

# LegalAction

Supplement October 2016

## Use it or lose it

### Children and legal aid



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# Use it or lose it

**Legal Action's special supplement is the final part of its 'Use it or lose it' series, highlighting what remains of legal aid for children and young people, and showing practitioners how they can make the most of it to help their young clients obtain much-needed access to justice.**

## Introduction

It is impossible to describe the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) as anything but a disaster for access to justice. From April 2013 large areas of law were cut from the scope of legal aid leaving tens of thousands of vulnerable people, including children, without assistance with their legal problems. Part of LAG's response to LASPO has been to highlight what is still covered by legal aid through our 'Use it or lose it' series. This special supplement discusses the areas of law that remain in scope for children and young people.

Details of the categories of law under which work can be undertaken by a firm or other organisation holding a Standard Civil Contract are contained in the office schedule to their contract. Controlled Work is available for nearly everything that remains in scope to at least advice and assistance level. LASPO Sch 1 (Civil legal services) specifies what is in scope and it is worth checking the revised version of this on the government's legislation website for any changes, although unhelpfully Sch 1, as it appears on that website, is not always guaranteed to incorporate all amendments; practitioners should take extra care when consulting that website.<sup>1</sup>

The cuts to legal aid and the increasing bureaucracy imposed on practitioners by the Legal Aid Agency (LAA) have contributed to a chilling effect on the take-up of legal aid. A key aim of *Legal Action's* 'Use it or lose it' series is to assist in reversing this trend. LAG is grateful to all of the authors who have contributed to this publication. We would particularly like to thank Noel Arnold, director of legal practice at Coram Children's Legal Centre. Noel has been a driving force behind this project, contributing five articles and acting as the legal editor for the publication. We are also grateful to Fiona Bawdon, who did much of the initial work on the publication while she was editor of *Legal Action*. Both the authors and everyone at LAG hope that the following articles will encourage practitioners in making the best use of legal

aid in their work helping children and young people to enforce their rights. Please keep up to date with further developments in legal aid by checking the website which supports LAG's *Legal Aid Handbook*<sup>2</sup> (edited by Vicky Ling and Simon Pugh with Anthony Edwards) and, of course, reading *Legal Action*.

## Private family law

*Noel Arnold, director of legal practice and solicitor, Coram Children's Legal Centre*

Arguably the most savage of the cuts made to the scope of legal aid by LASPO are those to the availability of legal aid to cover the costs of legal advice, assistance and representation for private family law matters. Private family law relates to those issues which concern two or more individuals (usually adults) who are or would be parties to proceedings before the family court (if the issues ended up being ventilated before the court). Typically, private family law relates to disputes about arrangements for children and/or property and assets following relationship breakdown. Virtually all private family law issues are removed from legal aid scope, save for two situations.

Firstly, where the person seeking legal aid has evidence that he or she is, or is at risk of being, a victim of domestic violence and the alleged perpetrator of that violence is the person who would be the 'other party' in proceedings before the family court if proceedings were commenced (see LASPO Sch 1 para 12(1)). Where the evidential requirements are met, the list of specific issues for which legal-aid-funded help can be provided is given at LASPO Sch 1 para 12(9). Secondly, where the person seeking legal aid has evidence that the child who would be the subject of the proceedings before the family court (if proceedings were commenced) is at risk from another person (not the person seeking legal aid) (see LASPO Sch 1 para 13(1)). Where the evidential requirements are met, the list of specific issues on which legal-aid-funded

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help can be provided is also listed.

The types of evidence which will be accepted are tightly prescribed by the LAA. Providers need to critically consider the private family law evidence guidance to ensure that the client has supplied the right type of evidence (see *The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 – evidence requirements for private family law matters* (LAA, April 2014, revised 16 May 2016)). It is essential to note that the evidence must be: from particular sources; able to confirm that the abuse or violence occurred, or that a risk thereof was judged to be present within 24 or 60 months of the date when legal aid was sought (60 months applies to evidence of domestic violence and 24 months applies to evidence of child protection/risks/abuse). The Civil Legal Aid (Procedure) Regulations 2012 SI No 3098 (CLA(P) Regs) were amended in 2015 so that where the evidence was relied

on in order to secure a legal aid certificate for Family Help (higher) (FH(H)), the fact that the evidence will at some future stage be outside the time period, will not cause the legal aid certificate to lapse. Neither will it prevent an application being made to extend the type of service from FH(H) to Full Representation (FR). The evidence requirements discussed above apply equally to Legal Help (LH) and Family Help (lower) (FH(L)) as well as applications for a legal aid certificate. The client must be financially eligible and the relevant merits criteria will need to be satisfied on applications for legal aid certificates.

Fortunately, it is not often that children and young people will need legal advice about private family law issues as they are unlikely to become involved in complex relationship breakdowns which would involve assets and property or their own children. However, it is certainly possible and where such situations

arise, the requirements for evidence of domestic violence and child abuse do not apply, meaning that all the specific issues listed within LASPO Sch 1 paras 12(9) and 13(1) will attract legal aid if the applicant is a child and is financially eligible. This is provided for by LASPO Sch 1 para 15 and therefore allows children and young people who are or would be (if family proceedings were commenced) the applicant or respondent (because the child him or herself is a parent) to obtain legal advice and assistance on their private family law issues under LH and FH(L), moving on to make applications for legal aid certificates (FH(H) and FR) as necessary. There will often be situations where private family law proceedings have been commenced by adults and the court will make an order that the child should be joined as a party to the proceedings (thereby being both a party to and the subject of the proceedings). In these circumstances it will be



usual for a children's guardian from Cafcass to be appointed to represent the child and provide instructions to a solicitor. Legal aid will usually be granted to the child where the court has made an order for joinder but it is means- and merits-tested. It is generally considered inequitable to aggregate the parents' means when considering the child's financial eligibility in these situations.

Providers will want to ensure that consideration is given to whether there is good reason for the child client to seek legal advice about the particular issue, as the LAA may wish to dispute whether or not another person could/should have sought the advice on behalf of the child and whether in fact the child being 'the client' is proposed only to get around the fact that most adults will be unable to secure legal aid for advice about private family law issues. In the author's view, the LAA will not accept it as appropriate for a child to be given legal-aid-funded advice about seeking a child arrangements order (CAO) in order to compel one parent to permit the child to spend time or live with another parent. In these circumstances, the child, while the subject of the family proceedings, should not be the applicant for an order in respect of him or herself: the parent who is aggrieved, for whatever reason, should be the person applying for a CAO. The family court itself is also likely to require convincing as to why a child is making an application to the court and not a parent or person with parental responsibility (PR). In the most exceptional circumstances, it might be possible, but in the author's view this will be extremely rare. Providers will also want to be careful to ensure that the child who is seeking legal-aid-funded help is able to give instructions and follow advice. It is prudent for the provider to consider the provisions of Family Procedure Rules 2010 (FPR) r16.6(1) read together with the conditions at FPR r16.6(3)(b)(i)–(ii).

Typical examples then, where a child may, in his or her own right, seek legal-aid-funded help directly from a provider, concern applying to the family court for an order about: contact with a sibling who is not looked after by a local authority; and specific issues concerning his or her parenting, eg a parent refusing to allow the child to attend a school trip or a parent seeking to force the child to attend a religious event. There are other private family law orders which children can apply for with legal aid covering the legal costs such as: forced marriage protection orders; female genital mutilation protection orders (see LASPO Sch 1 para 15A(1)); non-molestation orders; and declarations of parentage.

## Public family law

*Noel Arnold, director of legal practice and solicitor, Coram Children's Legal Centre*

Public family law matters (LASPO Sch 1 para 1(1)) which end up before the family court are those which relate to state intervention in a family's life. Usually this will only concern the family's children and so, practically, the term public family law is better articulated as public children law. These matters have traditionally been considered to be well protected against successive governments' policy aims to curtail legal aid provision. Graduated (fixed) fees were introduced years ahead of LASPO as the method of remuneration to providers representing parties in proceedings for care and supervision orders (this is Licensed Work which can be carried out under a legal aid certificate for FR); itself of note because to the present day, remuneration for work conducted under a legal aid certificate in every other category of law is remunerated by hourly rates (albeit diminishing in value and of a prescribed nature).

That said, all proceedings termed by the LAA/Ministry of Justice (MoJ) 'special Children Act cases' (Civil Legal Aid (Merits Criteria) Regulations 2013 SI No 104 (CLA(MC) Regs) reg 2), ie for care, supervision, child assessment, emergency protection and secure accommodation orders, are non-means, non-merits-tested for parents, persons with PR and children (who are automatic parties). The exception being that only the child who is subject to proceedings for a secure accommodation order will be entitled to non-means, non-merits-tested legal aid. Essentially, nothing changed for legal aid in the area of public children law following LASPO, save that the graduated fees and corresponding hourly rates (at which time is charged) were further cut.

All children who are the subject of, and themselves parties to, public children law proceedings before the family court are represented through a children's guardian from Cafcass who will instruct a solicitor on behalf of the child. In certain circumstances, the child can be represented separately (away) from the children's guardian if the court makes an order for this.

Some young people may themselves have children who then become the subject of public children law proceedings, usually either care or supervision order proceedings. Where this happens, the young person will be entitled (as a parent or person with PR) to non-means, non-merits-tested legal aid (FR) to respond to

the local authority's application, just as any parent or person with PR would. It is important for providers to be sure that they can represent the child respondent in such situations directly and without a litigation friend. If that is not possible, it will be fitting for an invitation to be made to the Official Solicitor to conduct the litigation on the child's behalf.

Young people may also have children, or may be soon to become parents to a child. A local authority may become involved if it has safeguarding concerns for the child or unborn child. Where this happens, it is important for these young (prospective) parents (who will naturally be more vulnerable due to their age) to obtain early advice and assistance. Where the provider is clear that the local authority's involvement is of a child protection nature, rather than involvement in a 'child in need' capacity under Children Act (CA) 1989 s17, then so long as the young client is financially eligible, LH can be offered to advise throughout the child protection processes. Where the young person receives a letter before proceedings from the local authority FH(L), which is non-means-tested, can be offered to advise and assist through the pre-proceedings process.

Other public children law matters, as set out in LASPO Sch 1 para 1(1), are also matters for which legal aid is available albeit on a means- and merits-tested basis, eg proceedings for: a placement order (those taking place on a stand-alone basis outside of care proceedings); contact with a child in care; discharge of a care order; contact with a child who is the subject of a placement order. Proceedings before the Family Division of the High Court, where the court is being asked to exercise its inherent jurisdiction to make protective orders in relation to children, are also within scope of legal aid (LASPO Sch 1 para 9(1)) and will be means- and merits-tested. There are circumstances in which no suitable private law remedy can be sought to benefit the child and a local authority has not commenced public law children proceedings; here children may need to be advised to initiate proceedings in their own right before the Family Division of the High Court, possibly in wardship or under the Human Rights Act (HRA) 1998.

## Civil Legal Advice

*Noel Arnold, director of legal practice and solicitor, Coram Children's Legal Centre*

Civil Legal Advice (CLA) is not an area of law, but it is an important concept to be aware of given its recent prominence since LASPO was

introduced. CLA is effectively a department within the LAA and is operated somewhat distinctly. It has its own contract, the Civil Legal Advice Contract 2013 (the CLA contract). CLA is commonly called the 'telephone gateway' and has an operator service. Staff who work on the operator service seek to assist members of the public who contact the service to establish how best they can secure legal services. Some categories of law are mandatory gateway matters and a provider cannot just open a LH case for a client seeking advice in such a category of law. The mandated areas for the gateway are set out in CLA(P) Regs reg 20. These are education, debt and discrimination (where the discrimination does not relate to another category of law, eg community care, actions against the police etc). Any person seeking legal-aid-funded help in these categories of law will need to contact the CLA operator service. There is a definition of 'exempted persons' who are not required to contact CLA and can seek face-to-face help from a provider if they wish. Exempted persons include those under 18, so children are exempted from the restrictive nature of gateway work.

Where someone contacts CLA, the operator service will assess means, merits and scope (although not in any particularly thorough way). They should also consider if the enquirer is an exempted person. If the operator service positively determines that the enquirer requires legal services, it refers the client's case to a specialist help provider, namely a provider with a CLA contract in the relevant category. Such providers give the client a legal-aid-funded service (Controlled Work) on behalf of CLA and so are considered part of the CLA operation rather than a 'normal' firm/organisation with a legal aid contract. Initial advice is given remotely without a LH form needing to be signed. Where the provider finds that more assistance is required than can be provided through an initial telephone call, the provider will send the client a LH form. Once that is signed and returned by the client with evidence of financial eligibility, the provider can conduct casework for the client.

The CLA contract is a national contract meaning that providers are expected to provide specialist help remotely (email, post, telephone). Only an exempted person can obtain face-to-face services. However, it is important to note that any provider (even those without the CLA contract) can contact CLA to justify why the client needs face-to-face services and, if successful, will obtain from CLA a 'reference number' to confirm that CLA has assessed the client as requiring a face-to-

face service (see *Lord Chancellor's guidance under section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012* (June 2014) (the Lord Chancellor's guidance), para 8.10).

Housing and family law also form part of the gateway, but these are not mandatory categories, meaning that those seeking legal aid advice and assistance in these areas can go to any provider with a contract in those areas. In the author's view, that will invariably be in the client's best interests, rather than being provided with casework assistance on a remote basis.

CLA work relates only to LH. Any person needing legal aid assistance which should be conducted under a legal aid certificate is not subject to the gateway requirements and can go to any provider. Naturally the problem with this is that the LAA no longer contracts with providers for education, discrimination and debt work as these are mandatory CLA areas. A provider who is not a CLA provider for those areas would therefore need to apply for an individual case contract, which would require much justification to the LAA before it could be granted. Further, and most worryingly, legal practitioner experience in these mandatory areas is diminishing in the legal aid sector as the LAA only contracts with a handful of providers to provide CLA work. For example, in the area of education law, there are only two specialist providers in the country. Legal practitioner experience in education law (provided on a legal aid basis) is effectively confined to the education law casework staff within those two providers. In the author's view this is a stark concern which, in the immediate years to come, will manifest into an acute difficulty for access to justice in these three areas of law. Another significant problem (which will also play out in times to come) is the ability of provider firms to recruit caseworkers/solicitors who meet the onerous supervisor standards in these mandatory areas, since experienced caseworkers either already work for the existing CLA providers, or work for privately paying firms/departments where they will have salary expectations which provider firms/organisations (which do the majority of legal-aid-funded work) cannot hope to meet or compete with.

## Education law

Noel Arnold, director of legal practice and solicitor, and Kate Harvey, head of education law and solicitor, both of Coram Children's Legal Centre

Education law was hugely affected by LASPO,

which removed from the scope of legal-aid-funded legal services the following specific education law issues or matters on which a person may commonly need help: school admissions; exclusions from school or colleges; school transport issues; home education disputes; complaints; bullying; negligence; disputes with independent schools; and disputes with further and higher education providers (eg academic appeals, degree classification etc). LASPO does this by simply not including these specific matters within its scope (see LASPO Sch 1). This is of significant concern for children's access to justice because while it would usually be a parent or other responsible person seeking legal advice and assistance as the client, the subject or ultimate beneficiary of legal services is the child whose education is in issue.

Coram Children's Legal Centre's 'Child Law Advice Service' provides a free digital first advice service (and low-cost telephone advice line) on all education law issues. However, the service naturally has its limitations given increasing demand and does not provide a casework service. It cannot therefore be considered as a replacement for the decimation of legal aid scope for education law issues. Some law firms offer low cost or free initial advice on these out-of-legal-aid-scope issues.

The only area of education law which is in scope is special educational needs (SEN) (see LASPO Sch 1 para 2(1)). Where a person seeking advice about a child's SEN has sufficient interest (eg a parent) and is financially eligible, they should be able to secure legal-aid-funded help. However, education law is an area which is mandated as gateway work and so the prospective client must contact the CLA operator service first (unless they are an exempted person). Casework assistance is provided on a remote basis (see 'Civil Legal Advice' above). Children are exempted persons so can receive face-to-face advice rather than remote advice, but it is rare that children will seek advice for themselves; usually parents will be the clients seeking advice. The particular legal issues are those which arise under Education Act 1996 Pt 4, Children and Families Act 2014 Pt 3, and Learning and Skills Act 2000 s140. Legal representation (advocacy services) before the First-tier Tribunal (FTT) is not funded work and so casework assistance is limited to all steps to prepare for the substantive tribunal hearing. This is all done under LH. Appeals against decisions of the FTT fall into the Licensed Work category and so an application for a legal aid certificate would need to be made to conduct casework relating to an appeal.

Discrimination relating to education issues is also eligible for legal-aid-funded assistance but similarly would usually go through CLA first, before onward referral to a CLA specialist provider.

Some areas of education law (out-of-legal-aid-scope issues), eg admissions and exclusions, may involve public law challenges against agencies of the state. Therefore, if a client is financially eligible and ordinary merits tests are met, legal-aid-funded assistance may be provided to investigate and possibly challenge the defendant agency. Such work would usually need to be conducted by either one of the two CLA providers in the education law category, or a provider with a public law contract (if that is justified). The difficulty for the client is that they will need to have conducted the initial stages, eg internal appeals, in relation to the dispute (until a public law challenge is apparent) either without legal assistance, with pro-bono help, or having paid privately. These public law challenges include judicial reviews of local authority failures to comply with statutory duties.

### Community care law

Noel Arnold, director of legal practice and solicitor, and Keeley Creedy, solicitor, both of Coram Children's Legal Centre

Community care law is essentially an umbrella term which refers to support and services which are provided, or (arguably) should be provided, to an individual. These forms of support and services are usually provided by the state, through local authority departments or the healthcare sector, and may include agencies with whom state agencies contract to make such provision available. The way this area of law is referred to in LASPO is by Sch 1 para 6(1), which explains that civil legal services (legal aid) in relation to 'community care services' are in scope. Crucially, LASPO Sch 1 para 6(3) then sets out in detail the statutory provisions which collectively form the definition of community care services. Providers therefore need to be careful that the issue that the client has (in relation to support and services being provided or to be provided) fits within the defined statutory provisions.

Legal-aid-funded assistance with community care law will normally need to be given by a provider with a community care contract, although some issues can legitimately (in the view of the LAA) fall within the public law contract. Providers should check the latest version of the LAA's category definitions

document. The standard terms document (of all the civil legal aid contracts) notes that the category definitions forms part of the legal aid contracts, hence its importance. The LAA's November 2015 category definitions document states that public law challenges, in particular by way of judicial review, are covered by the category of law (legal aid contract) in which the principal matter or proceedings appear or which relates to the underlying substance of the case. For example, a judicial review matter which concerns a young person's pathway plan would usually be expected to be conducted by a provider with a community care contract (see para 14 of the 2015 category definitions document). It continues (at para 16):

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

As far as children are concerned, the typical legal issues for which legal funded assistance may be required are: support and services to children; provision for disabled children; provision for children in need; social care needs of families who are the subject of 'no-recourse-to-public-funds' conditions; changes in placement; accommodation issues; disputes about 'looked-after child' status (CA 1989 s20 issues); pathway plans; appointment of personal advisers; looked-after child care plan challenges; respite care for parents/carers; staying-put issues; age-assessment disputes; and provision of healthcare services to children.

Providers will usually need to give careful thought to who the client should be. Where the child is able to give instructions and understand advice, it may be most appropriate for the child to be the recipient of the legal-aid-funded service. Alternatively, it will not be at all uncommon for another person to provide instructions on behalf of the child, such as a parent or a children's rights advocate. Identifying a suitable litigation friend, when one is needed, can often be a source of difficulty. Children's rights advocates are primarily charged with helping children express their own views. This is different from the role of litigation friend, who is required to

provide instructions to a solicitor as to what is in the best interests of the protected party (the child). Advocacy organisations can be reluctant to take on such a role and may also be concerned by the potential risk of a costs order being made. If it can be shown that there is no other suitable person to take on this role, the Official Solicitor will likely accept an invitation to act as litigation friend.

In addition, problems sometimes arise with the LAA when (in relation to Controlled Work) it scrutinises escape fee claims or audits case files and (in relation to Licensed Work) it considers applications for legal aid certificates. The LAA may dispute the provider's view that the parents' means should not be aggregated with the child's means on the basis that it would be inequitable to do this. In some cases this would not make a difference as the child would be financially eligible even if the parents' means are taken into account, but aggregation may often put the child outside the financial eligibility limits.

One of the other significant challenges for providers of children's community care advice and representation are the regulations concerning payment for judicial review work, where permission to proceed by way of judicial review is not granted by the court. The anxiety this induces will be well known to providers and detailed consideration of this is outside the scope of this article but is important, as most community care law issues, if not resolved through the making of representations, will result in the provider having to consider and advise the client on seeking adjudication of the dispute by a judicial review challenge.

Providers also need to note the restrictions on using delegated functions under the community care contract. In relation to judicial reviews, these have now been in place for some years and are set out (more recently) at para 5.3(a) of the 2015 Standard Civil Contract specification: general provisions (May 2016 amendment):

*... you do not have the power to make a determination that a client qualifies for authorised representation provided on an emergency basis, or to amend or refuse to amend a limitation or condition to which a determination in respect of Emergency Representation is subject, in relation to judicial review in any category of law, other than in relation to proceedings under Part VII Housing Act 1996 (as amended), section 21 National Assistance Act 1948 (as amended), section 20 Children Act 1989 (as amended), section 47(5) National Health Service and Community Care Act 1990 (as amended), section 19(3) Care Act*



2014, or section 36 of the Social Services and Well-being (Wales) Act 2014 unless we have specifically delegated this function to you by way of an authorisation. You must only exercise such a delegated function in relation to such cases and in such circumstances as we specify.

## Child abuse

Tracey Storey, partner, Irwin Mitchell LLP

When the MoJ released its consultation paper *Proposals for the reform of legal aid in England and Wales* (November 2010), it was clear that legal aid would continue in child abuse compensation claims. Reference was made to the seriousness of the harm, the vulnerability of survivors of child abuse and the lack of alternative funding. However, the reality was rather different. In the lead-up to the implementation of LASPO, legal aid applications for child abuse claims were being routinely refused by the LAA's predecessor, the Legal Services Commission (LSC). This was despite the fact that these were complex cases often involving novel points of law, limitation arguments, causation difficulties and massive betrayals of trust as well as breaches of human rights. This practical reality was taking place against a backdrop of parliament giving reassurances that legal aid was going to continue for these cases.

The Lord Chancellor's guidance set out that in child abuse cases where conditional fee agreements (CFAs) were an option, legal aid would be refused. The fact that legal aid would be better for the prospective claimant client was regarded as irrelevant and indeed the LAA would only consider applications where the prospects of success were less than 60 per cent (where prospects of success were considered to be 60 per cent or more, this was contemplated by the guidance to be indicative that a CFA would be suitable). If it could be demonstrated that after-the-event (ATE) insurance was available, then legal aid would not be considered.

For a considerable period of time following LASPO's introduction, the LAA continued refusing all applications on the grounds that they could be run under CFAs. However LASPO Sch 1 explains that abuse of an individual which took place at the time when the individual was a child or vulnerable adult is an area of law which can be funded by legal aid (see LASPO Sch 1 para 3). This also includes: abuse of position or powers by a public authority (LASPO Sch 1 para 21); breach of rights under the European Convention on

Human Rights (ECHR) by a public authority (LASPO Sch 1 para 22); and, finally, victims of a sexual offence (LASPO Sch 1 para 39). Accordingly LASPO Sch 1 clearly envisaged legal aid being available for cases involving abuse.

At Irwin Mitchell, we took advice from our Public Law Team that the LAA appeared to be putting in place a blanket policy which was not in line with the Lord Chancellor's guidance, which stated that applications should be considered on a case-by-case basis. In addition, refusing legal aid to a victim of child abuse could lead to significant deductions from their damages if the client's legal costs have to be funded under a CFA and this in itself could amount to a breach of ECHR art 6. We were able to successfully argue that where we have a prospective claimant client who does not have capacity or is under the age of 18, they are not in the same position as a person who does have capacity or is an adult. Adults and individuals with capacity can choose to represent themselves and so, therefore, refusing legal aid to children and people with a disability would be a breach of the Equality Act (EqA) 2010. Child claimants and claimants without capacity do not have the choice to represent themselves and we have been successful in obtaining legal aid for this category of claimants.

Additionally, we have noticed that the LAA has stopped raising the CFA point in cases where it is impossible to assess the percentage chances of success until further investigative work has been carried out under a legal aid certificate for Investigative Representation (IR). As most child abuse cases have limitation issues in any event and the initial prospects of success are usually between 50 and 60 per cent, it has been possible to argue that the cases are unsuitable for a CFA.

As a result, we have been successfully applying for legal aid for children, particularly in cases where children have been subjected to sexual abuse and where social care departments have been on notice that a child is at risk but have failed to take appropriate action to protect the child. Many of our clients are still children when we investigate these cases, or are young adults, sometimes with mental health issues or learning disabilities, and as they are vulnerable adults, we have been able to obtain legal aid to represent them.

## Court of Protection

David Edwards, solicitor, Simpson Millar

With the limited exception (Mental Capacity Act (MCA) 2005 s18(3)) of matters relating to property and affairs (for which legal aid is unlikely to be available in any event), the Court of Protection (CoP) has no jurisdiction over children under the age of 16 (MCA 2005 s2(5)). Children aged 16 or 17 can be the subject of proceedings in the CoP. A power exists to transfer proceedings relating to children of this age to the family court (or vice versa), if that is more appropriate (see MCA 2005 s21; Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007 SI No 1899; and *B (a local authority) v M* [2010] EWHC 3802 (Fam); [2011] 1 FLR 1635). Children cannot be subject to authorisations under the Deprivation of Liberty Safeguards (DoLS). Any such deprivation is therefore likely to require authorisation by way of a court order. There is no reason why a child could not be a respondent to CoP proceedings which relate to another person (eg their parent, or an adult sibling) and could not – provided the relevant merits and eligibility criteria are met – receive legal aid to be represented in such proceedings. The CoP has the power to dispense with the need for a child to act through a litigation friend in those circumstances (see Court of Protection Rules 2007 SI No 1744 r141(4)).

There are no special rules as to financial eligibility for children who are or may be parties to proceedings in the CoP. As with CoP work generally, these cases can be conducted by providers with either mental health or community care contracts. LASPO Sch 1 para 5 brings within scope '[c]ivil legal services provided in relation to matters arising under ... the Mental Capacity Act 2005'. It specifically excludes services provided in connection with the creation of lasting powers of attorney or the making of advance decisions. LH is, as usual, available for advice and assistance (subject to those exclusions and the ordinary sufficient benefit and financial eligibility tests) as to matters arising under the MCA 2005, including in relation to contemplated proceedings in the CoP. As with LH provided to children in general, the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 SI No 480 (CLA(FRPS) Regs) reg 16(4) requires that the parents' resources should be taken into account when assessing financial eligibility unless it appears 'inequitable' to do so.

Legal aid certificates for FR for

proceedings in the CoP are more strictly limited. Regulation 52 of the CLA(MC) Regs requires that, in addition to the ordinary cost-benefit and prospects-of-success tests, applicants must show that the CoP has ordered, or is likely to order, an oral hearing; that it is necessary for the individual to be provided with FR in the proceedings; and that the proceedings relate to a person's liberty or physical safety, medical treatment, capacity to marry, to enter into a civil partnership or to enter into sexual relations, or right to family life. Where a child is the subject of CoP proceedings (the protected party: 'P'), it will almost always be necessary for the child to be provided with FR.

Where the applicant for legal aid is a child, eligibility will in all cases be means-tested: since children cannot be the subject of a DoLS authorisation, they cannot benefit from non-means-tested legal aid even in proceedings which relate to a deprivation of their liberty. Whether that position is compatible with ECHR art 5 is something which may, in the appropriate case, need to be challenged by judicial review. Children of 16 or 17 who are the subject of CoP proceedings are reasonably likely to be living in residential care settings already, and may well be looked after by the local authority. In those circumstances, it is unlikely that it will be appropriate for the LAA, when assessing financial eligibility, to take the resources of the parents into account because it is unlikely that the parents will be 'substantially maintaining' the child (see CLA(FRPS) Regs reg 16(5)). The LAA's *Guide to determining financial eligibility for controlled work and family mediation* (April 2015) (the financial eligibility guidance) para 9.1(2) states that: 'Where a child is a "looked after" child, ie the responsibility of the local authority, it would usually be inequitable for his or her foster carer's/social worker's income and capital to be aggregated with that of the child'. It is suggested that the same must be true for certificated work.

Many children who are the subject of CoP proceedings will be able to show that they are eligible for legal aid. Difficulties may arise in the cases of children who have received a substantial award of damages for personal injury or clinical negligence, whose cases – for obvious reasons – come before the CoP relatively frequently. The rules for calculating eligibility where money is held on trust for a child are highly complex, and will need to be looked at in each individual case: it cannot, however, be simply assumed that money held on trust is disregarded for the purposes of legal aid eligibility.

## Employment

*Philip Richardson, partner, Stephensons Solicitors LLP*

LASPO brought about a sea change for legal aid in employment cases. Under the previous regime, legal aid was available for a wide range of employment disputes such as unfair dismissal, redundancy and unlawful deduction of wages. However, the scope of legal aid in employment cases is now principally governed by LASPO Sch 1 para 43(1) as: 'Civil legal services provided in relation to contravention of the Equality Act 2010 or a previous discrimination enactment.' LASPO crucially removed legal aid for employment tribunal matters and restricted it to claims involving aspects of discrimination as set out in LASPO Sch 1 para 43(3).

Importantly, children who suffer discrimination, bullying or harassment on the grounds of their age, disability or gender can, subject to the ordinary means and merits tests, benefit from LH for advice and assistance. However, the narrowing of the scope of legal aid has had, and is likely to continue to have, an impact on children accessing justice. In particular in the employment context, apprentices have been some of the worst affected outside of the discrimination sphere where legal aid is still available.

Interestingly, under LASPO Sch 1 para 32(2), LH is also available:

*... in relation to a claim under employment law arising in connection with the exploitation of an individual who is a victim of trafficking in human beings, but only where—(a) the services are provided to the individual, or (b) the individual has died and the services are provided to the individual's personal representative.*

In essence, this means that those who have any employment claim connected to victims of human trafficking may have access to legal aid; however, in practice, these cases are relatively few and far between.

The regime provides legal aid to cover advice and assistance for claims up to the tribunal, but does not cover representation at the tribunal itself, at preliminary hearings or at trial. It is important to note, however, that the scheme does allow applications to be made for FR to cover representation in the appeal courts.

The process for the prospective client claimant to obtain LH requires the client to telephone CLA (see 'Civil Legal Advice', p4) to briefly outline the nature of their legal issue

and to undergo an initial assessment of their financial eligibility, following which, if they are provisionally considered eligible, they will be transferred to one of the contracted specialist providers. Once the case is passed through to a specialist provider, more detailed instructions are taken from the client and they are provided with specific advice in relation to their issue.

## Clinical negligence

*Alison Eddy, partner, Irwin Mitchell LLP*

Legal aid is available in a very limited number of clinical negligence cases. Applications are allowed in cases where clinical negligence has caused a neurological injury to an individual, who, as a result, is now severely disabled. Further conditions which need to be satisfied are given as follows in LASPO Sch 1 para 23:

- the clinical negligence must have occurred while the individual was in utero or during/after birth but before the end of the first eight weeks of the individual's life (if born during or after the 37th week of pregnancy; if born earlier, the period of eight weeks begins with the first day of what would have been the 37th week);
- the services must be provided to this individual or, if they have died, to their personal representative.

The 'disability' must be severe and the term encompasses both physical and mental disability. 'Birth' is defined as 'the moment when an individual first has a life separate from his or her mother' (see LASPO Sch 1 para 23(5)). Both neurological injury and severe disability must be demonstrated. Neurological injury is not confined to the brain; it could encompass other parts of the nervous system.

There is no guidance on the definition of 'severe disability'. This is the area where most difficulties may arise. As practitioners, we see the following categories of cases:

- where there is clear evidence of severe disability in the form of a diagnosis or symptoms immediately following discharge; as long as all other criteria are satisfied, legal aid should be granted in such a case;
- where there is only a likelihood of severe disability (eg brain scan may show some damage or the parents are suspicious because of the traumatic nature of the birth). Brain injury can cause a variety of symptoms, which only become noticeable throughout the baby's childhood, judged



against developmental milestones. These applications therefore may not be successful until a child is older and the disability emerges or its extent is clearer.

The LAA may consider granting a legal aid certificate if the child is young and the extent of the disability cannot be demonstrated, if prejudice to the claimant can be shown. It remains to be seen how the LAA will approach such circumstances.

Examples of cases which will fall within the LASPO criteria may involve: mismanagement of labour leading to deprivation of oxygen for the baby resulting in a brain injury; negligent resuscitation; and delay/failure to diagnose a serious illness prior to discharge or upon readmission, such as Group B Strep infection, neonatal hypoglycaemia or septicæmia. It also encompasses claims against GPs for failure to refer/delay in referring infants suffering from a serious illness, such as septicæmia or meningitis, to hospital.

Merits and financial eligibility criteria apply. To qualify for FR both the cost-benefit ratio and the merits criteria must be met. Legal aid is available for all courts in which clinical negligence claims are heard and for all aspects of proceedings, including the investigation stage before proceedings are issued at court.

Where a child is injured as a result of admitted negligence, they are entitled to recover compensation to put them in the position they would have been in but for the negligence. This, of course, is impossible. However, compensation can help with care, equipment and therapies, which will be required for the rest of the child's life. These claims are very complex and only a small number of firms understand the issues and hold a legal aid contract to conduct this type of work.

## Housing

*Katie Brown, partner and deputy head of housing, community care and public law, TV Edwards LLP*

## Loss of home

Young people (aged 18 or older) may be fortunate enough to have their own tenancy or licence of a property. Their home may be at risk if they are in rent arrears or accused of anti-social behaviour. They will need advice and, if appropriate, representation at court to try to avoid eviction.

Legal aid covers costs in relation to court proceedings for the possession of the client's home at both the LH and legal aid certificate stages (see LASPO Sch 1 para 33(1)(a)). A new matter can be opened where the client has received a notice or indication in writing that their landlord intends to evict them from their home. Funding (under either the LH scheme or a legal aid certificate) can continue through the first set of court proceedings, through to the final warrant (notice of eviction) stage.

Legal aid is no longer available for advice on housing benefit claims or appeals. However, tenants represented in possession claims can request an adjournment of the proceedings pending the outcome of a claim or appeal.

There may also be cases where the landlord is harassing, or threatening unlawful eviction of, the tenant. These cases remain in scope (LASPO Sch 1 para 33(1)(b)) and clients can have the benefit of legal aid to apply for injunctions to stop the landlord's unlawful actions and to seek compensation.

## Homelessness

If a child is without safe or suitable accommodation, they will need advice on making a homeless application (under the Housing Act (HA) 1996) or requesting accommodation from children's services (under CA 1989 s20). Both remain in scope (LASPO Sch 1 paras 34(1)(b) and 6(3)(g) respectively) and can be conducted by providers with a housing contract (legal services in relation to CA 1989 s20 also fall within the community care contract).

For a homeless application, LH can cover advice and assistance and FR or IR under a legal aid certificate are available for judicial reviews against a refusal of interim accommodation under HA 1996 s188(1) or 188(3) or to issue a county court appeal against a negative review decision under HA 1996 s204.

Where a child or young person is homeless or threatened with homelessness and also requires advice on an application for an allocation of social housing under HA 1996 Pt VI, legal aid remains available (see LASPO Sch 1 para 34(1)(a)). Under LASPO, 'homeless' has the same meaning as under HA 1996 s175, which means that if they are living in accommodation which it would not be reasonable for them to continue to occupy and seeking priority for an allocation of social housing, advice to them is within scope.

In relation to social care support for children, LH is available for advice and assistance. Where children's services refuse

to accommodate a child under CA 1989 s20, either pending assessment or following an assessment that is legally flawed, an application for a legal aid certificate (IR or FR) can be made to investigate/pursue a judicial review claim. Delegated functions remain in place for the granting of emergency legal aid in those circumstances (as opposed to cases under CA 1989 s17 where practitioners no longer have delegated functions and must apply to the LAA for emergency legal aid) (see also 'Community care law', p6).

## Risk to health or safety in rented premises

Children are often badly affected by disrepair in their family homes, but only the tenant would be able to bring a claim against their landlord for breach of contract. If the young person has their own tenancy, advice and representation can be provided where there is a need to take action to remove or reduce a serious risk of harm to their health or safety (or a member of their family). It must also be shown that: the risk arises from a deficiency in their home; their home is rented or leased from another person; and services are provided with a view to ensuring that the other person makes arrangements to remove or reduce the risk (see LASPO Sch 1 para 35(1)).

It can be difficult for advisers to know when a new matter can be opened. The Lord Chancellor's guidance (paras 12.9, 12.10), provides a non-exhaustive list of factors to be taken into account when considering whether the case falls within scope. This also refers to the need for a 'credible allegation' that the disrepair poses a serious risk. When the risk is removed or deficiency repaired, legal aid must stop, so that the client has to deal with any claim for compensation themselves, or proceed under alternative funding arrangements (such as a CFA).

## Anti-social Behaviour, Crime and Policing Act 2014 - Part 1 Injunctions

On 23 March 2015, LASPO Sch 1 para 36 was amended to bring within scope legal aid in relation to an application for, or proceedings in respect of, an injunction against the individual under Anti-social Behaviour, Crime and Policing Act (ASBCPA) 2014 Part 1. These provisions replaced injunctions brought under HA 1996 s152. The LAA has included this work as 'miscellaneous', falling outside all other civil contracts (and the category definitions).

Many young people are at risk of having injunctions made against them because of their alleged behaviour. For children, the application

is brought in the youth court and practitioners should refer such cases to specialist criminal defence practitioners (see 'Criminal defence', p14). For those aged over 18, the application for an injunction will be issued in the county court.

If the application is brought by a local authority or housing association and the young person is at risk of being excluded from their home or having conditions imposed which interfere with their occupation of a property, it is likely to be appropriate for a housing provider to give advice and assistance to that young person. LH is available for this and delegated functions can be used to grant emergency legal aid (FR) for urgent hearings. It is very important for young people to receive legal advice at this stage because if an injunction is granted and the young person breaches the injunction they would be at risk of losing their home under a new mandatory ground for social housing tenants. Alternatively, young tenants can be advised to give an undertaking instead (if appropriate), which would alleviate this risk.

Where a young person is alleged to have breached an injunction, the landlord or housing association can bring committal proceedings. These are again dealt with by the county court, but funding is granted under the criminal legal aid scheme and practitioners must have either a criminal contract or an individual case contract. Relevant guidance was issued by the LAA in June 2015 (see *Apply for legal aid in civil contempt - committal proceedings: Guidance for providers*). It is clear that many people facing committal proceedings are failing to find solicitors willing to represent them due to the funding complexities.

## Welfare benefits

*Pamela Fitzpatrick, director, Harrow Law Centre*

Legal aid for welfare benefits cases has been severely affected by LASPO with most basic matters completely removed from scope. As a result, the number of providers with welfare benefits contracts has been dramatically reduced. However, any provider with a Standard Civil Contract may make exceptional case funding (ECF) applications (to cover advice/representation in relation to welfare benefits issues) for clients (see 'Exceptional case funding', p13).

Legal aid remains available for appeals on a point of law for welfare benefits, tax credits and council tax reduction schemes (see LASPO

s8(1) and Sch 1 para 8). A child or young person must meet the financial eligibility criteria and consequently the income of their parent or carer may be taken into account.

Depending on the issue, a judicial review may be funded by legal aid by a provider with either a welfare benefits or public law contract. Where permission to appeal is refused by the Upper Tribunal, it is possible for legal aid to be sought to fund a judicial review challenge against that decision by a provider with a welfare benefits contract. However, the time limits make this a very difficult area to pursue as the so-called 'Cart' judicial reviews must be made within 16 days of the impugned decision.

Public law challenges may also be made in respect of delay cases, but generally a judicial review may only be brought where there is no right of appeal or where the appeal cannot offer an effective remedy. The most likely cases to be successful will be where a person is at risk of losing their home, for example, following a sanction or a 'right-to-reside' decision. Applications for legal aid to cover such challenges should be made by providers with a public law contract, rather than welfare benefits contracts, per LASPO Sch 1 para 19.

Most welfare benefits, even those intended to assist with the additional cost of children, are awarded to a parent or carer rather than to the child. The only exception to this is disability living allowance (DLA) for children with a disability (see Social Security (Claims and Payments) Regulations 1987 SI No 1968 reg 43). Consequently a parent or carer will usually be the person bringing the legal challenge, rather than the child or young person.

A young person aged 18 or over can access most welfare benefits but will often receive a lower rate of benefit than older claimants. For example, with some exceptions, the main income replacement benefits, such as income support, jobseeker's allowance and universal credit, are paid at a lower rate to those under 25 and housing benefit at a lower rate for private renters under 35 (see Housing Benefit Regulations 2006 SI No 213 reg 13(5)). A young person aged 16 or 17 who is unemployed and not in full-time education is generally only able to claim one of the main means-tested benefits where the young person is a lone parent, disabled or estranged from their parent or carer.

Some benefits do not have any minimum age requirement but the general rules of the particular benefit may exclude a child or young person. For example, to qualify for housing benefit a person must be liable to pay rent or be treated as liable because the person responsible is not paying (see Housing Benefit Regulations 2006 reg 8(1)(c)).

LH is available in welfare benefits cases to provide advice and assistance to a client: considering whether or not to submit an application for permission to appeal to the Upper Tribunal; preparing such an application; making further representations in an appeal already lodged; for advice and assistance on the merits of a judicial review of a refusal of permission to appeal by the Upper Tribunal; and for preparation of onward appeals to the Court of Appeal and Supreme Court.

Where LH is used for an Upper Tribunal appeal, this is expected to also include any application to the Upper Tribunal for permission to appeal to the Court of Appeal. If no LH was provided at the Upper Tribunal stage, it is possible to provide LH to conduct the preliminary work in relation to an appeal to the Court of Appeal, which would include considering the merits, documents and completing the application for a legal aid certificate.

LH is also available for appeals on a point of law related to council tax reduction schemes. The route for appeals on council tax support schemes is an appeal to the valuation tribunal and a further appeal on a point of law to the High Court and onward appeals to the Court of Appeal and Supreme Court (LASPO Sch 1 para 8A (as inserted by Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2013 SI No 748 art 3)).

Legal aid is available for representation under a legal aid certificate for onward appeals related to welfare benefits or council tax reduction schemes to the Court of Appeal and Supreme Court.

A real lacuna for welfare benefits is that no legal aid is available for the steps prior to the appeal work. In order to appeal to the Upper Tribunal the appellant must first have had their case considered by the FTT. They must have: obtained a statement of reasons within the relevant time limit; identified an error of law; applied for permission to appeal to the FTT on a point of law; and had a decision either to refuse or grant permission to appeal. Only at this point does the person become entitled to make an application for legal aid and only then where they are financially eligible. Such hurdles are likely to defeat all but the most determined of appellants or those who are fortunate enough to have had the assistance of a welfare benefits adviser in the first stages (despite no legal aid being available for the same).

## Mental health

Sophy Miles, barrister, Doughty Street Chambers (previously a solicitor and founding partner of Miles and Partners LLP)

There is no minimum age for admission to hospital under the Mental Health Act (MHA) 1983 or for community treatment orders. Young people of 16 or over can be received into guardianship. Legal aid 'in relation to matters arising under [the MHA 1983]' are in scope (see LASPO Sch 1 para 5(1)(a)). Usually legal aid covers:

- proceedings before the FTT (Mental Health) (in England) or the mental health review tribunal (in Wales) (the Tribunal);
- advice about issues arising from detention or aftercare;
- (unusually) advice and/or representation in relation to judicial review or habeas corpus.

Mental health work can only be carried out by providers who hold a mental health contract. Important guidance is provided by the LAA in its document: *Contract management – mental health guidance* (April 2014) (the contract management guidance).

For those representing children and young people in proceedings before the Tribunal (the vast majority of mental health work) LH and Controlled Legal Representation (CLR) are available. CLR is not subject to a financial eligibility test. Importantly, LH can also be provided on a non-means-tested basis to a patient whose case is the subject of proceedings or contemplated proceedings before the Tribunal (see CLA(FRPS) Regs reg 5(1)(f)). The contract management guidance sets out (at section 2) the conditions that must be satisfied for non-means-tested LH to be provided.

Where LH is means-tested, the LAA recognises that obtaining evidence of means can pose particular difficulties and that:

*Exceptionally, the personal circumstances of the client (such as age, mental disability or homelessness) may make it impracticable for any evidence to be supplied. In such cases, eligibility can be assessed without evidence. However, the attendance note must give the reason why evidence could not be obtained and providers must be prepared to justify this on audit if necessary*

*... It will often be impracticable to obtain evidence of income from patients with mental health problems who are in hospital (for*

*example, those detained under the [MHA 1983]).*

*Providers should however attempt to obtain oral or written confirmation of the position ... (see Guide to determining financial eligibility for Controlled Work and Family Mediation (April 2015) (the financial eligibility guidance) section 12.2 paras 10 and 11).*

Non-means-tested CLR may be provided to either the patient whose case is to be considered by the Tribunal, or to a nearest relative who applies to the Tribunal, and will only be refused on a merits basis if it appears unreasonable in the circumstances (note 2014 Standard Civil Contract Mental Health Specification (Category Specific Rules) para 7.35 recognises that this would be unusual).

It is further recognised that some detained patients may be unable to sign a form due to their condition (2014 Standard Civil Contract para 7.40), so in exceptional circumstances the provider may annotate the form which is then signed by a supervisor of the provider firm/organisation. The contract management guidance states that this will include cases where the patient lacks capacity to sign the form (see section 2, p5). Practitioners should note that the 2014 Standard Civil Contract para 7.6(b) requires all advocates before the Tribunal, except self-employed counsel, to be members of the Law Society's Mental Health Accreditation Scheme.

The 2014 category definitions provide (at para 13) that:

*Public law challenges to the acts, omissions or decision of public bodies (including under the Human Rights Act 1998), in particular challenges by way of judicial review (as described in paragraph 19 of Part 1 of Schedule 1 to the Act) and habeas corpus (as described in paragraph 20 of Part 1 of Schedule 1 to the Act) are covered by the category in which the principal matter or proceedings appear or by the category which relates to the underlying substance of the case (as referenced by the widest category definition incorporating excluded work). They are also covered by the public law category.*

Means and merits-tested LH, IR and FR can be provided to those under 18 in cases where the underlying substance of the case relates to the mental health category; the most obvious being a claim for habeas corpus in the event of a detention where the requirements of the MHA 1983 have not been complied with.

## Children in prison

Dr Laura Janes, legal director, Howard League for Penal Reform

Parliament introduced savage cuts to the scope of prison law legal aid in December 2013 through the Criminal Legal Aid (General) (Amendment) Regulations 2013 SI No 2790. The government's rationale was that legal aid should only cover prison law issues that engage ECHR art 6, or that directly affect liberty. The government was of the view that all other matters could be adequately dealt with through the prison complaints system. Despite concerns raised by the Joint Committee on Human Rights about the impact of these cuts on children and other vulnerable prisoners, no exceptions were made for children. This means that the only prison law issues that remain within the scope of legal aid are: representation before an independent adjudicator; representations before the Parole Board where the Board has the power to direct release; and advice concerning sentence calculations in limited circumstances.

England and Wales still has one of the highest rates of child incarceration and the lowest age of criminal responsibility in Europe. There is no doubt that children in prison present with a huge range of unmet legal needs. Yet the issues remaining in scope do not routinely affect children. Parole reviews for children are relatively rare as are sentence calculation cases. Legal aid for independent adjudications is likely to be the remaining area of prison law most used by children. Even these cases only affect a small proportion of detained children who are serving longer-term sentences. Further, although children at risk of additional days following independent adjudications ought to be represented (*R (M) v Chief Magistrate* [2010] EWHC 433 (Admin); [2010] All ER (D) 183 (Feb)), no data is collected about the proportion of children who are represented before the independent adjudicator. When attending on behalf of their own clients, lawyers from the Howard League routinely see that significant numbers of children are not represented.

Prison law work is mainly funded under the lower volume crime category in the form of 'advice and assistance' or 'advocacy assistance' work. Legal-aid-funded prison law work can be conducted by firms with a criminal contract that includes the prison law category specified in the schedule to the contract.

In addition to there being very limited legal aid funding scope, all prison law matters



must also pass the sufficient benefit test.

Criminal legal aid (as described above) can be given to children in limited circumstances. The child must be old enough to give instructions and understand the nature of the advice and proceedings. If there is no adult who can make the application for criminal legal aid on behalf of the child, criminal legal aid can be provided to a child if there is a good reason why a relevant adult cannot make the application.

Prior to the scope cuts for prison law matters, legal aid was available to cover advice to children on their: sentence planning; adjudications before governors; resettlement; and treatment/conditions. These issues have not gone away and calls to the Howard League's advice line have increased by around one-third following prison law legal aid cuts.

Some of these issues may be dealt with under other legal aid contracts, although providers without experience of prison law may lack the background knowledge of the relevant prison processes. For instance, if a child is due to be released or eligible for early release but has no suitable accommodation and support in place, advice and assistance may be given via LH by providers with a community care or public law contract. If the duties owed by the local authority can be resolved, there may still be a need to challenge the decision by the prison or secretary of state concerning early release. This is an internal appeals process that must be adhered to before the matter may be suitable for a public law challenge. Another example is sentence planning issues, such as lack of access to appropriate offending behaviour work, which may engage ECHR art 8 or EqA 2010 duties. Such failures might be challenged by way of judicial review, although there remains the problem of exhausting other remedies first. There is no legal aid for that (initial advice and assistance with making representations) and unsurprisingly children often struggle to do this for themselves.

In the context of a legal challenge to the cuts to legal aid for prison law (*R (Howard League for Penal Reform and Prisoners' Advice Service) v Lord Chancellor* [2015] EWCA Civ 819; [2015] All ER (D) 31 Aug), the Secretary of State for Justice told the Howard League and the Prisoners' Advice Service (PAS) that the LAA will consider ECF applications for any prison law matter. However, it appears that such applications will only be granted in limited circumstances.

## Immigration and asylum law

*Sophie Freeman, solicitor, Coram Children's Legal Centre*

The most significant change brought in by LASPO in relation to this field was to remove virtually all immigration matters (as opposed to asylum) from the scope of legal aid. Controlled work (LH and CLR), with the notable exception of work for victims of trafficking (see below), is no longer available for those seeking to remain in the UK on non-protection grounds. This includes those making applications to remain on the basis of ECHR art 8 regardless of whether they are a child or an adult. The group particularly affected by this change are children and young people (whether separated or in families) who have lived in the UK for a long time (possibly their whole lives) but who have never regularised their stay or been assisted by others to do so.

Legal aid is available for children making applications for refugee status, humanitarian protection and protection under ECHR arts 2 and 3 (see LASPO Sch 1 para 30(1)). Generally, these types of cases are collectively referred to as 'protection claims'. Work representing unaccompanied children who are claiming asylum is remunerated at hourly rates (2013 Standard Civil Contract (Immigration and Asylum Specification) para 8.77(i)), with payment also being available for legal representatives to attend Home Office interviews (both screening and substantive) with their child clients (Civil Legal Aid (Immigration Interviews) (Exceptions) Regulations 2012 SI No 2683, and 2013 Standard Civil Contract (Immigration and Asylum Specification) para 8.52). Subject to the 'merits test' (see CLA(MC) Regs), legal aid is available for appeals against the refusal of protection claims. The author can envisage very few circumstances (if any at all) where an unaccompanied asylum-seeking child would not pass the 'merits test' to qualify for CLR for their appeal.

LASPO introduced an exception for victims of trafficking (VoTs) to obtain legal aid for applications for leave to enter or remain that would otherwise be out of scope (see LASPO Sch 1 para 32(1)). In order to qualify for this exception, VoTs will need to have been referred into the National Referral Mechanism for VoTs and to have received a positive 'conclusive grounds' decision, or a positive 'reasonable grounds' decision and no 'conclusive grounds' decision as yet. An amendment introduced by the Modern Slavery Act 2015 creates a

separate exception under LASPO Sch 1 para 32A(1) for victims of slavery, servitude or forced or compulsory labour, which applies in the same way as LASPO Sch 1 para 32. On a related note, legal aid is available to assist with forced marriage protection orders and female genital mutilation protection orders; a need for these orders could arise in the context of an immigration case although they are to be obtained from the family court (see 'Private family law', p2). Legal aid is also available in certain limited circumstances for victims of domestic violence applying to remain in the UK (see LASPO Sch 1 paras 28-29).

Legal aid is broadly available for applications for judicial review (LASPO Sch 1 para 19(1)) although since the introduction of the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 SI No 898, such applications are not without risk because providers will not be paid under a certificate for FR where permission is not granted by the court. There is provision for providers to apply to the LAA for discretionary payment where the case settles prior to a decision on permission being made, although this may be of less significance where a favourable settlement is reached with the benefit of an inter partes costs order against the defendant. It should be noted that where work has been done investigating the merits of a case under a certificate for IR, payment for this work is not affected by a subsequent refusal of permission. Judicial review remains a vital tool for all immigration practitioners and is of particular significance for children's and young people's cases in the following respects: challenges to refusals to grant indefinite leave to remain in favour of lesser forms of leave; challenges to refusals to grant British citizenship (note that legal aid for citizenship applications was already excluded from scope pre-LASPO and remains excluded); challenges against negative reasonable and conclusive grounds decisions for victims of trafficking; challenges to Home Office delays in deciding claims where there is no statutory right of appeal; challenges to refusals of fresh claims; and challenges to unlawful decisions to detain and to remove.

For matters normally out of the scope of legal aid, ECF may be provided where a failure to do so would breach a person's ECHR rights or their EU rights. (see 'Exceptional case funding', p13). The LAA has been forced to broaden its policy in relation to the interpretation of LASPO s10 and the circumstances in which ECF may be granted. The latest statistics on ECF applications show that between April and June 2016, 216 ECF applications were received in the area of immigration law (this includes

applications for both adults and children), of which 153 were granted. This represents an overall increase in applications; however, numbers still remain relatively low.

For children, there are particular reasons why legal aid funding should be available if they are to participate in any meaningful way in the complex administrative and judicial processes that determine their fate. Immigration cases are usually procedurally and legally complex, and the issues at stake, such as family life and the welfare of children, are of great importance. Practitioners should be encouraged to make ECF applications for children in general and particularly those separated from their families. Refusals to grant ECF can be challenged by way of judicial review.

Practitioners will frequently find that children's cases consist of a mixture of matters falling within the scope of legal aid, ie a protection claim, and those falling outside, most frequently relating to ECHR art 8. Legal aid can be granted for the in-scope area and other funding options explored for the out-of-scope part. For example, it may be possible to pursue an ECF application in relation to the part of a child's case that is out-of-scope in order to bring the entire case within scope. Where a child is supported by a local authority, another option is to ask children's services to pay for part of the child's case. Should a local authority refuse to do this, it may be possible to challenge it by way of judicial review, potentially with the assistance of a community care/public law provider.

### Exceptional case funding

*Polly Brendon, solicitor, Public Law Project*

ECF was intended to ensure that, despite the LASPO cuts to the scope of matters which legal aid would fund, legal aid remained available to those who needed it. The grant rate for ECF applications was initially very low, but has increased following the cases of *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622; [2015] 3 All ER 827 and *Director of Legal Aid Casework v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464; [2016] Fam Law 959; rvs [2015] EWHC 1965 (Admin); [2015] 1 WLR 5283. However, the number of people applying for ECF remains low. Children and young people's ability to access ECF is a particular concern; responding to a written question on 17 November 2015, Lord Faulks stated that, in 2014–15, 24 applications for non-

inquest ECF were received from individuals known to be under 18, and of those only five were granted.

In *IS* in the High Court, Collins J found that the non-inquest ECF scheme was operating unlawfully as people entitled to ECF were not able to obtain it. The factors contributing to his conclusion included: the lack of a workable procedure for urgent applications to be decided; the requirement that large quantities of information and evidence be provided with an application; and the lack of funding for providers to investigate whether there was 'a case' for ECF to be granted. However, the Court of Appeal allowed the defendants' appeal against Collins J's decision, with Laws and Burnett LJ finding that the scheme was operating lawfully, and Briggs LJ dissenting. *IS* has applied to the Supreme Court for permission to appeal.

To be granted ECF for a non-inquest case, the test in LASPO s10(3) must be met: ie it must be shown that a failure to provide funding would breach, or risk breaching, an individual's ECHR or EU rights. An ECHR right to civil legal aid most commonly arises under ECHR art 6 and/or 8. Article 6 is engaged in the wide variety of cases in which a civil right or obligation is to be determined. Examples include housing cases and cases where one party pays money to another. ECHR art 6 is not engaged in immigration cases, but the state's obligation to ensure that an individual's ECHR rights are practical and effective can give rise to a right to civil legal aid in such cases, for example where an individual requires funding to be able to participate effectively in a case which engages their rights under ECHR art 8. The relevant EU law provision is art 47 of the Charter of Fundamental Rights of the European Union.

Generally, the factors relevant to whether ECF should be granted are: '(a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity' (see *R (Gudanaviciene)* at para 72). The 'critical question is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness' (*R (Gudanaviciene)* at para 56).

The current version of the *Lord Chancellor's exceptional funding guidance (non-inquests)* (the ECF guidance) para 25 addresses child applicants for ECF. It suggests that, where a litigation friend is available, the LAA may consider whether that person could conduct the case for the child, and implies

that if no litigation friend is available the LAA should consider whether the child is able to conduct the case themselves. It is difficult to envisage circumstances in which either would be appropriate. The ECF guidance was found to be unlawful by Collins J in *IS*, but this finding was overturned by the Court of Appeal.

An application for ECF must be made on form CIV ECF1, together with the relevant merits and means forms for the type of service required (eg LH, IR, FR). In response to the High Court judgment in *IS*, the LAA issued a revised CIV ECF1 form. The new form is shorter and allows for an application to be made for LH to investigate whether the client has a case for ECF. The LAA aims to make an initial decision on ECF applications within 20 working days of receipt, although a decision may be made within five days if it agrees that the case is urgent. There is a right to request that the LAA conduct an internal review of a refusal of ECF. If the refusal is upheld on internal review, the only remedy is to apply for judicial review. Legal aid can be obtained for these challenges, which fall within the public law category definition. If ECF is granted, it should be backdated to allow the provider to be paid for the work done preparing the ECF application.

### Debt

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Post-LASPO, advice and assistance with debt matters can be funded by legal aid, but only via CLA (which is mandatory for this category of law). CLA will assess an individual's eligibility for advice and assistance by phone/post and, if the individual is eligible, will refer the client's matter to one of the very few specialist help providers who hold the relevant CLA contract to do debt work (see 'Civil Legal Advice', p4). Only under exceptional circumstances will a specialist help provider be able to provide a face-to-face service.

What has also changed is the scope of the advice that can be given as set out in LASPO Sch 1 para 33. Debt advice can still be provided but is limited to matters where there is an immediate risk of an individual losing their home. The main areas are, therefore: mortgage possession proceedings; involuntary bankruptcy (if the individual's home is part of the estate); and orders for sale.

Despite the limited method of service delivery (remote advice), there are exceptions. For example, individuals can be referred for face-to-face advice (as exempted persons) if

they are: a minor - under 18 years; deprived of their liberty; or they were previously assessed by CLA as an exempted person and they return with a linked problem (eg a mortgage possession matter in the last 12 months that was returning to court).

In theory then, children can access face-to-face advice on debt matters, which arguably can provide a better, more personal service. However, the reality in this area of law is that there are unlikely to be many people under 18 who require such advice due to their homes being at risk.

## Criminal defence

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The scope of criminal legal aid for children was largely unaffected by LASPO. Provision for legal aid is set out at LASPO ss13-20, which covers initial advice and assistance to those arrested and held in custody at a police station or other qualifying premises and for criminal proceedings.

LASPO s13(7) defines 'initial advice' as 'advice as to how the law in relation to a matter relevant to the individual's arrest applies in particular circumstances and as to the steps that might be taken having regard to how it applies' and 'initial assistance' as 'assistance in taking any of those steps which the individual might reasonably take while in custody, including assistance in the form of advocacy'.

LASPO s14 explains that 'criminal proceedings' are proceedings before a court for dealing with an individual accused of an offence or convicted of an offence, including proceedings in respect of a sentence or order and/or such other proceedings before any court, tribunal or other person as may be prescribed.

In order to provide legal-aid-funded criminal defence services the provider will need to have the appropriate contract with the LAA.

## Police station

All requests for representation must be logged within 48 hours of attendance with the Duty Solicitor Call Centre (DSCC), which will give the provider a DSCC Reference that will allow the provider to claim a fee. Legal representation is free irrespective of age. The sufficient benefit test must be met and the provider must be attending to provide advice and assistance

per LASPO s13. The sufficient benefit test is automatically satisfied where a client has a right to legal advice or is attending for interview as a volunteer under the Police and Criminal Evidence Act 1984 (PACE).

Providers are paid a fixed fee for the case. There is the possibility of escaping the fee where the value of the work done is three times more than the value of the fixed fee.

## Court

Any applicant for legal aid who is under 18 at the time of submitting application form CRM 14 is 'passported' through the financial eligibility tests, on the basis of age alone. If the applicant turns 18 during the proceedings, they remain eligible and do not need to be reassessed as they were 'age passported' when submitting the original application. If the applicant was 17 at the time of the offence but turns 18 before submitting the application, then they cannot be age passported and will be required to satisfy both financial eligibility and the interests of justice tests.

Despite automatic financial eligibility for children, it is still necessary to pass the interests of justice test. Page 6 of the CRM 14 requires explanation as to why legal aid is sought. The inherent inability of a child to understand court proceedings or present their own case, trace and interview witnesses or cross-examine witnesses, means that the test is passed in every case before taking into consideration the personal circumstances of the child client. The application for legal aid is made in the child's name with no requirement to provide financial information for parents, guardians or carers; instructions are taken directly from the child.

Representation in the youth court will be remunerated by payment on a fixed-fee basis depending on the category of the case. Again it is possible to escape the fixed fee where the value of the work exceeds the higher standard fee limit. Once this limit is exceeded the case becomes a non-standard fee case and payment is made on the basis of time spent, provided the work is directly engaged in providing legal services to the client, the work done is reasonable and the time spent is reasonable.

A CRM 7 application will need to be completed and the whole file will be sent to the LAA for assessment. It is possible that a significant number of youth cases can attract a non-standard fee due to the complexity of the work in comparison to adult matters. Youth courts have the power to deal with indictable-only offences where a young person is unlikely to be sentenced to two years or more in

detention (eg secure children's home, training centre or young offenders institution).

Multi-handed robbery cases, violent offences (such as causing grievous bodily harm) and sexual offences are frequently retained in the youth court; both the offences and the clients are more complex than run-of-the-mill magistrates work and therefore more time will inevitably be spent on case preparation. There are a significant number of children in the youth justice system with special educational needs such as autism and speech and language difficulties, which often requires lawyers to examine the child's ability to participate in the proceedings by instructing psychologists, psychiatrists, speech and language therapists and intermediaries.

In certain circumstances it is possible to apply for an advocate's representation order where the court determines that there are circumstances which make the proceedings unusually grave or difficult (see Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 SI No 614 reg 16(2)(b)). This means that the provider can instruct counsel as advocate and also themselves attend the trial to advise and assist the client.

Crown Court work for children is paid at the same rate as for adults, at a fixed fee rate which is calculated by a combination of the value assigned to the particular offence combined with the value assigned to the category of the case, ie guilty plea, cracked trial, trial etc and the number of pages of prosecution evidence.

Judicial reviews and proceedings for habeas corpus can be done under either a crime contract as 'associated civil proceedings' or as public law if a firm has a public law contract. Associated civil proceedings would most frequently be public law challenges to decisions made by police, youth/magistrates' courts or the Crown Court in criminal proceedings. For example, the decision to detain a child overnight in the police station rather than transfer to local authority accommodation or the decision of the youth court to decline jurisdiction and send a matter to the Crown Court.

## Anti-social behaviour

The ASBCPA 2014 came into force on 23 March 2015 and amends LASPO Sch 1 para 36 to include within the scope of civil legal aid the new ASBCPA 2014 Part 1 injunction which will be available in the county court and High Court for adults and youth courts for those under 18. In order to provide representation



in such proceedings, the provider must have either a civil (housing) or criminal contract. For criminal legal aid providers this work would be classified as associated civil work (see 'Housing', p9).

However, applications for breach for under 18s will fall under the crime contract and be treated as criminal proceedings as they are punishable by imprisonment or a fine and will be paid on the same fixed rates of remuneration as magistrates' court cases. Unlike other matters, travel and waiting will also be paid at an hourly rate for breach proceedings which can be claimed in addition to the fixed fee.

Orders made before 23 March 2015 are not subject to the changes brought about by the ASBCPA 2014 and will continue to operate on the old arrangements for five years. Therefore, variance, discharge, appeal and breach of an order will continue to fall under criminal legal aid until 2020.

### Actions against public authorities with the power to prosecute, detain or imprison

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Certificated-work funding for claims of this nature, brought by children through their litigation friend, is available with reference to LASPO Sch 1 paras 21 and 22, when read in conjunction with the Lord Chancellor's guidance, the CLA(MC) Regs and the CLA(P) Regs. LH is available per the same model as other civil categories via a specific fixed fee, which can be escaped.

LASPO Sch 1 specifically excludes legal aid for civil claims for false imprisonment, assault/battery, personal injury/death, negligence, trespass to goods, damage to property and breach of statutory duty, unless the claim concerns 'abuse by a public authority of its position or powers' or 'significant breach of [ECHR] rights' (LASPO Sch 1 paras 21-22). These paragraphs provide that legal aid remains available for civil claims against 'a public authority with the power to prosecute, detain or imprison' (see 2015 category definitions).

'Public authority' has the same meaning as under the HRA 1998. Therefore, chief officers of police fall within this definition as do young offenders institutions, secure training centres, the Home Office (in respect of immigration detention) and the CPS. Private companies carrying out state functions such as private detention and escort services will also fall within this definition given that, under HRA 1998 s6(3), a public authority is defined as

'any person certain of whose functions are functions of a public nature'.

In order to be granted legal aid under LASPO Sch 1 para 21, one must show that the public authority's conduct amounts to an abuse of its position or powers where the act or omission: (a) is deliberate or dishonest; and (b) results in harm to a person or property that was reasonably foreseeable.

Legal aid providers had proceeded on the basis that any intentional tort by a public authority with the power to detain would amount to an 'abuse of position or power' and that there was no requirement to show that the act was both deliberate and dishonest. In *Director of Legal Aid Casework v R (Sisangia)* [2016] EWCA Civ 24, the claimant brought a judicial review against the refusal of legal aid funding for a false imprisonment claim arising from an arrest which did not meet the necessity criteria under PACE s24(5) and in which the claimant was not informed of the grounds for her arrest as required by PACE s28. However, she did not claim that there had been any dishonesty on the officers' part. The Court of Appeal overturned the decision of Dingemans J that she ought to have been granted funding and held that for funding to be granted under LASPO Sch 1 para 21 'something more than an intentional tort is necessary before the impugned act becomes an "abuse of power" even if we cannot say precisely what that "something more" is' (para 30). The judgment suggests that for funding to be granted under Sch 1 para 21 the 'something more' might be apparent malice, bad faith or dishonesty on the part of the officers.

Claims against detaining and prosecuting authorities which lack dishonesty, malice or bad faith and do not fall within LASPO Sch 1 para 21 can still be funded under LASPO Sch 1 para 22. This provides legal aid for claims in tort (or a claim for damages other than a claim in tort, eg within a judicial review claim) in respect of an act or omission by a public authority that involves a significant breach of ECHR rights. This was confirmed in *Sisangia*: 'There is also the possibility that in a case of false imprisonment a claim may be funded under paragraph 22 of Schedule 1 as involving a "significant breach" of a convention right' (para 9).

Given that breaches of ECHR rights by public authorities in such cases can cause death, detention, fear of conviction, trespass, injury and damage to reputation, funding should therefore be granted under LASPO Sch 1 para 22.

The word 'significant' is not defined in LASPO Sch 1 para 22; however, the Lord

Chancellor's guidance helpfully states (at para 11.2) that it should bear its natural meaning and that:

*... Factors which might be relevant ... include the severity of the violation and:*

- *whether the breach was deliberate; and*
- *whether the individual has suffered a significant disadvantage taking account of both the applicant's subjective perceptions and what is objectively at stake in a particular case.*

One might argue that the severity of the violation is exacerbated where the victim is a child. Further, by way of example, the following cases of significant ECHR rights breaches which specifically affect children should be granted legal aid pursuant to LASPO Sch 1 para 22:

- ECHR art 2: a death in custody concerning a child or a civil claim on behalf of a child following the death in custody of his or her parent;
- ECHR art 3: a serious assault in a young offenders institution following negligence by prison authorities or a failure to investigate child sexual abuse;
- ECHR art 4: a failure to investigate child trafficking; and
- ECHR art 8: unlawful retention and/or disclosure of police intelligence concerning a child to a third party.

Turning to the requirement to show that harm caused was 'reasonably foreseeable' there should be little difficulty in satisfying this test given that, for example:

- detention is a foreseeable consequence of a false imprisonment;
- injury is a foreseeable consequence of assault/battery;
- prosecution is a foreseeable consequence of a malicious prosecution; or
- invasion of privacy is a foreseeable consequence of trespassing on a person's property etc.

In addition, LASPO does not state that all losses resulting from an unlawful act must be foreseeable, merely that 'harm to a person or property' was foreseeable. By way of example, false imprisonment always results in loss of liberty and can result in psychiatric injury. Even if the latter was not reasonably foreseeable, the loss of liberty will have been, such that legal aid should be provided.

Standalone claims for clinical negligence are specifically excluded by LASPO Sch 1 para 21(3). However, the LAA's 2015 category

definition for 'Action Against the Police Etc' (AAP) states (at para 22) that: '... claims for damages for clinical negligence (including claims funded via exceptional funding) are included only if the clinical negligence forms part of a claim which includes another cause of action against a body or person with power to detain or imprison'. When seeking legal aid for such claims, reliance could be placed on the category definition.

### Equality Act 2010 claims

Legal aid is available for EqA 2010 claims pursuant to LASPO Sch 1 para 43, and many civil and HRA 1998 claims against the police and other detaining authorities can include such a claim.

EqA 2010 claims must ordinarily go through CLA (CLA(P) Regs reg 20) (see 'Civil Legal Advice', p4). However, discrimination claims within the AAP category are exempt from the mandatory telephone gateway and therefore can be funded where they fall within the AAP definition.

### Merits issues

The provisions of the CLA(MC) Regs which are specific to AAP claims are at regs 39-43 and 57-59, which state that any AAP legal aid application must set out the likely damages, costs and merits of the claim. In many actions against the police the claimant would be entitled to basic, aggravated, exemplary damages and/or special damages.

Applications for FR in cases under LASPO Sch 1 paras 21, 22, are addressed by CLA(MC) Regs reg 58 and may be granted where: (a) the proportionality test is met; and (b) the LAA is satisfied that the prospects of success are either very good (at least 80 per cent), good (at least 60 per cent) or moderate (at least 50 per cent).

Alternatively, legal aid may also be granted if prospects are borderline (not possible, by reason of dispute of law, fact or expert evidence to assess prospects as below 45 per cent or up to 50 per cent) or marginal (at least 45 per cent) but the case is also of: 'significant wider public interest'; 'overwhelming importance to the [client]'; and/or where 'the substance of the case relates to a breach of [ECHR] rights'. Cases involving the violation of children's rights, especially those which suggest wider systemic issues, could therefore still be funded even where prospects are borderline or marginal (see Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016 SI No 781).

The proportionality test is met where, pursuant to CLA(MC) Regs reg 8, 'the Director

is satisfied that the likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case'. The proportionality test is further explained at para 4.2.7 of the Lord Chancellor's guidance.

### Alternative funding under CLA(MC) Regs reg 39 - conditional fee agreements

Post-LASPO, practitioners will also need to show that no alternative source of funding is available before legal aid will be granted. Where prospects of success are at least 60 per cent, the LAA may refuse funding on the basis that a CFA is, in theory, available (see para 7.17 of the Lord Chancellor's guidance). Many AAP claims will have merits below 60 per cent absent independent evidence of the officers' wrongdoing and so that in itself would mean that a CFA is not appropriate. Where merits in an AAP case are 60 per cent or more, the applicant will need to show that the case is not suitable for a CFA and the following factors support the grant of legal aid:

- ATE insurance to protect against the risk of an adverse costs order is not available in police actions. ATE premiums are no longer recoverable from defendants post-LASPO (LASPO s46) and are therefore payable out of claimants' damages. The cost of premiums has generally exceeded damages and this has led to the elimination of ATE insurance in such cases as insurers have now withdrawn from this market;
- para 7.19 of the Lord Chancellor's guidance provides that a case may not be suitable for a CFA if there are large disbursements. Most clients who qualify for legal aid, especially children, would not be able to fund the substantial disbursements associated with pursuing a claim against the police given their very limited means, particularly in the light of recent dramatic increases in court fees.

These factors should therefore be relied on in any legal aid application for a child.

### Police complaints

Advice and assistance on police complaints can be provided under LH or, where the work has a dual purpose in being of benefit to a civil claim and a police complaint, might be part of certificated work.

Under CLA(MC) Regs reg 39(d) any applicant seeking legal aid for a civil claim

needs to show that the police complaints system is not a 'reasonable alternative' to a civil claim against the police. The starting point is that the remedies sought through a police complaint and those to be obtained through civil proceedings are wholly different. A claimant cannot obtain damages or declaratory relief through the police complaints system. The police complaints system is therefore not a reasonable alternative to a civil claim. Further, the complaints system is beset with delays and it is often necessary to take steps to meet urgent limitation deadlines in civil litigation before the outcome of any police complaint is known. The grant of legal aid therefore often cannot await the conclusion of any complaint.

The complaints process also has historically poor outcomes and complaints are rarely upheld even in cases which subsequently result in successful civil claims. The vast majority of police complaints (apart from those resulting in death or very serious injury) continue to be investigated internally by the police force complained against as opposed to the Independent Police Complaints Commission. Therefore the police complaints system does not generally allow for an independent adjudication of responsibility for police misconduct.

1 See: [www.legislation.gov.uk](http://www.legislation.gov.uk)

2 See: <https://legalaidhandbook.com>

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