where the standard prospects of success test do not apply, such as domestic violence cases or where the substance of the case relates to a breach of human rights.</p>
<p>7. The Civil Legal Aid (Preliminary Proceedings) Regulations 2013 (S.I. 2013/265)</p>	<p>Specifies certain proceedings that are not to be regarded as “preliminary” for the purposes of <u>paragraph 5 of Part 4 of Schedule 1 to LASPO 2012</u> and so are not within the general scope of legal aid.</p>

Secondary Legislation	Brief description
<p>8. The Civil Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/422)</p>	<p>Sets out the remuneration arrangements for civil legal services under <u>Part 1 of LASPO 2012</u>.</p>
<p>Amended by</p>	
<p>The Civil Legal Aid (Remuneration) (Amendment) Regulations 2013 (S.I. 2013/2877)</p> <ul style="list-style-type: none"> • 2 December 2013 	<p>Amends remuneration for civil legal aid services in order to:</p> <ul style="list-style-type: none"> • harmonise the basis of payment to self-employed barristers with those of other advocates in civil non-family cases; • remove the current 35% uplift paid in cases in the Immigration and Asylum Upper Tribunal; and • reduce fees paid to most expert witnesses involved in civil and family cases by 20%.
<p>The Civil Legal Aid (Remuneration) (Amendment) Regulations 2014 (S.I. 2014/7)</p> <ul style="list-style-type: none"> • 1 February 2014 	<p>Set the fee for the payment of remuneration by the Lord Chancellor to persons who provide civil legal services where the provision of those services is governed by the <u>2014 Standard Civil Contract (Welfare Benefits)</u>.</p>
<p>The Civil Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2014 (S.I. 2014/586)</p> <ul style="list-style-type: none"> • 22 April 2014 	<p>Amends remuneration for family legal aid services in order to:</p> <ul style="list-style-type: none"> • provide for consequential changes to the family legal aid schemes as a result of the introduction of the new single Family Court; and • reduce the fixed representation fees paid to solicitors in care proceedings by 10%, including the hourly rates which apply when the escape threshold has been reached in the fixed fee scheme.
<p>The Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 (S.I. 2014/607)</p> <ul style="list-style-type: none"> • 22 April 2014 	<p>Provides that the Lord Chancellor must not pay remuneration in an application for judicial review unless either</p> <p>(a) permission to proceed is given by the court, or</p> <p>(b) permission is neither given nor refused and the Lord Chancellor considers that it is reasonable to pay remuneration; and makes other incidental provisions.</p>
<p>Replaced by S.I. 2015/898 [below]</p>	<p><i>Quashed by High Court order dated 19 March 2015 following judgment in <u>Ben Hoare Bell and others v the Lord Chancellor [2015] EWHC 523 (Admin)</u></i></p>

Secondary Legislation	Brief description
<p>The Civil Legal Aid (Remuneration) (Amendment) (No. 4) Regulations 2014 (S.I. 2014/1389)</p> <ul style="list-style-type: none"> • 31 July 2014 	<p>Introduces the concept of the Advocate's bundle, the mechanism which payment of bundle bolt-on fees to advocates will be linked to in future (rather than the court bundle).</p> <p>Amends the definition of "advocate's meeting" to refer to the updated Practice Direction governing such meetings, now in effect.</p>
<p>The Civil Legal Aid (Procedure, Remuneration and Statutory Charge) (Amendment) Regulations 2014 (S.I. 2014/1824)</p>	<p>Enables remuneration to be paid to persons who provide civil legal services under the <u>2014 Standard Civil Contract</u>.</p>
<p>The Civil and Criminal Legal Aid (Remuneration) (Amendment) Regulations 2015 (S.I. 2015/325)</p> <ul style="list-style-type: none"> • 23 March 2015 • Amends two SIs 	<p>Ensures that the civil legal aid remuneration framework reflects new powers to tackle anti-social behaviour under the ASBCPA.</p>
<p>The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (S.I. 2015/898)</p> <ul style="list-style-type: none"> • 27 March 2015 <p>Replaces S.I. 2014/607, see above.</p>	<p>Provides that legal aid practitioners will be paid for their work in a judicial review case, in addition to the two circumstances mentioned in <u>S.I. 2014/607</u>, in the following three circumstances:</p> <ol style="list-style-type: none"> 1. the defendant withdraws the decision to which the application for judicial review relates and the withdrawal results in the court <ol style="list-style-type: none"> (i) refusing permission to bring judicial review proceedings, or (ii) neither refusing nor giving permission; 2. the court orders an oral hearing to consider whether to give permission to bring judicial review proceedings, or 3. the court orders a rolled-up hearing.
<p>The Civil and Criminal Legal Aid (Amendment) Regulations 2015 (S.I. 2015/1416)</p>	<p>Sets out the framework for remuneration in relation to FGMPOs.</p>
<p>The Civil and Criminal Legal Aid (Amendment) (No. 2) Regulations 2015 (S.I. 2015/1678)</p>	<p>Ensures existing arrangements for remuneration for civil legal services apply in relation to the <u>2015 Standard Civil Contract</u>.</p>
<p>The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) (Secondary Legislation) Regulations 2016 (S.I. 2016/211)</p>	<p>Makes consequential and incidental amendments required as a consequence of the commencement of the <u>Social Services and Well-being (Wales) Act 2014</u>.</p>

Secondary Legislation	Brief description
<p>The Civil Legal Aid (Remuneration and Statutory Charge) (Amendment) Regulations 2016 (S.I. 2016/983)</p> <ul style="list-style-type: none"> • 1 November 2016 • Amends two SIs 	<p>Ensures that Regulations refer to the new <u>2016 Standard Civil Contract (Welfare Benefits)</u>.</p>
<p>9. The Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435)</p> <p>Amended by</p> <p>The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013 (S.I. 2013/2803)</p> <ul style="list-style-type: none"> • 2 December 2013 	<p>Sets out the arrangements for funding and remuneration of advice, assistance and representation for criminal proceedings under <u>Part 1 of LASPO 2012</u>.</p> <p>Amends the Regulations to:</p> <ol style="list-style-type: none"> 1. set out the reduced fees for work undertaken on or after 2 December 2013 in Very High Costs Cases (VHCCs) which are the subject of a 2013 VHCC contract; 2. reduce most expert fees by 20%; and 3. make an amendment to the category of work in which a provider can claim a fee consequential to amendments to be made to the <u>Criminal Legal Aid (General) Regulations (S.I. 2013/9)</u> which will change the scope of criminal legal aid for prison law. <p>This S.I. was made along with the <u>Criminal Defence Service (Very High Cost Cases) (Funding) Order 2013 (S.I. 2013/2804)</u>.</p> <p>S.I. 2013/2804 makes corresponding provisions under the <u>Access to Justice Act 1999</u> framework to set out the reduced fees for work undertaken on or after 2 December 2013 in VHCCs which are the subject of a contract between the Lord Chancellor and members of the Very High Case Contract (Crime) Panel or a 2010 VHCC contract.</p> <p>S.I. 2013/2804 also amends the <u>Criminal Defence Service (Funding) Order 2007 (S.I. 2007/1174)</u> to provide for the fees applicable to advocates who are not members of the 2008 panel.</p>

Secondary Legislation	Brief description
<p>The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014 (S.I. 2014/415)</p> <ul style="list-style-type: none"> • 20 March 2014 	<p>Makes provision for the reduction of litigators' fees by 8.75% in cases in the Crown Court (other than VHCCs), in the Court of Appeal, and in other cases covered by the <u>Standard Crime Contract</u> (such as magistrates' court cases, police station attendance and Parole Board cases).</p>
<p>The Criminal Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2014 (S.I. 2014/2422)</p> <ul style="list-style-type: none"> • 2 October 2014 	<p>Introduces interim payment of fees for litigators in proceedings in the Crown Court.</p> <p>Provides for payment to both litigators and advocates under the graduated fee scheme (instead of a fixed fee) where a trial is cracked, because the prosecution offer no evidence on all counts against a defendant and the judge directs a verdict of not guilty,</p>
<p>The Civil and Criminal Legal Aid (Remuneration) (Amendment) Regulations 2015 (S.I. 2015/325)</p>	<p>Ensures that the criminal legal aid remuneration framework reflects new powers to tackle anti-social behaviour under the ASBCPA.</p>
<p>The Serious Crime Act 2015 (Consequential Amendments) Regulations 2015 (S.I. 2015/800)</p> <ul style="list-style-type: none"> • 3 May 2015 	<p>Amends references in secondary legislation to the offences in <u>sections 48 to 50 of the Sexual Offences Act 2003</u>, so as to replace the descriptors used to refer to those offences in consequence of the changes to the titles of those offences made by <u>section 68 of the Serious Crime Act 2015</u>.</p>
<p>The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2015 (S.I. 2015/882)</p> <ul style="list-style-type: none"> • 5 May 2015 	<p>Amends the regulations in relation to claiming and payment of fees for conducting legally aided criminal advocacy work pursuant to a determination under <u>section 16 of LASPO</u>.</p> <p>Currently, the advocate who is the "instructed advocate" (in most cases the first advocate instructed on the case) can claim and receive most fees payable for advocacy in the case. These regulations make the fee payable in most instances to the "trial advocate" instead (the advocate who attends the main hearing and, in relation to trials, the advocate who attends on the first day).</p>

Secondary Legislation	Brief description
<p>The Criminal Legal Aid (Remuneration etc) (Amendment) Regulations 2015 (S.I. 2015/1369)</p> <ul style="list-style-type: none"> Part 2 on 1 July 2015, and Part 3 on 11 January 2016 Amends four SIs <p><i>This S.I. is itself amended by and revoked in part by:</i> <i>S.I. 2015/1678 and S.I. 2015/2049</i></p> <p><i><u>S.I. 2015/2049</u> is described below.</i></p> <p><u><i>S.I. 2015/2049</i></u></p> <p><i>This instrument delays the coming into force of the amendments due to be effective from 11 January 2016 (Part 3), until 1 April 2016. It also reinstates reference to the <u>2010 Standard Crime Contract</u> in relevant legal aid legislation and makes a correction to the Amending Regulations to ensure that advice and assistance provided by a Duty Lawyer at court is exempt from the means test.</i></p>	<p>Amends the fees payable under the Regulations in two ways:</p> <ul style="list-style-type: none"> reducing fees under the existing scheme introducing new fixed fee schemes. <p>Also contains amendments consequential on the introduction of new contracts for the provision of services made under the following sections of LASPO:</p> <ul style="list-style-type: none"> section 13 (advice and assistance for individuals in custody); section 15 (advice and assistance for criminal proceedings); and section 16 (representation in criminal proceedings). <p>Also makes minor amendments to the regulations for clarification.</p> <p><i>But see S.I. 2016/313 below for revocation regarding new fixed fee schemes.</i></p>
<p>The Civil and Criminal Legal Aid (Amendment) Regulations 2015 (S.I. 2015/1416)</p>	<p>Provides for remuneration of providers conducting criminal proceedings in family courts.</p>
<p>The Civil and Criminal Legal Aid (Amendment) (No. 2) Regulations 2015 (S.I. 2015/1678)</p>	<p>Amends this and other regulations (referenced in this Table) governing the provision and remuneration of criminal legal aid as needed, as a result of</p> <ol style="list-style-type: none"> the abolition of committal and transfer proceedings, and the introduction of new case management provisions in the <u>Criminal Procedure Rules 2015</u>.
<p>The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2016 (S.I. 2016/313)</p> <ul style="list-style-type: none"> 31 March 2016 	<p>Provides that the new fixed fee schemes provided for by <i>S.I. 2015/1369</i> (above) will not come into force. Amends the existing fee schemes by increasing fees for advice, assistance and representation made available under <u>sections 13, 15 and 16 of LASPO</u>.</p>

Secondary Legislation	Brief description
<p>The Criminal Legal Aid (Standard Crime Contract) (Amendment) Regulations 2017 (S.I. 2017/311)</p>	<p>Amends regulations to refer to the new <u>2017 Standard Crime Contract</u> in place of the <u>2010 Standard Crime Contract</u>. Makes two other minor changes:</p> <ul style="list-style-type: none"> • provides for an upper limit for payment to providers in respect of work done in connection with proceedings that are designated as criminal proceedings in the High Court, Family Court or County Court, and • clarifies the arrangements for payment for advocacy assistance in the Magistrates' Court in relation to new hearings on police bail arising from the <u>Policing and Crime Act 2017</u>.
<p>10. The Civil Legal Aid (Connected Matters) Regulations 2013 (S.I. 2013/451)</p>	<p>With reference to <u>paragraph 46 of Part 1 of Schedule 1 to LASPO 2012 (connected matters)</u>, sets out certain additional civil legal services which may be made available in certain circumstances where a person qualifies for civil legal services under another paragraph in <u>Part 1 of Schedule 1</u>.</p>
<p>11. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 6) Order 2013 (S.I. 2013/453) <i>Bringing into operation various provisions of LASPO on 4 March, April 1 and April 8, 2013.</i></p>	<p>Provides for the commencement of the legal aid provisions of LASPO 2012, except <u>section 19(4)</u>.</p>
<p>12. The Legal Aid (Disclosure of Information) Regulations 2013 (S.I. 2013/457)</p>	<p>Allows legal aid providers to disclose information to the LAA notwithstanding the usual rules of privilege regarding the disclosure of client information.</p>
<p>13. The Criminal Legal Aid (Financial Resources) Regulations 2013 (S.I. 2013/471)</p>	<p>Sets out the rules and criteria for determining the financial eligibility of individuals for criminal legal aid under <u>Part 1 of LASPO 2012</u>.</p>
<p>Amended by</p>	
<p>The Armed Forces and Reserve Forces Compensation Scheme (Consequential Provisions: Subordinate Legislation) Order 2013 (S.I. 2013/591)</p> <ul style="list-style-type: none"> • 8 April 2013 • Amends two SIs 	<p>Provides that armed forces independence payments are to be deducted in the calculation of disposable income under Part 2 and gross annual income under Part 3.</p>

Secondary Legislation	Brief description
<p>The Criminal Legal Aid (Financial Resources) (Amendment) Regulations 2013 (S.I. 2013/2791)</p> <ul style="list-style-type: none"> • <i>2 December 2013 except for Regulations 4, 7 to 9 and 13 to 15 which come into force on 27 January 2014</i> 	<p>Makes provision for the introduction of a financial eligibility threshold for applications for legal aid in the Crown Court; and some further minor and consequential amendments</p>
<p>The Care Act 2014 (Consequential Amendments) (Secondary Legislation) Order 2015 (S.I. 2015/643)</p> <ul style="list-style-type: none"> • <i>Regulations state that they come into force on the day on which section 1 of the Care Act 2014 comes into force, which is 1 April 2015</i> • <i>Amends four SIs</i> 	<p>Includes direct payments under the <u>Care Act 2014</u> as direct payments to be deducted in the calculation of disposable income and gross annual income</p>
<p>The Legal Aid, Community Legal Service and Criminal Defence Service (Amendment) Regulations 2015 (S.I. 2015/838)</p>	<p>Provides for the disregard of Special Education Needs direct payments (SEN direct payments) under <u>the Children and Families Act 2014</u> for the purpose of determining eligibility for criminal legal aid</p>
<p>The Criminal Legal Aid (Remuneration etc) (Amendment) Regulations 2015 (S.I. 2015/1369) This S.I. is itself amended by and revoked in part by: <i>S.I. 2015/1678</i> and <i>S.I. 2015/2049</i>. Please see above under <u>Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435)</u></p>	<p>Makes amendments consequential to changes to the <u>Criminal Legal Aid (Remuneration) Regulations (S.I. 2013/435)</u>.</p>
<p>The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) (Secondary Legislation) Regulations 2016 (S.I. 2016/211)</p>	<p>Makes consequential and incidental amendments required as a consequence of the commencement of the <u>Social Services and Well-being (Wales) Act 2014</u>.</p>

Secondary Legislation	Brief description
<p>The Civil and Criminal Legal Aid (Financial Eligibility and Contributions) (Amendment) Regulations 2016 (S.I. 2016/708)</p> <ul style="list-style-type: none"> • 28 July 2016 • Amends four SIs 	<p>Reflects changes to the benefits system made by the <u>Welfare Reform Act 2012</u> and the <u>Welfare Reform (Northern Ireland) Order 2015 (S.I. 2015/2006 (N.I. 1))</u>, which introduced universal credit, adding universal credit to the list of qualifying benefits. Adds payments on account of benefit, personal independence payments, transfer advances for universal credit and payments made by or under the Welsh Independent Living Grant to the list of income payments to be disregarded for the purposes of income calculation tests.</p>
<p>The Criminal Legal Aid (Standard Crime Contract) (Amendment) Regulations 2017 (S.I. 2017/311)</p>	<p>Amends regulations to refer to the new <u>2017 Standard Crime Contract</u> in place of the <u>2010 Standard Crime Contract</u>. Makes two other minor changes:</p> <ul style="list-style-type: none"> • provides for an upper limit for payment to providers in respect of work done in connection with proceedings that are designated as criminal proceedings in the High Court, Family Court or County Court, and • clarifies the arrangements for payment for advocacy assistance in the Magistrates' Court in relation to new hearings on police bail arising from the <u>Policing and Crime Act 2017</u>.
<p>14. The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (S.I. 2013/480)</p>	<p>Sets out the rules and criteria for determining the financial eligibility of individuals for civil legal aid under <u>Part 1 of LASPO 2012</u>.</p>
<p>Amended by</p>	
<p>The Armed Forces and Reserve Forces Compensation Scheme (Consequential Provisions: Subordinate Legislation) Order 2013 (S.I. 2013/591)</p>	<p>Provides that armed forces independence payments (AFIP) are to be disregarded in the calculation of disposable income or gross income under the regulations.</p>
<p>The Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2013 (S.I. 2013/753)</p> <ul style="list-style-type: none"> • 1 April 2013 	<p>Together with <u>S.I. 2013/754</u> (below), makes provision for the financial eligibility rules for cases under the <u>2007 Hague Convention (international recovery of child support and other forms of family maintenance)</u>.</p>
<p>The Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2014 (S.I. 2014/812)</p> <ul style="list-style-type: none"> • 22 April 2014 	<p>Amends the financial eligibility criteria in relation to MIAMs and mediation in relation to the <u>1980 Hague Convention (Convention on the Civil Aspects of International Child Abduction)</u>.</p>

Secondary Legislation	Brief description
<p>The Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) (No. 2) Regulations 2014 (S.I. 2014/2701)</p> <ul style="list-style-type: none"> • 3 November 2014 	<p>Ensures that the financial means test does not apply to the second party in respect of the first mediation session which takes place following a MIAM where the first party is financially eligible for legal aid for such matters.</p> <p>Also ensures that where a person who is undertaking a course of study applies for civil legal aid, child care costs incurred by reason of that study can be deducted from their study-related income for the purposes of determining their financial eligibility.</p>
<p>The Care Act 2014 (Consequential Amendments) (Secondary Legislation) Order 2015 (S.I. 2015/643)</p>	<p>Includes direct payments under the <u>Care Act 2014</u> as direct payments to be disregarded in the calculation of disposable or gross income and disposable capital.</p>
<p>The Legal Aid, Community Legal Service and Criminal Defence Service (Amendment) Regulations 2015 (S.I. 2015/838)</p>	<p>Provides for the disregard of SEN direct payments for the purpose of determining eligibility for civil legal aid.</p>
<p>The Civil and Criminal Legal Aid (Amendment) Regulations 2015 (S.I. 2015/1416)</p>	<p>Provides a discretion to waive financial eligibility requirements for civil legal aid for FGMPs and makes provision regarding calculation of a child applicant's resources. Sets out financial eligibility requirements for immigration matters for victims of slavery.</p>
<p>The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) (Secondary Legislation) Regulations 2016 (S.I. 2016/211)</p> <ul style="list-style-type: none"> • 6 April 2016 	<p>Makes consequential and incidental amendments required as a consequence of the commencement of the <u>Social Services and Well-being (Wales) Act 2014</u>.</p>
<p>The Civil and Criminal Legal Aid (Financial Eligibility and Contributions) (Amendment) Regulations 2016 (S.I. 2016/708)</p>	<p>Reflects changes to the benefits system made by the <u>Welfare Reform Act 2012</u> and the <u>Welfare Reform (Northern Ireland) Order 2015 (S.I. 2015/2006 (N.I. 1))</u>, which introduced universal credit, adding universal credit to the list of qualifying benefits. Adds payments on account of benefit, personal independence payments, transfer advances for universal credit and payments made by or under the Welsh Independent Living Grant to the list of income payments to be disregarded for the purposes of income calculation tests.</p>

Secondary Legislation	Brief description
<p>The Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2017</p> <ul style="list-style-type: none"> • 14 July 2017 	<p>Provides a discretion to disregard support payments received by victims of the Grenfell Tower fire for the purpose of determining eligibility for civil legal aid.</p>
<p>15. The Criminal Legal Aid (Contribution Orders) Regulations 2013 (S.I. 2013/483)</p>	<p>Sets out the liability of individuals who are in receipt of representation under <u>section 16 of LASPO 2012 (representation for criminal proceedings)</u> to make a payment in connection with the provision of such representation, based on an assessment of the financial resources of the individual.</p>
<p>Amended by</p>	
<p>The Criminal Legal Aid (Contribution Orders) (Amendment) Regulations 2013 (S.I. 2013/2792)</p> <ul style="list-style-type: none"> • 27 January 2014 	<p>Makes amendments that are consequential to the introduction of a financial eligibility threshold for applications for legal aid in the Crown Court.</p>
<p>The Care Act 2014 (Consequential Amendments) (Secondary Legislation) Order 2015 (S.I. 2015/643)</p>	<p>Includes direct payments under the <u>Care Act 2014</u> as direct payments to be disregarded in the calculation of gross annual income.</p>
<p>The Criminal Legal Aid (Contribution Orders) (Amendment) Regulations 2015 (S.I. 2015/710)</p> <ul style="list-style-type: none"> • 1 June 2015 	<p>Makes amendments to implement a policy that will enable assets restrained under <u>Part 2 of the Proceeds of Crime Act 2002</u> to be taken into account when calculating criminal legal aid contributions.</p>
<p>The Legal Aid, Community Legal Service and Criminal Defence Service (Amendment) Regulations 2015 (S.I. 2015/838)</p>	<p>Provides for the disregard of SEN direct payments for the purpose of determining liability for contributions towards the cost of legal services.</p>
<p>The Civil and Criminal Legal Aid (Amendment) (No. 2) Regulations 2015 (S.I. 2015/1678)</p>	<p>Amends this and other regulations (referenced in this Table) governing the provision and remuneration of criminal legal aid as needed, as a result of</p> <ol style="list-style-type: none"> the abolition of committal and transfer proceedings, and the introduction of new case management provisions in the <u>Criminal Procedure Rules 2015</u>.
<p>The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) (Secondary Legislation) Regulations 2016 (S.I. 2016/211)</p>	<p>Makes consequential and incidental amendments required as a consequence of the commencement of the <u>Social Services and Well-being (Wales) Act 2014</u>.</p>

Secondary Legislation	Brief description
<p>The Civil and Criminal Legal Aid (Financial Eligibility and Contributions) (Amendment) Regulations 2016 (S.I. 2016/708)</p>	<p>Reflects changes to the benefits system made by the <u>Welfare Reform Act 2012</u> and the <u>Welfare Reform (Northern Ireland) Order 2015 (S.I. 2015/2006 (N.I. 1))</u>, which introduced universal credit, and adds payments on account of benefit, personal independence payments, transfer advances for universal credit and payments made by or under the Welsh Independent Living Grant to the list of income payments to be disregarded for the purposes of income calculation tests.</p>
<p>16. The Civil Legal Aid (Statutory Charge) Regulations 2013 (S.I. 2013/503)</p>	<p>Sets out the statutory charge, which arises over money and other property preserved or recovered by a legally aided party in civil proceedings, and over costs payable to the legally aided party by another party to the proceedings.</p>
<p>Amended by</p>	
<p>The Civil Legal Aid (Procedure, Remuneration and Statutory Charge) (Amendment) Regulations 2014 (S.I. 2014/1824)</p>	<p>Ensures that legal aid-only costs, as described under the <u>2014 Standard Civil Contract</u>, are excepted from the charge on costs payable to a legally aided party, and do not form part of the charge on costs recovered from another party to proceedings.</p>
<p>The Civil and Criminal Legal Aid (Amendment) (No. 2) Regulations 2015 (S.I. 2015/1678)</p>	<p>There exist exceptions from the statutory charge on costs payable to a legally aided individual by another party to proceedings. This S.I. ensures these exceptions apply in relation to the <u>2015 Standard Civil Contract</u>.</p>
<p>The Civil Legal Aid (Remuneration and Statutory Charge) (Amendment) Regulations 2016 (S.I. 2016/983)</p>	<p>Ensures that regulations refer to the new <u>2016 Standard Civil Contract (Welfare Benefits)</u>.</p>
<p>17. The Criminal Legal Aid (Recovery of Defence Costs Orders) Regulations 2013 (S.I. 2013/511)</p>	<p>Where an individual receives legal aid for representation under <u>Part 1 of LASPO 2012</u> in relation to criminal proceedings before any court other than the Magistrates' Court or the Crown Court, this S.I. provides that the court must make a determination requiring the individual to pay some or all of the cost of their representation at the conclusion of proceedings (unless exceptions apply). Such determinations are to be recorded in a document known as a Recovery of Defence Costs Order.</p>

Secondary Legislation	Brief description
Amended by	
The Civil and Criminal Legal Aid (Financial Eligibility and Contributions) (Amendment) Regulations 2016 (S.I. 2016/708) <ul style="list-style-type: none"> • 28 July 2016 	Includes benefits under the <u>Welfare Reform (Northern Ireland) Order 2015 (S.I. 2015/2006 (N.I. 1))</u> as a qualifying benefit to entitle a person to be excepted from a recovery of defence costs determination by court.
18. The Legal Aid (Financial Resources and Payment for Services) (Legal Persons) Regulations 2013 (S.I. 2013/512)	Sets out the rules and criteria for determining the financial eligibility of legal persons for civil and criminal legal aid under <u>Part 1 of LASPO 2012</u> .
Amended by	
The Legal Aid (Financial Resources and Payment for Services) (Legal Persons) (Amendment) Regulations 2013 (S.I. 2013/754) <ul style="list-style-type: none"> • 1 April 2013 	Together with <i>S.I. 2013/753 (above)</i> , makes provision for the financial eligibility rules for cases under the <u>2007 Hague Convention (international recovery of child support and other forms of family maintenance)</u> .
19. The Civil Legal Aid (Costs) Regulations 2013 (S.I. 2013/611)	Concerns costs orders in civil proceedings in favour of or against a legally aided party and, in certain circumstances, against the Lord Chancellor.
20. The Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 (S.I. 2013/614)	Provides for determinations by a court under <u>Part 1 of LASPO 2012</u> in relation to whether an individual qualifies for criminal legal aid, and in relation to the right under <u>section 27(4)</u> of the Act of an individual who qualifies for legal aid to select a representative of their own choice.
Amended by	
Financial Services Act 2012 (Consequential Amendments and Transitional Provisions) (No 3) Order 2013 (SI 2013/1765) <ul style="list-style-type: none"> • 1 September 2013 	Makes consequential amendments in connection with the <u>Financial Services Act 2012</u>
The Criminal Legal Aid (Determinations by a Court and Choice of Representative) (Amendment) Regulations 2013 (S.I. 2013/2814) <ul style="list-style-type: none"> • 2 December 2013 	Amends the criteria for allowing “enhanced representation” (selecting a QC or multiple advocates to represent a defendant) and specifies the circumstances in which the consent of the presiding judge of the circuit is necessary before allowing enhanced representation

Secondary Legislation	Brief description
<p>The Civil and Criminal Legal Aid (Amendment) (No. 2) Regulations 2015 (S.I. 2015/1678)</p>	<p>Amends this and other regulations (referenced in this Table) governing the provision and remuneration of criminal legal aid as needed, as a result of</p> <ul style="list-style-type: none"> (a) the abolition of committal and transfer proceedings, and (b) the introduction of new case management provisions in the <u>Criminal Procedure Rules 2015</u>.
<p>21. The Legal Aid (Information about Financial Resources) Regulations 2013 (S.I. 2013/628)</p>	<p>Concerns information that the DLAC may request from certain Northern Irish Departments, and the Commissioners for Her Majesty’s Revenue and Customs, for the purposes of facilitating a determination about an individual’s financial resources for the purpose of legal aid.</p>
<p>Amended by</p>	
<p>The Legal Aid (Information about Financial Resources) (Amendment) Regulations 2013 (S.I. 2013/2726)</p> <ul style="list-style-type: none"> • 24 October 2013 	<p>Enables the DLAC to request information from the Secretary of State for Transport in order to facilitate a determination for the purpose of legal aid that a relevant individual’s financial resources include an interest in a motor vehicle. Also adds Armed Forces Independence Payment (AFIP) to the list of prescribed benefits regarding which the DLAC may request information.</p>
<p>The Legal Aid (Information about Financial Resources) (Amendment) Regulations 2014 (S.I. 2014/901)</p> <ul style="list-style-type: none"> • 2 April 2014 	<p>Includes a maternity allowance for participating wives or civil partners of self-employed earners as a prescribed benefit regarding which DLAC may request information</p>
<p>The Care Act 2014 (Consequential Amendments) (Secondary Legislation) Order 2015 (S.I. 2015/643)</p>	<p>Includes direct payments under the Care Act 2014 as prescribed benefits regarding which information may be requested in order to determine eligibility for legal aid</p>
<p>The Legal Aid, Community Legal Service and Criminal Defence Service (Amendment) Regulations 2015 (S.I. 2015/838)</p>	<p>This was intended to enable the DLAC to request information about SEN direct payments, and direct payments made under regulations under <u>s.17A of the Children Act 1989</u> for the provision of services to children with disabilities (“Children Act direct payments”), in order to determine financial eligibility for legal aid.</p> <p><i>The amendment regulation to Regulation 11 was revoked by S.I. 2015/1408 (below) as it was made using incorrect Parliamentary procedure.</i></p>

Secondary Legislation	Brief description
<p>The Legal Aid (Information about Financial Resources) (Amendment) Regulations 2015 (S.I. 2015/1408)</p> <ul style="list-style-type: none"> • 26 June 2015 	<p>Corrects the error made by the amendment regulations (S.I. 2015/838, above) in Regulation 11 and removes SEN and Children Act direct payments from the direct payments for which information can be sought.</p>
<p>The Pensions Act 2014 (Consequential, Supplementary and Incidental Amendments) Order 2015 (SI 2015/1985)</p> <ul style="list-style-type: none"> • 6 April 2016 immediately after the State Pensions Regulations 2015, except for articles 1, 9(1), (6) and (7) on 4 January 2016 	<p>Includes the new state pension under the <u>Pensions Act 2014</u> as a prescribed benefit regarding which the DLAC may request information</p>
<p>The Civil Legal Aid (Merits Criteria and Information about Financial Resources) (Amendment) Regulations 2015 (S.I. 2015/2005)</p> <ul style="list-style-type: none"> • 10 December 2015 	<p>Enables the DLAC to request information about SEN direct payments, and direct payments made under regulations under <u>s.17A of the Children Act 1989</u> for the provision of services to children with disabilities (“Children Act direct payments”), in order to determine financial eligibility for legal aid.</p> <p><i>Replicates the amendment made by S.I. 2015/838 (above), which was made erroneously by negative Parliamentary process and subsequently revoked by S.I. 2015/1408.</i></p>
<p>The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) (Secondary Legislation) Regulations 2016 (S.I. 2016/211)</p>	<p>Makes consequential and incidental amendments required as a consequence of the commencement of the <u>Social Services and Well-being (Wales) Act 2014</u></p>

Secondary Legislation	Brief description
<p>22. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2013 (S.I. 2013/748)</p>	<p>Amends <u>Schedule 1 to LASPO 2012</u> to:</p> <ul style="list-style-type: none"> • allow for civil legal aid to be provided for appeals on a point of law relating to council tax reduction schemes; • amend the definition of domestic violence in <u>paragraphs 12, 28 and 29 of Part 1 of Schedule 1 to LASPO 2012</u> so that it is consistent with the cross-government definition; • allow for civil legal aid to be provided in relation to applications under the Convention on the International Recovery of Child Support and other forms of family maintenance under the <u>2007 Hague Convention</u>; & • ensure that legal aid for judicial review is available only as set out in <u>paragraph 19 of Part 1 of Schedule 1 to LASPO 2012</u>.
<p>23. The Criminal Legal Aid (Motor Vehicle Orders) Regulations 2013 (S.I. 2013/1686)</p> <ul style="list-style-type: none"> • 30 July 2013 	<p>Authorises a court to make motor vehicle orders in respect of an individual for the purpose of enabling certain sums required to be paid under the <u>Criminal Legal Aid (Contribution Orders) Regulations 2013 (S.I. 2013/483)</u> to be recovered from the individual, where those sums are overdue.</p>
<p>24. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Community Care) Regulations 2014 (S.I. 2014/1562)</p> <ul style="list-style-type: none"> • 7 July 2014 	<p>Ensures that civil legal services may be provided in relation to community care services which are provided or arranged by clinical commissioning groups, as established pursuant to the <u>National Health Service Act 2006</u> as amended by the <u>Health and Social Care Act 2012</u>.</p>
<p>25. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) (Advocacy Exceptions) Order 2014 (S.I. 2014/3305)</p> <ul style="list-style-type: none"> • 16 December 2014 	<p>Amends <u>Schedule 1 to LASPO 2012</u> to maintain the availability of civil legal aid for advocacy in certain proceedings in line with recent changes to the law:</p> <ul style="list-style-type: none"> • New injunctions replacing Anti-Social Behaviour Orders and Anti-Social Behaviour Injunctions under ASBCPA • Appeal from a parenting order under ASBCPA • Injunctions for gang-related violence and related appeals under the Crime and Court Act 2013 and • Proceedings in the Upper Tribunal for children and young persons with special educational needs under the <u>Children and Families Act 2014</u>.

Post-Legislative Memorandum: Part 2 LASPO, Litigation Funding and Costs

Introduction

This section considers the provisions in Part 2 on civil litigation funding and costs (sections 44–48 and 55–60) which implement Lord Justice Jackson’s recommendations. There are other, unrelated, provisions which are considered briefly at the end of section A below.

Objectives

The main objective of Part 2 was to control the costs of civil litigation. This was done by implementing reforms to the arrangements for civil litigation funding and costs recommended by Lord Justice Jackson in his *Review of Civil Litigation Costs: Final Report*,¹⁵¹ published in 2010.

A. Background

1. Lord Justice Jackson, a Court of Appeal judge, was commissioned to undertake a review of civil litigation costs by the then Master of the Rolls, Sir Anthony Clarke. His terms of reference set his objective: “To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost”.¹⁵²
2. He undertook a year-long investigation, publishing a preliminary report in May 2009 and completing his final report in December. It was published in January 2010. His 550 page report contained 109 recommendations.
3. Lord Justice Jackson found that the costs of civil litigation were too high. He found that “[c]onditional fee agreements (“CFAs”), of which “no win, no fee” agreements are the most common species, have been the major contributor to disproportionate costs in civil litigation in England and Wales.”¹⁵³ CFAs are particularly used in damages cases, of which personal injury is the largest category. Under the then provisions,¹⁵⁴ the claimant was effectively at no financial risk, the risk being borne by the claimant’s lawyer and the defendant. On the other hand, a losing defendant had to pay not only the claimant’s base legal costs (as is normal in litigation), but also the CFA success fee and the claimant’s ‘after the event’ (ATE) insurance premium, both of which were recoverable from the losing side and which can add substantially to costs.
4. He recommended a package of measures, including: the abolition of the recoverability of CFA success fees and ATE insurance premiums; a 10% increase in general damages for pain, suffering and loss of amenity; and a ban on referral fees in

¹⁵¹<https://www.judiciary.gov.uk/wp-content/uploads/.../jackson-final-report-140110.pdf>

¹⁵²Review, para 1.2, page 2.

¹⁵³Review, para 2.1, p. xvi

¹⁵⁴Under the Access to Justice Act 1999, which amended the Courts and Legal Services Act 1990

respect of personal injury litigation; and the introduction of qualified one way costs shifting (QOCS) in personal injury litigation. All of these were implemented for personal injury litigation in Part 2 of LASPO and accompanying measures. He foresaw that, if those measures were implemented, there would be five consequences:¹⁵⁵

- Most personal injury claimants would recover more damages than they did then, although some would recover less;
- Claimants would have a financial interest in the level of costs which were being incurred on their behalf;
- Claimant solicitors would still be able to make a reasonable profit;
- Costs payable to claimant solicitors by liability insurers would be significantly reduced; and
- Costs would also become more proportionate because defendants would no longer have to pay success fees and ATE insurance premiums.

5. The Coalition Government commenced a full consultation in November 2010 on implementing Lord Justice Jackson's main recommendations for the reform of funding arrangements.¹⁵⁶ The then Lord Chancellor and Secretary of State for Justice, Kenneth Clarke QC MP, summarised the intention of the proposals:¹⁵⁷

"The Government is very grateful to Sir Rupert Jackson, a judge of the Court of Appeal, for his comprehensive and cogently argued Review of Civil Litigation Costs: Final Report. This report marks a turning point in the recent history of civil litigation becoming ever more costly. He argues convincingly that disproportionate costs – as we have now – do not advance access to justice; as he puts it: "achieving proportionate costs and promoting access to justice go hand in hand."

This consultation paper seeks views on implementing Sir Rupert's recommendations on reforming 'no win no fee' conditional fee agreements (CFAs), and some other recommendations on litigation funding and costs. We believe that the key recommendations – and in particular those on the reform of CFAs – would, if implemented, lead to a significant reduction in legal costs. His report is therefore particularly timely.

Civil litigation funding and costs may seem a somewhat technical subject, but it is important nonetheless. It is about how we ensure fairness and proper access to justice in civil cases for all parties, especially in the context of changes to legal aid that we are proposing. We are therefore seeking to strike the right balance between access to justice for those who need it with ensuring that costs are proportionate and that unnecessary or frivolous cases are deterred. These are difficult issues which have been grappled with for some time, as all who are familiar with this area of law know. But it is the Government's belief that these recommendations in this major report mark the way forward.

¹⁵⁵Review, para 2.8, p. xviii

¹⁵⁶<http://webarchive.nationalarchives.gov.uk/20110601185159/http://www.justice.gov.uk/consultations/566.htm>

¹⁵⁷ibid pp3-4

Sir Rupert's proposals on the reform of CFAs are primarily directed at reducing the disproportionate costs of civil litigation – in particular for defendants. Given that many claims are brought against central and local government under CFAs, the additional costs of the current arrangements – in the form of recoverable success fees and after the event insurance premiums – impose a significant costs burden on the taxpayer. Implementing Sir Rupert's proposals will help to maintain access to justice for claimants and defendants but will also deliver significant costs savings for government. With the current financial position, we are committed to achieving costs savings wherever possible."

6. The consultation lasted between 15 November 2010 and 14 February 2011 (running alongside the legal aid consultation which led to the reforms in Part 1 of LASPO). Over 600 formal responses were received. The Government published its response on 29 March 2011,¹⁵⁸ with the Lord Chancellor and Secretary of State for Justice summarising the effect of the proposals:¹⁵⁹

"Under our proposals, meritorious claims will be resolved at more proportionate cost, while unnecessary or avoidable claims will be deterred from progressing to court. This is sound common sense. It will help businesses and other defendants who have to spend too much time and money dealing with avoidable litigation, actual or threatened. Substantial unnecessary costs will be removed from the system, leading to significant savings for defendants."

7. The proposals which required primary legislation were taken forward in Part 2 LASPO. At Second Reading in the House of Lords on 21 November 2011, the Justice Minister, Lord McNally, said this:

"Part 2 implements reforms in civil litigation funding and costs, based on Lord Justice Jackson's recommendations. No-win no-fee conditional fee agreements were first introduced in England and Wales by my noble and learned friend Lord Mackay of Clashfern. Most observers believe that they succeeded in their goal of improving access to justice for those who were neither poor enough to qualify for legal aid nor wealthy enough to afford the costs of privately funded litigation. However, later changes tilted the balance much too far in favour of claimants. The Master of the Rolls, the noble and learned Lord, Lord Neuberger, said to the Times only last week: "When you see the level of costs in some cases ... it is clear that the system is unsatisfactory, some would say worse than unsatisfactory, and something needs to be done about it".

This Bill intends to do something about it by ending the recoverability from losing parties of success fees and insurance premiums that drive up legal costs. This will be balanced against a 10 per cent increase in general damages for claimants. By taking these steps, we will restore common sense to the system and stop the perverse situation in which fear of excessive costs often forces defendants to settle, even when they know that they are in the right. This marks a return to the kind of arrangement that prevailed when the system was first set up by my noble and learned friend Lord Mackay in the mid-1990s."

¹⁵⁸<https://www.gov.uk/government/publications/reforming-civil-litigation-funding-and-costs-in-england-and-wales-government-response>

¹⁵⁹*ibid*, p. 4

8. The relevant ‘Jackson’ provisions in Part 2 came into effect in England and Wales on 1 April 2013 through changes to the Civil Procedure Rules and new regulations and associated measures (as set out in B, below).
9. Although the reforms were implemented generally in April 2013, there were a number of exceptions. The reforms to the recoverability of CFA success fees and ATE insurance premiums were delayed for the following proceedings:
 - Proceedings in respect of and relating to insolvency proceedings. The CFA and ATE reforms came into effect from April 2016;
 - Publication and privacy proceeding (the pre-April 2013 arrangements – recoverable success fee and recoverable insurance premium – continue); and
 - Diffuse mesothelioma claims (the pre-April 2013 arrangements continue).

B. Summary of key changes in Part 2 of LASPO

10. The scheme of the civil litigation funding and costs provisions in Part 2 LASPO is provided by amendments to relevant provisions in the Courts and Legal Services Act 1990 (“CLSA”) and the Access to Justice Act 1999 (“AJA”).
11. The provisions in Part 2 LASPO fundamentally reformed the way in which CFAs work. CFA claimants regained an interest in the costs which are incurred on their behalf and the way their case is conducted, as they became liable for their own lawyer’s success fee.¹⁶⁰ It remains open for claimants to take out ATE insurance if they wish, but they are responsible for paying their own premiums, which again encourages them to take responsibility for the costs of their case. The LASPO reforms were intended to encourage defendants to defend cases where they are in the right, rather than settle them for fear of the costs should the claim succeed.
12. Claimants’ damages were protected by a number of measures which were implemented alongside the LASPO reforms, including:
 - a. a 10% increase in damages for pain, suffering and loss of amenity;¹⁶¹ and;
 - b. in personal injury cases:
 - i. the introduction of qualified one way costs shifting (QOCS), to protect the claimant’s liability for adverse costs in losing cases; and
 - ii. a cap on the amount the lawyer can charge as a success fee.
13. Part 2 (sections 56–60) also banned referral fees in personal injury cases, which helped to tackle the perception of a compensation culture, as lawyers and claims management companies are no longer able to pay for details of potential claimants.

“No win no fee” conditional fee agreements (CFAs): section 44

14. CFAs are a means of funding litigation, usually entered into by claimants, where the lawyer agrees not to take a fee if the claim fails. If the claim is successful, the lawyer

¹⁶⁰As they had been from the introduction of CFAs in England and Wales in 1995, until the Access to Justice Act 1999 provisions came into force in April 2000.

¹⁶¹The 10% increase was effected through the Court of Appeal decisions in *Simmons v Castle* [2012] EWCA Civ 1039 & [2012] EWCA Civ 1288

can charge an uplift (known as a success fee) in addition to the base costs. They are typically used in damages cases, in particular personal injury claims.

15. **Before** the implementation of LASPO, the success fee that might be charged (and recovered from the losing side) under a CFA was capped at a maximum of 100% of base costs, although the cap was fixed at a lower level in certain types of personal injury cases that settle before going to trial. The success fee was payable by the losing defendant, in addition to the base costs.
16. **After** the implementation of LASPO, in consequence of amendments made by **section 44** of the Act to section 58 and 58A of the CSLA, the success fee (if one is charged) will be payable by the successful claimant. This means that claimants pay their lawyer's success fee out of the damages awarded to them. In personal injury cases, the amount that a lawyer can charge is capped at 25% of non-pecuniary damages, such as those awarded for pain, suffering and loss of amenity, and past loss. Damages awarded for future care and loss are protected. The 25% cap is inclusive of VAT.

Damages-based agreements: section 45

17. Under a damages-based agreement¹⁶² (DBA), lawyers are not paid if they lose a case but may take a percentage of the damages awarded to their client as their fee if the case is successful. DBAs are similar to CFAs in that they are each 'no win no fee' agreements, but in a DBA the lawyer's payment is linked to the damages awarded, whereas in a CFA it is linked to the costs recovered.
18. **Before** the implementation of LASPO, lawyers were not permitted to act under DBAs in civil litigation. However, solicitors were permitted to act under DBAs in 'non-contentious' business, including cases before tribunals. The use of DBAs developed in tribunals over time and they became commonly used in Employment Tribunals in particular, and also in Tax Tribunal cases. The use of DBAs in Employment Tribunals were subject to the Damages-Based Agreements Regulations 2010 made under the Courts and Legal Services Act 1990 (as amended) which specifically regulated the use of DBAs in employment cases. Section 45 of LASPO amends that legislation so that DBAs can be used and regulated in civil litigation.
19. **After** the implementation of Part 2 of the Act, the amendments made by section 45 to section 58AA of the CLSA allow solicitors and barristers to use DBAs in civil litigation. The amount that lawyers can take from the damages in personal injury cases is capped at 25% of non-pecuniary damages, such as those awarded for pain, suffering and loss of amenity, and past loss. As with CFAs, damages awarded for future care and loss are protected and cannot be used towards the lawyer's fee. Successful claimants on DBAs will recover their base costs (the lawyer's hourly rate fee and disbursements) from defendants in the usual way and the claimant will pay any shortfall between the costs recovered and the DBA fee agreed with the lawyer.

¹⁶²The term DBA was first used in s. 154 of the Coroners and Justice Act 2009 (amending the CLSA) which controlled their use in employment cases. The LASPO provisions expanded their use to all areas of civil litigation. DBAs were previously sometimes referred to as 'contingency fees'.

After the event (ATE) insurance: sections 46 to 47

20. ATE insurance protects the insured (generally a claimant) from having to pay certain legal costs. It is a type of insurance taken out after the decision is made to begin legal proceedings under CFAs, with the premium typically increasing as the case progresses and the costs incurred increase. ATE insurers undertake to pay the defendant's costs in the event that the claimant loses the case. They may also cover the claimant's disbursement costs and other expenses. The premium is typically not paid by claimants, but is recovered from defendants in cases which defendants lose.
21. **Before** implementation, the ATE insurance premium was payable by the losing defendant. The premium was not usually charged when a claimant lost the case, which meant that premiums were higher because an element of self-insurance was built into the premium price – premiums charged on successful cases must be high enough to cover the costs that were paid in unsuccessful cases where a premium was not charged.
22. **After** implementation, in consequence of amendments made by **section 46** of LASPO to the AJA and CLSA, any ATE insurance premium would be payable by the successful claimant. Premiums are likely to be charged, but also to be lower because the element of self-insurance is no longer present. Qualified one way cost shifting has been introduced in personal injury cases which means that claimants will generally not have to pay the defendant's costs if the claim fails, and the need for ATE insurance in such cases is reduced or removed.
23. There is also a limited exception, for clinical negligence cases only, where ATE insurance premiums covering the cost of expert reports which relate to causation and liability are still recoverable.¹⁶³ This means that claimants do not have to pay upfront for the costs of reports relating to causation and liability. Such reports are important to establish whether there is a case for bringing proceedings.
24. As part of these changes, in consequence of **section 47** of LASPO, and amendment to section 30 of the AJA, membership organisations such as trade unions are liable for their own self-insurance costs. Previously, losing defendants had to pay these costs.

Mesothelioma claims: section 48

25. There was much concern in Parliament, and in particular in the House of Lords, about the application of the CFA/ATE reforms to mesothelioma claims. **Section 48** provides that the reforms should not apply to mesothelioma claims until the Lord Chancellor has published 'a review of the likely effect of those sections in relation to such proceedings': see D, legal issues, below.

Offers to settle: section 55

26. The policy intention was to encourage further the early settlement of claims. Part 36 of the Civil Procedure Rules sets out a process of sanctions and rewards for the making and acceptance of offers to settle; this process is used particularly in personal injury damages cases. Lord Justice Jackson recommended an additional amount (10% of damages) to be paid by a defendant who does not accept a claimant's offer

¹⁶³See C(i)(d), below

to settle where the court gives judgment for the claimant that is at least as advantageous as the claimant's offer. Section 55 provides for rules to be made to achieve this. These provisions are intended to encourage claimants to make, and defendants to accept, early reasonable offers. This is intended to reduce the time taken for cases to settle and consequently help to lower overall costs.

Referral fees: sections 56 to 60

27. Referral fees are fees paid by solicitors or others to third parties who 'refer' business (such as potential claims) to them. Many personal injury claims were referred to solicitors by claims management companies who advertise for claimants to come forward. However, others such as insurers or repair garages were also involved. Referral fees were allowed to be paid by solicitors between 2004, when the professional rules changed and the then ban was lifted by the Law Society, and the implementation of LASPO with its ban on the payment of referral fees in personal injury cases.
28. **Before** implementation, referral fees could be paid by solicitors and others (although barristers are prohibited from using referral fees by their professional rules) who may have interest in a case, to parties who pass on details of possible claims (subject to data protection laws) or who might be instructed in connection with a claim (for example a medical expert instructed by a solicitor). There were no legislative controls on referral fees, which were estimated to be around £600–800 per case.
29. **After** implementation, the payment of referral fees is banned in personal injury cases. It is for regulators (for example, the Solicitors Regulation Authority, the Bar Standards Board, the Claims Management Regulator,¹⁶⁴ and the Financial Services Authority for insurers) to enforce the ban. The prohibition can, by regulations made by the Lord Chancellor, be extended to other types of claim and legal services providers.

Other measures (not in LASPO)

30. These statutory reforms were accompanied by a large number of other reforms, such as case and costs management reforms that were taken forward by the judiciary, involving significant reforms to the Civil Procedure Rules (CPR). A significant change to the CPR was the introduction of **QOCS (qualified one way cost shifting)**, which has so far been implemented in personal injury cases (including clinical negligence) only.¹⁶⁵ QOCS means that claimants are protected from paying the other side's costs if the case is lost. This general protection is subject to the claimant's behaviour (the protection is lost if the claim is 'fundamentally dishonest'), and their acceptance of appropriate offers to settle. There is no means test for QOCS in personal injury cases as a matter of practicality, but it has been accepted that any extension of QOCS to other types of litigations may involve means testing.

¹⁶⁴And, since 2014, the Chartered Institute of Legal Executives

¹⁶⁵In September 2013 the Government consulted on extending QOCS to defamation and privacy proceedings, having commissioned the Civil Justice Council to recommend a potential way forward: <https://consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims/>

The Government has not pursued those reforms, so the pre-LASPO arrangements remain in force for defamation and privacy proceedings.

31. **A 10% increase in general damages for pain, suffering and loss of amenity.** This applies to all tort cases, however funded, to which the LASPO reforms apply. Aside from a general increase in damages, it helps claimants finance a success fee or ATE insurance premium, if necessary.
32. **Proportionality** – Lord Justice Jackson’s proposed rule on proportionality has been implemented. The test is intended to control the costs of activity that is clearly disproportionate to the value, complexity and importance of the claim.
33. In addition, there are other provisions in Part 2 LASPO:
- Sections 49 to 54 amend the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 to give the court powers to make orders in divorce proceedings, and corresponding civil partnership proceedings, for payments to be made by one party to another for the purposes of paying for legal services.
 - Section 61 amends the Legal Services Act 2007 to enable the Supreme Court to make costs orders in civil proceedings where a successful party is represented *pro bono*, with the monies recovered going to a prescribed charity.
 - Section 62 gives force to Schedules 7 and 8 of the Act. These provisions amend the Proceeds of Crime Act 2002 by restricting the powers of the courts to order the payment from central funds of costs incurred by defendants, witnesses and appellants in criminal proceedings, particularly in respect of legal costs (ie lawyers’ fees, charges and disbursements including expert witness costs). Similar restrictions are applied to costs incurred by persons making representations to the court in the course of references made by the Attorney General; persons discharged following extradition proceedings in England and Wales; and persons involved in proceedings before the Court Martial Appeals Court. The restrictions do not apply in relation to costs incurred in proceedings in the Supreme Court.

Implementation

34. The sections in Part 2 LASPO that relate to civil litigation funding and costs¹⁶⁶ came into force on 1 April 2013, but the CFA and ATE insurance reforms have yet to be commenced in certain limited categories of proceedings (i.e. defamation and privacy, and mesothelioma claims).

Secondary Legislation

35. **The following statutory instruments came into force at the same time as the LASPO provisions were implemented on 1 April 2013:**
- a. Conditional Fee Agreements Order 2013 (SI 2013/689) – prescribes the requirements (in addition to those set out in sections 58 and 58A of the CLSA as amended by LASPO) with which a conditional fee agreement (CFA) providing for a success fee must comply in order to be enforceable. The Order specifies both the CFAs which may provide for a success fee (article 2) and the maximum amount that may be charged by way of a success fee (article 3). In particular, it caps the success fee that may be paid in personal injury claims (article 5). It also makes transitional

¹⁶⁶Specifically, sections 44-48 and 55-60

and saving provisions (article 6) and it revokes the Conditional Fee Agreements Order 2000 (SI 2000/823).

b. Damages-Based Agreements Regulations 2013 (SI 2013/609) – prescribe the requirements (in addition to those set out in section 58AA(4) of the Courts and Legal Services Act 1990) with which an agreement between a client and a representative must comply in order to be an enforceable damages-based agreement, both in civil proceedings and employment matters. The maximum proportion of damages which may be taken as a payment is prescribed as follows: 25% in personal injury cases (excluding damages for future care and loss); 35% in employment cases, and 50% in all other cases.

c. Offers to Settle in Civil Proceedings Order 2013 (SI 2013/93) – specifies the additional amounts, in both monetary and non-monetary claims, that a court might order a defendant to pay a claimant where the defendant does not accept the claimant's offer to settle, and the court subsequently gives judgment for the claimant which is at least as advantageous to the claimant as the claimant's offer.

d. Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations 2013 (SI 2013/739) – revoke and replace the defective Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013 (SI 2013/92). They make provision, in a claim in excess of £1,000 in damages, to enable successful parties to recover, by way of costs, after the event insurance premiums for expert reports in clinical negligence cases from losing parties, and limits recoverability of those premiums to the costs of insuring against the risk of incurring liability to pay for reports which relate to liability or causation in those cases.

e. Amendments to the Civil Procedure Rules – including, for example, Part 44, in relation to Qualified One Way Costs Shifting (QOCS) in personal injury claims.

36. The following secondary legislation was implemented together with the coming into force of the statutory provisions on 17 December 2014:

Referral Fees (Regulators and Regulated Persons) Regulations 2014 (SI 2014/3235) – secondary legislation made under the provisions of the Legal Services Act 2007 brought practitioners authorised to conduct litigation and regulated by the Chartered Institute of Legal Executives (CILEx) within the scope of section 56 of LASPO which implements the ban on the payment and receipt of referral fees in personal injury claims. This Order therefore applied the ban to these practitioners by adding CILEx to the list of relevant regulators and specifying the group of practitioners whom it regulates for this purpose.

37. The following statutory instrument brought the CFA/ATE reforms into effect for insolvency proceedings on 6 April 2016:

Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 12) Order 2016 (SI 2016/345).

38. All the regulation making powers under Part 2 have been used except for:

The powers in relation to the referral fee ban under (a) s. 56(4)(c), which enables the Lord Chancellor to extend the ban beyond claims for personal injury or death, and (b) s. 57(9), which enables the Lord Chancellor to specify the amount above which a payment may be regarded as a referral fee.

Legal Issues

39. The only issue on which the statutory provisions have been challenged in the courts is the application of Part 2 provisions to mesothelioma claims.
40. Section 48 of LASPO provides that the reforms set out in Part 2 LASPO (specifically the reforms to CFAs and ATE insurance) will not apply to mesothelioma claims until a review of the likely impact of the reforms on these cases has been carried out and a report published on the findings.
41. A review was carried out by the MoJ as part of the *Reforming mesothelioma claims* consultation between July–October 2013. On 4 December 2013, the Government announced its decision to implement the reforms; the substantive reasons were given in part 7 of the *Reforming mesothelioma claims* consultation response on 6 March 2014, which included the report under section 48 of LASPO.
42. That decision was successfully challenged by way of an application for judicial review. On 2 October 2014, the High Court found that the Government’s review had not complied with section 48.
43. The Government announced further by way of a written ministerial statement on 17 December 2015¹⁶⁷ that it will carry out the section 48 review as part of the post-implementation review of the Jackson reforms in Part 2 of the LASPO Act. That review will take place in 2018.

Other Reviews

44. There has been some consideration of the detailed implementation of the ‘Jackson reforms’, but this tends to focus on the rules and regulations made under the primary legislation, rather than the LASPO provisions themselves.
45. The Civil Justice Council (CJC)¹⁶⁸ hosted a conference on 21 March 2014, to mark a year since the Part 2 provisions came into force. It invited the submission of papers for consideration; these are listed on the CJC website¹⁶⁹. While there was not much comment about the statutory provisions, some respondents identified issues with the detailed implementation of the ‘Jackson’ reforms, including, for example, the extent of QOCS. A CJC working group was then established which looked specifically at QOCS, reporting in June 2016.¹⁷⁰

¹⁶⁷HLWS410

¹⁶⁸A non-departmental public body of the Ministry of Justice, established under the Civil Procedure Act 1997

¹⁶⁹<https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/costs-of-civil-litigation/>

¹⁷⁰<https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/>
<https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-qocs-2016-report.pdf>

46. The CJC also set up a working group to look at the operation of the DBA Regulations. That reported in September 2015.¹⁷¹
47. The House of Lords Select Committee on the Equality Act 2010 and Disability, published its report the Equality Act 2010: the impact on disabled people, on 24 March 2016. It recommended the extension of QOCS to discrimination claims under the Equality Act 2010.¹⁷²

Preliminary Assessment of the Act

48. The Government committed to undertake a Post-Implementation Review of the Part 2 provisions within 3–5 years of implementation. Issues of concern¹⁷³ can be considered further as part of that review. In a written ministerial statement on 17 December 2015, the Government stated that the review would take place “towards the end of that [April 2016 and April 2018] period”.¹⁷⁴ There has not been any body of opinion calling for an early review, or for the amendment of the statutory provisions in Part 2. That may be because the provisions are seen to be working reasonably effectively, or because it is still too early to tell their full impact given the length of civil litigation.
49. As set out above, Lord Justice Jackson’s recommendations formed a comprehensive package of reforms. The statutory provisions were enacted in Part 2 LASPO but other parts of the package were implemented by other means. That said, the control of civil litigation costs is an ongoing process. Aside from these measures, there have been others which have similar objectives, including:
 - The extension of fixed recoverable costs in fast track personal injury cases (to cover road traffic accident, employer liability and public liability cases up to £25k damages) by changes to the Civil Procedure Rules in 2013;
 - Further developments specifically aimed at whiplash cases were implemented between October 2014 and June 2016, including:
 - new provisions to fix the cost of obtaining an initial whiplash medical report at £180;
 - the introduction of an expectation that medical evidence will be limited to a single report unless a clear case is made otherwise, and allowing defendants to give their account of the incident directly to the medical expert, when appropriate;
 - new rules to discourage insurers from settling whiplash claims without a medical report;

¹⁷¹<https://www.judiciary.gov.uk/announcements/damages-based-agreements-dbas-publication-of-cjc-recommendations/>

¹⁷²<https://www.publications.parliament.uk/pa/ld201516/ldselect/ldseqact/117/11702.htm>, rec 9 para 402

¹⁷³Including the extension of QOCS to discrimination claims under the Equality Act: see 2010 <https://www.parliament.uk/business/committees/committees-a-z/lords-select/equality-act-2010-and-disability/news-parliament-2015/government-response/> at pp. 26-7

¹⁷⁴HLWS410

- stopping experts who produce medical reports from also offering treatment to the injured claimant, to ensure there is no incentive for them to encourage unnecessary treatment;
 - improving the independence of medical reporting used in support of whiplash claims, through the introduction of the MedCo IT Portal for sourcing medical reports;
 - introducing a requirement for all claimant solicitors to check whether potential claimants have made any previous whiplash claims before accepting the claim, through the ask CUEPI process; and
 - the introduction of a robust accreditation scheme to make sure that all medical experts writing medical reports in support of whiplash claims operate to the same minimum standards.
- The announcement on 23 February 2017¹⁷⁵ of an increase in the small claims track limit in personal injury cases, from £1k to £5k for road traffic accident cases, and to £2k for all other personal injury cases. This reform will be implemented through changes to the Civil Procedure Rules and is expected to be implemented as soon as Parliamentary time allows (see below).
 - Provisions will be taken forward in primary legislation through a Civil Liability Bill, as announced in the Queen's speech in June 2017, to introduce a tariff of fixed compensation for pain, suffering and loss of amenity for whiplash cases with a duration of up to two years, and a ban on the making or requesting of offers to settle whiplash claims without medical evidence. Subject to Parliamentary approval, these reforms are expected to be implemented, alongside the changes to the small claims track limit, as soon as Parliamentary time allows.
 - On 31 July 2017, Lord Justice Jackson published his report on extending fixed recoverable costs more widely in civil litigation. The Government will consult on any proposals before implementation.
50. Whilst there has inevitably been comment on points of detail,¹⁷⁶ we are not aware of significant overarching concerns arising from the implementation of Part 2.¹⁷⁷ Writing in 2016, Lord Faulks QC (Justice Minister 2014–16) said:¹⁷⁸
- 'A post-implementation review of Part 2 is due to take place in April 2018. I would not, of course, wish to pre-empt the findings of any review, but I would be surprised if the principles of Sir Rupert's recommendations were found to be unsound.'*

¹⁷⁵<https://www.gov.uk/government/consultations/reforming-the-soft-tissue-injury-whiplash-claims-process>

¹⁷⁶Including, for example, whether QOCS should be extended to other categories of litigation: see above.

¹⁷⁷With the exception of the issues in relation to mesothelioma claims set out above.

¹⁷⁸*The Reform of Civil Litigation*, Lord Justice Jackson, Sweet and Maxwell 2016, p. xiv.

Part 3 Sentencing and punishment of offenders

Objectives of Part 3

Part 3 of Legal Aid, Sentencing and Punishment of Offenders Act 2012 covers sections 63 to 148 and schedules 9 to 27. In those 85 sections and 19 schedules are contained a wide-ranging and diverse series of provisions relating to sentencing, the release of offenders, remand, youth justice, the rehabilitation of offenders and the creation of new offences.

The vast majority of these provisions have now been commenced with the main body of provisions being commenced on 3 December 2012 (SI 2012/2906). Where the provision has not commenced or has a different commencement date this is noted in the summary below.

Some of the provisions in part 3 have been amended or supplemented by subsequent legislation. Where these changes are significant they are also noted below.

Implementation

Chapter 1: Sentencing

Section 63: Duty to consider compensation order

Section 63 strengthened the obligation on the court to consider ordering a person convicted of an offence to pay compensation, placing the court under an express duty where empowered to do so. This provision came into force on 3 December 2012. It is not possible to identify changes in the number of compensation orders relating directly to this provision.

Section 64: Duty to give reasons for and to explain effect of sentence

Section 64 replaced the existing section 174 of the 2003 Act, making the provisions simpler. It also provided that the Criminal Procedure Rules (CPR) may outline cases in which either the duty to state the court's reasons for deciding on the sentence, or the duty to explain the matters mentioned does not apply and the CPR can make provision about how an explanation of the matters mentioned is to be given. The updated Criminal Procedure Rules issued in 2014 reflect this provision.

Section 65: Aggravation related to transgender identity

Section 65 amends section 146 of the 2003 Act adding transgender identity (actual or presumed) to the personal characteristics which constitute an aggravating factor.

Community orders

Further changes to the provisions in LASPO in regard to community orders and suspended sentence requirements have been made by subsequent legislation, in particular, by section 44 and Schedule 16 of the Crime and Courts Act 2013 and the Offender Rehabilitation Act 2014.

Section 66: Duration of community order

Section 66 made provision about when a community order comes to an end.

Section 67: Breach of community order

Section 67 amended provisions about breach of a requirement imposed as part of a community order and a court's powers in relation to such a breach.

The section gave a court the option of taking no action in relation to a breach. Section 67(2)(a) was however not commenced and has been superseded by provisions in the Crime and Courts Act 2013.

Suspended sentence orders**Section 68 and Schedule 9: Changes to powers to make suspended sentence order**

Section 68 amended provisions relating to suspended sentences, enabling courts to suspend sentences of imprisonment between 14 days and two years. This increased the length of a custodial period that could be suspended from one year to two years. The number of suspended sentences and the custodial period suspended are available online at: <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2015>

Section 69: Fine for breach of suspended sentence order

Section 69 enabled the court to impose a fine of up to £2,500 for breach of a suspended sentence order where it decides not to give effect to the custodial sentence. It also inserted a new provision giving the Secretary of State a power by order to amend the maximum amount of a fine which may be imposed by the magistrates' court or Crown Court in relation to a breach of a suspended sentence order. The power has not been used.

Requirements under community orders and suspended sentence orders**Section 70: Programme requirement**

Section 70 amends the 2003 Act provisions in relation to "programme requirements".

This has been superseded and supplemented by the Offender Rehabilitation Act 2014 which amends section 202 of the 2003 Act, which makes provision for an offender to be required to participate in an accredited programme as a requirement of a community order or suspended sentence order. In addition, subsection (2) of section 16 removes the provision from the 2003 Act that an offender can only participate in accredited programmes in places approved by the local probation board or local provider of probation services.

Section 71: Curfew requirement

Section 71 amended the 2003 Act provisions in relation to curfew requirements by:

- 1) increasing the maximum period in any day for which the court may impose a curfew requirement from twelve to sixteen hours.
- 2) increasing the maximum period for which a curfew requirement may be imposed from six to twelve months

Section 72: Foreign travel prohibition requirement

Section 72 amended the 2003 Act to enabling a court to impose a prohibition on foreign travel as a requirement in a community order or suspended sentence order; this prohibits travel outside of the British Islands.

Sections 73-75 Mental Health, Drug Rehabilitation and Alcohol Treatment Requirements

Sections 73-75 were commenced on 3 December 2012. Her Majesty's Prisons and Probation Service (HMPPS) issued guidance to Probation Trusts in November 2012 on the use of the Mental Health Treatment Requirements (MHTRs), Drug Rehabilitation Requirements (DRRs) and Alcohol Treatment Requirements in light of the LASPO Act changes which was updated in 2013 for a wider audience.¹⁷⁹

HMPPS issued further guidance in February 2014 on the delivery of MHTRs, DRRs and ATRs which built on the previous guidance but was updated to reflect the changes to responsibility for probation services in England and Wales from 2014 resulting from the Transforming Rehabilitation reforms and the Offender Rehabilitation Act 2014.¹⁸⁰

In December 2014 guidance for those working both in mental health and criminal justice agencies was issued to support the integrated delivery of MHTRs¹⁸¹. It was jointly developed by HMPPS, the Ministry of Justice, Department of Health, NHS England and Public Health England.

Section 73: Mental health treatment requirement

Section 73 sought to make it easier for courts to use mental health treatment requirements (MHTRs) as part of a community order or suspended sentence order by simplifying the assessment process and ensuring that those who require community based treatment receive it as early as possible. Section 73 removed the condition in the 2003 Act that a court could only impose a mental health treatment requirement on the evidence of a Section 12¹⁸² registered mental health practitioner. This change means that the courts may seek views and assessments from a broader range of suitably trained mental health professionals.

Section 74: Drug rehabilitation requirement

Section 74 amended the 2003 Act provisions on drug rehabilitation requirements (DRRs), removing the requirement that the treatment and testing period of a drug rehabilitation requirement must be at least six months. With no minimum treatment and testing period the court was provided with greater discretion in determining the appropriate length of the requirement.

The changes also meant that local providers had the flexibility to tailor requirements to individual need, changing patterns of substance misuse and moving towards a recovery-focused approach to treatment.

¹⁷⁹See www.justice.gov.uk/downloads/about/noms/work-with-partners/supporting-community-order-treatment-requirements.pdf

¹⁸⁰See <https://www.gov.uk/guidance/healthcare-for-offenders>

¹⁸¹See <https://www.gov.uk/guidance/healthcare-for-offenders>

¹⁸²of the Mental Health Act 1983

Section 75: Alcohol treatment requirement

Section 75 amended the 2003 Act provisions on alcohol treatment requirements (ATRs), removing the requirement that the period of an ATR must be at least six months. With no minimum treatment and testing period the court was provided with greater discretion in determining the appropriate length of the requirement.

Sections 76-77

Section 76 introduces a new alcohol abstinence and monitoring requirement for community or suspended sentence orders. Section 77 provides a piloting power for this requirement. A pilot of the alcohol abstinence and monitoring requirement is ongoing in London supported by the Mayor's Office for Policing and Crime (MOPAC). This measures compliance with the abstinence requirement using a transdermal electronic tag. The pilot began in July 2014 in the South London Local Justice Area as a proof of concept, and has subsequently been extended and expanded to cover all of London since January 2017. Current legislation allows for the pilot to run until 31 March 2018.

Perpetrators of Domestic Abuse (DA) were excluded from the MOPAC pilot cohort due to concerns that abstinence from alcohol may create additional risks for the victim and that attention could be diverted away from specific interventions designed to tackle offending behaviour. MOPAC are currently undertaking a feasibility study to explore and understand the benefits and dis-benefits of using an abstinence requirement on domestic abuse perpetrators.

The Ministry of Justice is developing a pilot with Humberside, Lincolnshire and North Yorkshire PCCs due to commence this year, the intention is that half of the cohort will be domestic abuse perpetrators. The legislation in progress will allow for a start date of 1 May 2017.

Section 76: Alcohol abstinence and monitoring requirement

Section 76 inserted a new section into the 2003 Act which created an alcohol abstinence and monitoring requirement which may be imposed as a requirement of a community order or suspended sentence order where the offender submits to being monitored.

Section 77: Piloting of alcohol abstinence and monitoring requirements

Section 77 required the provisions creating the new alcohol abstinence and monitoring requirement to be commenced initially for the purposes of a pilot.

Section 78: Overseas community orders and service community orders

Section 78 amended to provisions of the Armed Forces Act 2006 relating to both service and overseas community orders which can be made by service courts, providing that the foreign travel prohibition requirements introduced by the Act and the alcohol abstinence and monitoring requirement introduced by section 76 are not available for inclusion as a requirement in an overseas community order.

Youth sentences**Section 79: Referral orders for young offenders**

Section 79 amended the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A 2000) in relation to the circumstances in which the court has the power to give a referral order to an offender under the age of 18. These amendments widened the powers of a youth or magistrates' court to deal with offenders so that the court would no longer have to

choose between making a referral order or absolutely discharging the offender: it is now able to choose to conditionally discharge the offender instead. In addition the court is no longer prevented from offering referral orders to offenders who have previously received referral orders in the past. There is no limit to the number of referral orders that a repeat offender can receive. It also made consequential amendments to the Coroners and Justice Act 2009.

This section was commenced 3 December 2012. Revised statutory guidance on referral orders, reflecting these legislative changes was published on 3 December 2012. Further revised guidance was issued on 13 April 2015.

Further amendments were made to the referral orders provisions in the Powers of Criminal Courts (Sentencing) Act 2000 under sections 43-45 of the Criminal Justice and Courts Act 2015. While these were not amendments to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, they gave referral orders greater flexibility by providing the court with additional options on a breach, and providing that the court may extend a referral order for a period up to 12 months on a further conviction as well as replacing the *duty* to revoke on a further conviction with a *power* to do so.

While the volumes of both referral orders and conditional discharges have fallen since 2013, the proportion of youth sentences that are referral orders has risen from 36% to 43% and the proportion that are conditional discharges has slightly fallen from 13% to 12%. These proportions are somewhat higher than the 2007 peak in youth offending where the proportion of youth sentences that were referral orders was 33% and conditional discharges stood at 9%

Section 80: Breach of detention and training order (DTO)

Section 80 amended the PCC(S)A 2000 to extend the powers of the court to punish an offender who has breached their DTO by failing to comply with the supervision requirements imposed on them, it created a new power for the court to impose an additional period of supervision, and provided further provision in relation to periods of supervision and detention.

Section 81: Youth rehabilitation order: curfew requirement

Section 81 mirrors the amendments made by section 71 of the PCC(S)A 2000 to the curfew requirement for community orders in the Criminal Justice Act 2003 for youth rehabilitation orders in the Criminal Justice and Immigration Act 2008 ('the 2008 Act') by increasing the maximum number of hours in a day for which a curfew can be imposed from twelve to sixteen hours a day and the length of time for which a curfew requirement may be imposed from six to twelve months.

The Ministry of Justice does not hold data on the length of curfew requirements for under 18s. However, since 2013 the proportion of youth sentences that are custodial sentences of less than 12 months has remained constant at 4%.

Section 82: Youth rehabilitation order: mental health treatment requirement

Section 82 amends Schedule 1 to the 2008 Act to make provision for mental health treatment requirements in youth rehabilitation orders. It mirrors the amendments to mental health treatment requirements made by section 73 of the PCC(S)A 2000 to the Criminal Justice Act 2003 in relation to adults by removing the requirement for evidence from a medical practitioner approved for the purposes of section 12 of the Mental Health Act 1983.

Section 83: Youth rehabilitation order: duration

This section amends the current provisions in Schedules 1 and 2 to the 2008 Act which set out the duration of youth rehabilitation orders; enabling the court to specify different completion dates for different requirements attached to an order and for the end date of the order to be the same as the last completion date for a requirement. It also includes a power for the magistrates' court to extend the date of an order by up to 6 months where a further requirement is imposed but only on one occasion (this allows the order to extend beyond the three-year maximum set out in Schedule 1 PCC(S)A 2000.)

Section 84: Youth Rehabilitation Order: Fine for Breach

This section amends the 2008 Act to provide for the fine available to a court to deal with the breach of a youth rehabilitation order under Schedule 2 of the 2008 Act to be increased to a maximum amount of £2500. Previously the maximum fine in both the magistrates' court and the Crown Court was £250 if the offender was aged under 14 or £1000 in any other case.

Fines

Section 85: Removal of limit on certain fines on conviction by magistrates' court

Section 85 removed limits on fines of £5,000 or more (however that amount is expressed) on conviction by the magistrates' court. The section applies to fines set out in primary and secondary legislation. The section also modifies powers to create offences which are punishable on summary conviction by a fine with a limit of £5,000 or more, so that they are punishable by a fine of any amount. The section gives the Secretary of State a power to disapply the removal of limits and to set alternative limits, subject to certain restrictions.

On 11 March 2015 the Secretary of State issued The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015. Section 85 was commenced alongside these regulations. These powers replaced, with certain exceptions, a level 5 (£5000) fine with the power to impose an unlimited fine on summary conviction.

Section 86: Power to increase certain other fines on conviction by magistrates' court

Section 86 makes provision in relation to fines or maximum fines of fixed amounts which are less than £5,000. The Secretary of State may make regulations in respect of relevant offences or in respect of powers to create offences which are punishable by a fine of a fixed amount (i.e. a sum set out as a figure in the legislation) of less than £5,000. The regulations may specify or describe an amount in place of the original amount.

Section 87: Power to amend standard scale of fines for summary offences

Section 87 gives the Secretary of State power by order to alter the sums specified as levels 1 to 4 on the standard scale of fines for summary offences.

In 2014 the Government proposed to raise the levels 1-4 maxima alongside making level 5 fines unlimited on summary conviction. However, the statutory instruments laid on 9 June 2014 were withdrawn following opposition to the increased fines level. The Government continues to keep the maxima for fine levels 1 to 4 under review.

Section 88: Withdrawal of warrants of control issued by fines officer

Section 88 relates to the withdrawal of “warrants of control and allows a fines officer, in certain circumstances, to issue a replacement notice indicating an intention to take further action. It also allows for an appeal against the replacement notice to be made to the magistrates’ court. It provides fines officers with the power to withdraw warrants that they have issued, in specified circumstances. This section was commenced on 3 December 2012.

Repeal of uncommenced provisions

Section 89 and Schedule 10: Repeal of sections 181 to 188 of Criminal Justice Act 2003

Section 89 repealed sections of the 2003 Act which would have introduced “custody plus” and “intermittent custody” orders. Whilst the provisions relating to the never implemented “custody plus” sentence were repealed other related provisions to increase magistrates’ sentencing powers were retained in the 2003 Act.

Chapter 2: Bail

Section 90 and Schedule 11: Amendment of bail enactments

Section 90 gives effect to Schedule 11 which amended the Bail Act 1976 and other legislation concerning bail.

Schedule 11: Amendment of enactments relating to bail

Schedule 11 amended the 1976 Act so that certain of the exceptions to the presumption that bail should be granted to a defendant will not apply where there is no real prospect that the defendant will be sentenced to a custodial sentence if convicted (“the no real prospect test”).

It is not possible to ascertain how these provisions relate directly to variations in the number of defendants remanded in custody or bailed.

Chapter 3: Remands of Children otherwise than on bail

Remands

Chapter 3 of Part 3 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“the LASPO Act 2012”) made a number of changes to the way that 10-17 year olds are dealt with during remand proceedings in the criminal courts. The changes were designed to make all 10-17 year olds refused bail by the criminal courts subject to a single remand framework, and reduce the number of 10-17 year olds securely remanded.

Youth secure remand episodes decreased by 57% between the year ending March 2011 to the year ending March 2015. For those young people given a secure remand in year ending March 2016, 64% were given a non-custodial outcome following their remand. This is made up of 27% that were acquitted and 38% that were sentenced. In the year ending

March 2011, 59% were not given a custodial sentence. Of these, 27% were acquitted, 31% were sentenced.¹⁸³

Sections 91 to 107 comprise Chapter 3 of Part 3 of the LASPO Act 2012. These sections were all commenced on 3 December 2012 under commencement order SI 2012/2906. The sections all remain in force and are described below, together with where amendments have been made by subsequent legislation and where secondary legislation has been implemented under them.

Section 91: Remands of children otherwise than on bail

Section 91 is concerned with a child who has not been granted bail and who either (a) has been charged with or convicted of an offence and is awaiting trial or sentence or (b) is the subject of extradition proceedings. This section provides that the court must remand that child to local authority accommodation unless one of the sets of conditions set out in sections 98 to 101 is met. Where those conditions are met, the court may remand the child to youth detention accommodation.

Section 92: Remands to local authority accommodation

Section 92 sets out the practical effect of and arrangements in respect of a remand to local authority accommodation, including that the court must designate a local authority to receive the child, and how the court is to determine which local authority that is to be.

Section 93: Conditions etc. on remands to local authority accommodation

Section 93 provides that a court may impose conditions on a child whom it has remanded to local authority accommodation. These conditions are the same as the court may apply to a child who is remanded on bail under section 3 of the Bail Act 1976. They may be made, varied or revoked by the court on application by the local authority designated by the court. The court may also require the child to comply with any conditions imposed for the purpose of securing electronic monitoring where the relevant conditions are met. These conditions are set out at sections 94 and 95.

Section 94: Requirements for electronic monitoring

Section 94 applies in cases other than extradition cases and sets out five requirements that must be satisfied before a court may impose electronic monitoring on a child remanded to local authority accommodation under section 92.

Section 95: Requirements for electronic monitoring: extradition cases

Section 95 provides for a modified version of the five requirements in section 94 in respect of children concerned in extradition proceedings.

Section 96: Further provisions about electronic monitoring

Section 96 provides that when imposing a condition of electronic monitoring the court must make a person responsible for the monitoring and that they must be of a description specified in an order made by the Secretary of State - currently the *Remand to Local*

¹⁸³Table 6.5 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585901/youth-justice-statistics-2015-to-2016-supplementary-tables.zip

Authority Accommodation (Electronic Monitoring) (Responsible Person) Order 2016 SI 2016/1080.

Section 97: Liability to arrest for breaking conditions of remand

Section 97 confers power for a constable to arrest without a warrant a child who the constable has reasonable grounds for suspicion of having breached any of the conditions imposed under section 93, and imposes a duty on the constable to bring the child before a court as soon as reasonably practicable and in any event within 24 hours. If the court determines that the child has broken any of the conditions imposed under the original remand it can remand the child on new conditions or, where appropriate, remand the child to youth detention accommodation.

Remands to youth detention accommodation

Section 98: First set of conditions for a remand to youth detention accommodation

Section 98 applies to a child charged with or convicted of an offence and describes the first set of conditions that, if met, would allow the court to remand the child to youth detention accommodation. This set of conditions includes a requirement relating to the seriousness of the offence which must be either a violent or sexual offence or one that if it had been committed by an adult could be punishable with a sentence of imprisonment of fourteen years or more.

Section 99: Second set of conditions for a remand to youth detention accommodation

Section 99 defines an alternative set of conditions that would enable the court to remand a child charged or convicted of an offence to youth detention accommodation, focusing on the behaviour of the child while on remand. It applies if the child faces a real prospect of receiving a custodial sentence. In these circumstances, if they have or are alleged to have committed an offence while on remand in custody and have a recent history of absconding while on remand, or, alternatively, the offence forms part of a recent history of committing imprisonable offences while on remand (on bail or in custody) then they may be remanded securely under to this section.

Section 100: First set of conditions for a remand to youth detention accommodation: extradition cases

Section 100 sets out an equivalent set of conditions to those in Section 98, this time for a child in an extradition case.

Section 101: Second set of conditions for a remand to youth detention accommodation: extradition cases

Section 101 sets out an equivalent set of conditions to those in Section 99, this time for a child in an extradition case.

Section 102: Remands to youth detention accommodation

Section 102 contains general provisions regarding arrangements when a child is remanded to youth detention accommodation. It provides that the Secretary of State and the Youth Justice Board for England and Wales may direct that the child be placed in a youth detention establishment, namely a secure children's home, a secure training centre, a young offender institution or a new form of youth detention accommodation specified by the Secretary of State pursuant to the existing order-making power. The Secretary of

State, or the Youth Justice Board, must consult the local authority designated by the court before directing where the child must be placed.

This section was commenced on 3 December 2012 under commencement order SI 2012/2906. It has subsequently been amended by the Crime and Courts Act 2013 to clarify further which local authority may be designated by the court and to allow courts to revisit and replace a designation previously made for the purposes of regulations made under section 103. These amendments came into force on 26 April 2013. This section has also been amended by the Criminal Justice and Courts Act 2015 to include secure colleges in the definition of youth detention accommodation. This amendment came into force on 20 March 2015.

Supplementary

Section 103: Arrangements for remands

Section 103 gives the Secretary of State, and the Youth Justice Board, the power to make arrangements for accommodation in a secure children's home for those children who are subject to a remand to youth detention accommodation. It also gives the Secretary of State an order-making power in respect of recovering from a designated local authority the costs of a child being subject to a remand to youth detention accommodation. Initial transitional financial provisions were set out in *The Recovery of Costs (Remand to Youth Detention Accommodation) (England and Wales) Regulations 2012 (SI 2012/2822)*. These were then replaced by *The Recovery of Costs (Remand to Youth Detention Accommodation) Regulations 2013 (SI 2013/507)*. The Secretary of State may also make payments to local authorities in respect of them receiving or accommodating a child remanded to local authority accommodation, or in respect of the recovery of costs of a child remanded to youth detention accommodation.

This section was commenced on 3 December 2012 under commencement order SI 2012/2906. It has subsequently been amended by the Criminal Justice and Courts Act 2015 to apply it to all types of youth detention accommodation specified in section 102(2). This amendment came into force on 20 March 2015.

Section 104: Looked after child status

Section 104 provides that:

- a) Any child remanded to youth detention accommodation is to be treated as looked after by the designated authority.
- b) The Secretary of State has the power to apply with modifications or not apply, any legislation to a child who is treated as looked after by virtue of being remanded under this Chapter. Certain sections of the Children Act 1989 do not therefore apply to children remanded to youth detention accommodation as specified in the *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Children Act 1989) (Children Remanded to Youth Detention Accommodation) Regulations 2012 (SI 2012/2813)*.

Section 105 and Schedule 12: Minor and consequential amendments

Section 105 gives effect to Schedule 12; this makes various amendments and repeals which are consequential on the new scheme for remands of children otherwise than on bail.

Section 106: Regulations under this Chapter

Section 106 specifies the parliamentary process that is applicable to regulations made under powers in this Chapter.

Section 107: Interpretation of Chapter 3

Section 107 provides definitions of terms used. This section was commenced on 3 December 2012. It has been amended by the Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016/413 which came into force on 6 April 2016.

Chapter 4: Release on licence

Sections 108-118 were commenced on 3 December 2012.

Calculation of days to be served

Section 108: Crediting of periods of remand in custody

Section 108 replaces section 240 of the 2003 Act with a new section 240ZA, dealing with the crediting of time spent on remand in custody against any subsequent sentence of imprisonment or detention. Section 240ZA provides for remand time to be calculated and applied administratively rather than by the courts. All time that meets the criteria of the provision will be counted to reduce a subsequent sentence. There is no longer discretion to disapply any such time. This provision addresses a concern raised by the senior judiciary in regard to judges having sufficient information to make remand credit calculations.

Section 109: Crediting of periods of remand on bail

Section 109 amends section 240A of the 2003 Act which gives the court power to direct that time spent remanded on bail subject to electronic monitoring (“tagged bail”) counts towards any subsequent sentence imposed, provided that that sentence is imposed for the same offence for which the defendant was remanded or a related offence. Two days successfully completed on tagged bail count as one day of the sentence.

Section 110 and Schedule 13: Amendments consequential on sections 108 and 109

Section 110 makes amendments consequential on sections 108 and 109.

Release

Section 111 and Schedule 14: Prisoners serving less than 12 months

Section 111 amends the 2003 provisions for prisoners serving sentences of less than 12 months to be released unconditionally at the half way point, by replicating the corresponding provision in the Criminal Justice Act 1991.

Section 112: Restrictions on early release subject to curfew

Section 112 amends section 246 of the 2003 Act which provides for early release on Home Detention Curfew (HDC), which includes electronic monitoring, excluding a number of categories of prisoner from the HDC scheme. The amendments prevent anyone serving a sentence of four years or more from being eligible for the scheme and makes ineligible those previously released and recalled under the scheme for breach of licence conditions (during a previous or current sentence) or those previously returned to prison for

committing a further offence before the expiry of a previous sentence. These changes brought the 2003 Act scheme in line with the scheme under the 1991 Act, so that the statutory provisions for HDC will be the same for all prisoners.

Further release after recall

Section 113: Cancellation of revocation of licence

Section 113 amended section 254 of the 2003 Act to provide that when prisoners have been recalled erroneously (for example, as a result of incorrect information about the breach), a licence revocation may be cancelled. This will apply even after the Parole Board have considered the recall and made a decision on release.

Section 114: Further release after recall

Section 114 replaces sections 255A to 255D of the 2003 Act, which provide for the release of prisoners after recall; there are two different recall schemes under these provisions. Under section 255B prisoners, if not released executively or by the Parole Board within 28 days, are released at the completion of 28 days detention. Under section 255C prisoners are subject to detention to the end of their sentence unless released executively or by the Parole Board. Section 255A identifies which scheme will apply to a prisoner and sets out the criteria for suitability for automatic release. Recalled prisoners serving extended sentences and those not suitable for automatic release will be dealt with under section 255C. The combination of the previous section 255C and 255D allows for the executive release of recalled extended sentence prisoners.

Section 114 was amended by section 9 of the Offender Rehabilitation Act 2014 so that offenders given fixed term recalls whilst on early release on home detention curfew (HDC) might not be re-released until the later of the following dates: end of the fixed term or end of the period that they would have served in custody if they had not been released early.

Other provisions about release

Section 115: Supervision of young offenders after release

Section 115 amends the 2003 Act to include a provision for the supervision of young adult prisoners released from a sentence of Detention in a Young Offenders' Institution ("DYOI") – available for 18 to 20 year olds. This will ensure that prisoners released from a DYOI sentence of less than 12 months will receive 3 months supervision. Such supervision can include specific requirements relating to drug testing and electronic monitoring.

Section 116: Miscellaneous amendments relating to release and recall

Section 116 makes amendments to the 2003 Act, removing the duty of the Secretary of State to consult the Parole Board before releasing extended sentence prisoners on compassionate grounds. This brings such release of extended sentence prisoners into line with that of all other determinate sentence prisoners.

Application and transitional provision

Section 120: Application and transitional etc provision

Section 120 gives effect to Schedule 15.

Schedule 15: Application of sections 109 to 120 and transitional and transitory provision

Schedule 15 contains provision for the application and commencement of the release and recall sections.

Section 121: Simplification of existing transitional provisions

This section:

- a. Applies the release and recall provisions of the 2003 Act to all prisoners regardless of the date of offence or the date of sentence.
- b. Provides that provisions relating to the release of fine defaulters and contemnors under the 2003 Act will apply to all prisoners regardless of the date of committal.
- c. Has the effect of repealing fully the release and recall provisions of the 1991 Act and the transitional and savings provisions under the 2003 Act Commencement Order 2005.

Schedule 16: Amendments of Criminal Justice Act 2003: transitional and consequential provisions

Schedule 16 inserts a new section 267A into Chapter 6 of Part 12 of the 2003 Act to give effect to new Schedule 20A; the new Schedule 20A makes transitional provision for sentences where the offence was committed before 4 April 2005 where the 2003 Act release provisions will apply,

Schedule 17: Restatement of transitional provision

This amends various sections in Chapter 6 of Part 12 of the 2003 Act to make clear that those sections are subject to the release, licence and removal provisions of Schedule 20B, which apply to those prisoners who were subject to the release arrangements of the 1991 Act.

Chapter 5: Dangerous Offenders

Sentences

Section 122 and Schedules 18 and 19: Life sentence for second listed offence

Section 122 inserts a new section 224A into the 2003 Act, together with a new Schedule 15B (which is set out in Schedule 18). Schedule 19 contains related consequential and transitory provisions.

The new section provides that a court must impose a life sentence on a person aged 18 or over who is convicted of an offence listed in Part 1 of Schedule 15B of that Act which is serious enough to justify a sentence of imprisonment of 10 years or more, if that person has *previously* been convicted of an offence listed in any Part of Schedule 15B and was sentenced to imprisonment for life or for a period of 10 years or more in respect of that previous offence. However, the court is not obliged to impose a life sentence where it is of the opinion that there are particular circumstances which relate to the offence, the previous offence or the offender which would make it unjust to do so in all the circumstances.

Section 123: Abolition of certain sentences for dangerous offenders

Section 123 repeals provision in the 2003 Act for sentences of imprisonment for public protection (IPPs) and detention for public protection (the equivalent sentence for persons under 18).

It leaves in place the provision in section 225 which requires life imprisonment to be imposed where the offence for which an offender is convicted carries a maximum sentence of life imprisonment and the court considers the seriousness of the offence justifies a life sentence. It also leaves in place the equivalent provision in section 226 with respect to detention for life.

This section abolishes the IPP sentence from 3 December 2012. An IPP sentence could not be imposed for anyone convicted on or after 3rd December.

Section 124: New extended sentences

Section 124 inserts new sections 226A and 226B in the 2003 Act which create new extended sentences for adults and persons under 18 respectively for the sexual and violent offences listed in Schedule 15 to the 2003 Act (where certain conditions are met). For both sentences, the court must consider that the offender presents a substantial risk of causing serious harm through re-offending.

Section 125 and Schedule 20: New extended sentences: release on licence

Section 125 sets out the release arrangements for the new extended sentence. Different release arrangements will apply depending on the seriousness of the offence in respect of which the sentence was imposed. Offenders who have committed an offence listed in Parts 1 to 3 of Schedule 15B, or whose offending merits a custodial term of 10 years or more, will be considered for release on licence by the Parole Board once the offender has served two-thirds of the appropriate custodial term, and will be released automatically at the end of the appropriate custodial term if the Parole Board has not already directed release. Offenders who have not committed a Schedule 15B offence but have committed an offence meriting an appropriate custodial term of less than 10 years will be released automatically after two-thirds of the appropriate custodial term.

The release arrangements for extended sentences were subsequently amended by section 4 of the Criminal Justice and Courts Act 2015 to mean that all prisoners serving an extended sentence imposed on or after 13 April 2015 will be subject to discretionary release by the Parole Board.

Schedule 20: Release of new extended prisoners: consequential provision

This provides for the Parole Board to set licence conditions where an offender is initially released by the Parole Board.

Section 126: Sections 123 to 125: consequential and transitory provision

Section 126 introduces Schedule 21, which includes provision that is consequential on sections 123, 124 and 125.

Section 127: dangerous offenders subject to service law

Section 127 introduces Schedule 22, which applies the provision made in Chapter 5 of Part 3 in respect of offenders subject to service law and makes consequential and transitory provision.

Section 128: Power to change test for release on licence of certain prisoners

Section 128 gives the Secretary of State a power to set a release test, or tests, that the Parole Board must apply when considering the release of prisoners serving indeterminate sentences under section 225 or 226 of the 2003 Act (IPP prisoners), prisoners serving extended sentences imposed under section 226A or 226B of that Act and determinate sentence prisoners subject to Parole Board release whose release provisions have been saved under Schedule 20B of the 2003 Act (collectively, “discretionary release prisoners”).

Successive Secretary of States have not seen the need to exercise the power at section 128. The Government believes that the release test currently exercised by the Parole Board in relation to sentences of imprisonment for public protection works well and there is no need at present to change it. The current test has seen prisoners serving these sentences released in increasing numbers (there were 512 first times releases in 2015 which was the highest number since the sentence became available in 2005, figures for 2016 will be published in April).

Sections 122 to 128 and the relevant schedules (Schedules 18, 19 and 20) were commenced on 3 December 2012

Chapter 6: Prisoners etc.

Section 129: Employment in prisons: deductions etc. from payments to prisoners

Section 129 makes amendments to the Prison Act 1952 (“the 1952 Act”) in respect of the employment and payment of prisoners and persons required to be detained in remand centres, secure training centres and young offender institutions. It makes particular provision in respect of reductions in, deductions from and levies on the earnings of prisoners and persons in young offender institutions who are aged 18 or over.

Section 129 has not been commenced but the Government is considering the best ways to encourage prisoners to undertake meaningful paid work as part of its focus on reducing reoffending.

Section 130: Transfer of prisoners: prosecution of other offences

Section 130 inserts new section 3A into the Repatriation of Prisoners Act 1984 which provides that prisoners transferred to England, Wales or Scotland, in accordance with international prisoner transfer arrangements, with statutory protection from prosecution in Great Britain in relation to offences committed prior to transfer taking place.

Section 131: Transit of prisoners

Section 131 inserts new sections into the Repatriation of Prisoners Act 1984. These new sections enable the Isle of Man, the Channel Islands or countries with which the UK has prisoner transfer arrangements to transfer, via an airport or port in England, Wales or Scotland, a prisoner serving a sentence of imprisonment to or from a third country, for the purpose of the serving that sentence.

Chapter 7: Out of court disposals

Penalty notices

Section 132 and Schedule 23: Penalty notices for disorderly behaviour

Section 132 gives effect to Schedule 23, which confers a new power on Chief Officers of Police to set up within their area a scheme which will allow police officers, where appropriate, to issue penalty notices with an education option. This gives recipients the opportunity to discharge their liability to be convicted of the penalty offence by paying for and completing an educational course related to the offence for which the notice was given.

This provision came into force on 8 April 2013 and a number of forces now administer penalty notices for disorder with an educational option.

Cautions

Section 133: Conditional cautions: involvement of prosecutors

Section 133 amends sections 22 to 25 of the 2003 Act. The section enables the authorised person (usually a police officer) to make a decision to offer a conditional caution by removing the requirement that, before the authorised person can offer a conditional caution to an offender, they must refer the matter to the relevant prosecutor (usually the Crown Prosecution Service) to decide that there is sufficient evidence to charge the offender with the offence, and that a conditional caution should be given. The section enables those decisions to be taken by the authorised person without reference to the relevant prosecutor. This provision came into force on 8 April 2013.

Section 134: Conditional cautions: removal etc. of certain foreign offenders

Section 134 amends section 22 of the 2003 Act so as to make available new types of conditions that can be attached to a conditional caution given to an offender who is a foreign national and who does not have leave to enter or remain in the United Kingdom. The object of these conditions is to bring about the departure of the foreign offender from the UK and ensure that they do not return to the UK for a period. This provision came into force on 8 April 2013.

Youth cautions

Section 135 and Schedule 24: Youth cautions

Section 135, by amendment to the Crime and Disorder Act 1998 ('the 1998 Act'), abolishes the Final Warning Scheme and creates and sets out the effect a new 'youth caution.' When a youth caution is given the police must refer the child to the appropriate Youth Offending Team ('YOT') as soon as practicable who must assess the child and, unless they consider it inappropriate, must arrange for the child to participate in a rehabilitation programme.

This section was commenced 8 April 2013 (SI 2013/453). Guidance on youth cautions, for police and youth offending teams (YOTs) was published on 8 April 2013. Since 2013 the proportion of youth cautions has decreased as a proportion of youth disposals from 43% to 38%, however there has been a longer term decreasing trend since the peak in youth offending in 2007 at 57%. Between 2012 and 2013, the proportion of youths receiving a caution, who were first time offenders, has dropped from 72% to 66%, though since the

peak in youth offending in 2007 this proportion has remained relatively stable around 70%.

The reoffending rate ranged between 24% and 27% for those who received a reprimand, warning or caution in 2005/06 to 2012/13. There was then a step change to 31% with the 2013/14 cohort and has remained at 31% for the 2014/15 offending cohort.

Schedule 24: Youth cautions: consequential amendments

Schedule 24 is given effect by section 135(3) and makes various amendments which are consequential on the repeal of reprimands and warnings under the 1998 Act and the introduction of youth cautions by section 136. This section and *Schedule* were commenced 8 April 2013 (SI 2013/453). Guidance on youth cautions, for police and YOTs was published on 8 April 2013.

Section 136: Youth conditional cautions: previous convictions

Section 136 amends section 66A(1) of the 1998 Act by omitting paragraph (a) which prevented a youth conditional caution from being given to a young person who has previously been convicted of an offence.

Guidance on youth cautions, for police and youth offending teams (YOTs) was published on 8 April 2013. Data on the use of youth cautions and conditional cautions is set out above under s.135.

Section 137: Youth conditional cautions: references to youth offending teams

Section 137 inserts a new subsection (6A) into section 66A of the 1998 Act, the effect of which is to require an authorised person who gives a young person a youth conditional caution to refer that young person to the Youth Offending Team (YOT) as soon as is practicable. The YOT must assess the young person and arrange for them to participate in a rehabilitation programme unless they consider it is inappropriate. This section was commenced 8 April 2013 (SI 2013/453). Guidance on youth cautions, for police and youth offending teams (YOTs) was published on 8 April 2013.

Section 138: Youth conditional cautions: involvement of prosecutors

Section 138 amends the 1998 Act by removing the requirement that the conditions attached to a youth conditional caution be specified by a relevant prosecutor. A condition that a youth attend at a specified place at specified times may still be attached to a youth conditional caution but the place and times must be specified in that condition by whoever offers the caution. The amendments in this section also allow the decision as to whether a youth conditional caution should be given to be made by an authorised person (previously had to be made by a relevant prosecutor). It removes the requirement for a relevant prosecutor to set the amount of a fine, and allows conditions to be varied by an authorised person as well as the relevant prosecutor.

This section was commenced 8 April 2013 (SI 2013/453). Guidance on youth cautions, for police and youth offending teams (YOTs) was published on 8 April 2013. This section has not been repealed, amended or superseded. The Ministry of Justice does not hold any data on this section.

Chapter 8: Rehabilitation of Offenders

Sections 139-141 make changes to the Rehabilitation of Offenders Act 1974

Section 139 (which amended sections 5 and 6 of the 1974 Act, and inserted a new s.8AA), the remaining parts of section 141 (transitional protection and consequential) and all of Schedule 25 except paragraph 4 (which omits section 3 from LASPO), were then commenced on 10 March 2014:

Section 140 (which inserted a new s.56A into the UK Borders Act 2007 to disapply s.4(1), (2) and (3) of the ROA in relation to certain immigration decisions) was commenced on 1 October 2012. The same Commencement Order also brought into force s.141(7)-(9) and (12), which sets out the transitional provisions in respect of s.140.

Paragraph 4 of Schedule 25 has not been commenced as the provisions were replicated in other legislation.

Section 139: Establishment or alteration of rehabilitation periods

Section 139 extends the scope of the Rehabilitation of Offenders Act 1974 so that custodial sentences of up to and including 4 years may become spent. It also inserts into section 5 of the ROA to amend the times at which different sentences may become spent.

Section 140: No rehabilitation for certain immigration or nationality purposes

Section 140 relates to immigration and nationality proceedings. It amends the UK Borders Act 2007 to exclude immigration or nationality decision making, including initial decisions and any subsequent proceedings, from the operation of the ROA.

Section 141: Transitional and consequential provision

Section 141 contains the transitional and consequential provisions relating to these amendments. These apply the changes to the 1974 Act retrospectively so that existing convictions will become spent according to the new rehabilitation periods.

Schedule 25: Rehabilitation of offenders: consequential provision

Schedule 25 makes minor and technical amendments to the ROA to ensure that the amendments apply to England and Wales only. It also amends the order making power in section 10 of the ROA to give the Secretary of State the power to make incidental, consequential, supplementary, transitional, transitory or savings provisions when making an order under that section.

Chapter 9: Offences

Section 142 and Schedule 26: Offences of threatening with article with blade or point or offensive weapon in public or in school premises

Section 142 creates offences relating to the aggravated use of an offensive weapon or an article with a blade or point. The offences are committed where a person has an offensive weapon or an article with a blade or point with him or her and intentionally uses the weapon or article to threaten another creating an immediate risk of serious physical harm. This section was commenced on 3 December 2012.

Subsequently, section 78 of the Serious Crime Act 2015 has made it an offence to possess any article which has a blade or is sharply pointed, or other offensive weapon, in prison without authorisation. This includes makeshift weapons manufactured by prisoners from everyday items. The offence applies to all persons in prison including prisoners, staff and visitors.

The Criminal Justice and Courts Act 2015 also subsequently introduced a minimum sentence (6 months imprisonment) for repeat offences involving offensive weapons.

Section 143 and Schedule 27: Causing serious injury by dangerous driving

This section inserts a new section 1A in the Road Traffic Act 1998 (RTA), and makes provision for a new criminal offence of causing serious injury by dangerous driving. The offence is committed when a person causes serious physical injury to another person by driving dangerously on a road or other public place. This section was commenced on 3 December 2012.

Subsequent changes to driving offences involving creating an offence of causing serious injury by disqualified driving were included in the Criminal Justice and Courts Act 2015. The Government issued a consultation document on offences and penalties for driving offences causing death or serious injury in December 2016.

Section 144: Offence of squatting in a residential building

This section creates a new offence of squatting in a residential building. The offence is committed when a person is in a residential building as a trespasser; the person knows or ought to know that they are a trespasser, and that person is living in the building or intends to live there for any period. This section came into force on 1 September 2012.

Sections 145 to 147: Scrap metal dealing

Sections 145, 146 and 147, relating to scrap metal dealing, were commenced in December 2012 but repealed and replaced by provisions in the Scrap Metal Dealers Act 2013.

Section 148: Reasonable force for the purposes of self-defence etc.

Section 148 amended section 76 of the 2008 Act to expand the section 76, so that the law relating to self-defence and related defences is set out clearly in one place. This section came into force in April 2013.

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