



Ministry of Justice

Legal Aid Eligibility and Universal Credit: Equality Statement

1 Policy Summary

- 1.1 This Equalities Statement has been written to be read alongside the Legal Aid and Universal Credit Consultation, to which this statement is an Annex.
- 1.2 The change proposed in the consultation document is to limit passporting through the legal aid means tests to Universal Credit recipients with zero income from employment, while continuing to passport recipients of legacy benefits¹ and State Pension Guarantee Credit. All other legal aid applicants would be subject to the existing means test criteria² and those on low income (but not in receipt of the benefits listed in paragraph 2 of the Evidence Base, Impact Assessment) may be eligible for non-contributory legal aid or be asked to pay a contribution towards their legal costs.
- 1.3 We propose that transitional arrangements are put in place that would allow the amendments to the passporting process to be integrated in a way that causes minimum disruption for legal aid recipients and those administering the scheme. Legal aid applicants who were in receipt of Universal Credit, irrespective of any earnings from employment, at the time of the original application for legal aid would not be reassessed only because of a change to the passporting arrangements during the life of the cases.

2 Pool of affected individuals

- 2.1 The policy has the potential to affect people with a criminal or civil justice problem in scope of legal aid who:
 - i. are currently in receipt of income-based Jobseekers Allowance, Employment Support Allowance or Income Support (current passported benefits) and may be in receipt of Universal Credit by the time roll-out is complete;

¹ For as long as they continue to exist.

² Although note that some categories of law are also exempt from the means test. For example, care proceedings under the Children Act 1989 account for a large volume of civil representation work but are not subject to means testing where the applicant for legal aid is the child, parent or person with parental responsibility.

- ii. are currently in receipt of Working Tax Credits, Child Tax Credits or Housing Benefit and may be in receipt of Universal Credit by the time roll-out is complete; and those who
- iii. are currently not in receipt of any legacy benefits and may be in receipt of Universal Credit by the time roll-out is complete.

2.2 The policy also has the potential to affect civil legal aid providers who conduct means tests for legal help and mediation work.

3 Anticipated policy impacts

3.1 Annex A (located on page 7 of this Equality Statement) gives examples of typical circumstance where an individual's eligibility might be subject to change under the proposed option. Most claimants would be unaffected by the change. However, some of those who are now passported to non-contributory legal aid may have been on a non-passported benefit, and so were subject to a means test to receive either non-contributory legal aid or legal aid with a contribution, or had sufficient means to be ineligible for legal aid.

3.2 We estimate that around 650 claimants would become eligible for non-contributory legal aid through passporting under the proposal, while 500 claimants would become ineligible for non-contributory legal aid, with 250 of those asked for a contribution. There are mechanisms by which those who do not satisfy the financial thresholds for the means test can ultimately be granted legal aid, such as the hardship review for crown court claimants and waivers to the civil and family means test, which includes protective injunctions in domestic violence matters.

4 Equality duties

4.1 Section 149 of the Equality Act 2010 ('the 2010 Act') requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:

- i. Eliminate unlawful discrimination, harassment, victimisation and any other conduct unlawful under the 2010 Act;
- ii. Advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
- iii. Foster good relations between different groups (those who share a relevant protected characteristic and those who do not).

4.2 Paying 'due regard' needs to be considered against the relevant 'protected characteristics' of race, sex, disability, sexual orientation, religion and belief, age, gender reassignment and pregnancy and maternity. In addition the characteristic of marriage and civil partnership is relevant to (i).

5 Methodology

5.1 Adhering to guidance published by the Equality and Human Rights Commission (EHRC), our approach to assessing the potential for particular disadvantage resulting from the proposals has been to identify the individuals whom the proposals would impact (the 'pool'), and then draw comparisons between the potential impacts of the proposal on those who share particular protected characteristics, with those who do not share those characteristics.

5.2 Guidance from the Equality and Human Rights Commission (EHRC) states that the pool to be considered at risk of potential indirect discrimination should be defined as those people who may be affected by the policy (adversely or otherwise) and that this pool should not be defined too widely.

6 Available data

6.1 Although our modelling can estimate policy cost to a reasonable degree of accuracy, and provide an idea of change in financial eligibility, it cannot provide an accurate profile of the characteristics of the affected population for use in equalities analysis³.

6.2 The Legal Aid Agency (LAA) publishes data on the characteristics of legal aid clients for each category of legal aid (civil representation, legal help, mediation, crime lower and crime higher). The data covers age, gender, disability and ethnicity although data on all of these characteristics is not available for every category of legal aid.

6.3 This data provides us with a reasonable picture of legal aid clients' protected characteristics. However, there are limitations to the data:

- i. there is no data on the other 5 protected characteristics, which means we are unable to make a quantitative assessment of equalities impacts for these, and;
- ii. not all clients included in this data have the potential to be affected by the policy. There are certain categories of law for which clients are not subject to means testing, and therefore not affected by changes to financial eligibility policy⁴. We do not know the extent to which the profile of clients not subject to means testing differs from the profile of those subject to means testing. If they do differ considerably, this may affect our ability to draw conclusions about equalities impacts from this data.

6.4 For these reasons we have also made use of the Family Resources Survey (FRS) for this equalities analysis. The FRS is an annual representative household survey which forms an important part of the modelling of impacts for this policy.

6.5 The FRS cannot tell us which households amongst those financially eligible will experience a civil or criminal justice problem in scope of legal aid which is subject to means testing and for which they pass the merits tests. However, it allows the best comparison of the protected characteristics of the currently financially eligible population and those who are financially eligible under the policy proposal.

³ In order to estimate policy impacts, our modelling combines information on age, gender, income and case type from legal aid case data with more detailed information on income and benefit entitlement from DWP's Policy Simulation Model (PSM). We do this by matching records in the legal aid case data to records with broadly similar age, gender and income profiles in the PSM. The information in the case data is insufficient to match clients either precisely, or on the basis of other characteristics (such as disability, ethnicity or pregnancy/maternity).

⁴ Care proceedings under the Children Act 1989, for example, account for a large volume of civil representation work but are not subject to means testing where the applicant for legal aid is the child, parent or person with parental responsibility.

7 Equalities impact

The need to eliminate unlawful discrimination on the basis of a protected characteristic

- 7.1 Discrimination can be direct or indirect. Direct discrimination occurs when a policy would result in people being treated less favourably because of a protected characteristic.
- 7.2 We do not consider this policy to be directly discriminatory as the changes would be applied in the same way to all criminal and civil legal aid applicants irrespective of their protected characteristics. No-one would therefore be treated less favourably because of a protected characteristic. Similarly, to the extent to which this policy may affect civil and criminal legal aid providers we consider that there would be no direct discrimination on the basis of protected characteristics due to the application of the changes in the same way to everyone.
- 7.3 Indirect discrimination occurs when a policy applies equally to all individuals in the pool but would put those sharing a protected characteristic at a particular disadvantage compared to those who don't.
- 7.4 We have looked at the distribution of protected characteristics among the civil and criminal legal aid populations and compared these to the distribution in the general population⁵.
- 7.5 When compared to the general population the following groups were found to be over-represented among legal aid clients and therefore more likely than other groups to be affected by the policy:
- i. those aged 19-45, for both civil and criminal legal aid;
 - ii. those with a long-standing illness or disability (among civil legal help clients);
 - iii. women (among civil representation clients);
 - iv. men (among criminal legal aid clients in both magistrates' courts and Crown courts, men); and
 - v. people with a Black or Black British ethnicity (among civil legal help clients, Crown court legal aid clients, and clients seeking advice at the police station).
- 7.6 There are a few possible ways in which an individual's eligibility could change as a result of the policy proposal⁶. In most circumstances there would be no real change in their entitlement to legal aid, only in the way in which their financial eligibility is assessed.
- 7.7 Though the current passporting benefits are often described as 'out of work benefits', recipients of all three may also be in part-time paid employment⁷.

⁵ Annex A contains the comparison table. From the legal aid statistics quarterly publication for January to March 2016, containing client diversity data for 2015-16, published June 2016. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/533053/legal-aid-statistics-england-and-wales-client-diversity-data.csv/preview. General population statistics from the 2011 Census (ONS).

⁶ See Annex B for a full table of possible movements

⁷ Up to 16 hours, with various conditions and deductions from benefit payments.

7.8 If the income of someone in receipt of a passporting benefit was assessed by the LAA, it is very unlikely that it would exceed the upper threshold for legal aid eligibility. However, it is possible that their assessed income may mean an income contribution is due⁸.

7.9 Under the policy option, someone currently in receipt of a passporting benefit with earnings from part-time employment would be subject to the full means test, and therefore may be asked to pay a contribution where they would not have before. If a significant proportion of those in receipt of passporting benefits have earnings from part-time employment, this may have important equalities implications.

7.10 In civil legal aid, this may affect:

- i. recipients of Income Support, the majority (61%) of whom are lone parents⁹. A large proportion (90%) of lone parents are women¹⁰; and
- ii. recipients of Employment Support Allowance, paid to disabled claimants.

7.11 In criminal legal aid, this may affect:

- i. recipients of Jobseekers' Allowance, the majority (63%⁹) of whom are men.

7.12 In designing the policy proposal, a key objective was to find a way to deal with the introduction of Universal Credit which ensured legal aid is targeted at those who need it most without incurring additional legal aid fund costs to the taxpayer. To achieve this, our policy proposal should as far as possible mimic the existing passporting and means testing arrangements while accounting for legacy benefits being phased out and Universal Credit phased in.

7.13 Our modelling suggests that there would be very little movement from non-contributory legal aid to contributory legal aid in both civil and criminal legal aid if, subject to consultation, the proposal were to be implemented. This means that the potential for indirect discrimination against the over-represented groups discussed above is limited. We consider any proposed changes to legal aid financial eligibility to be a proportionate means of achieving the legitimate aim of ensuring legal aid is targeted at those who need it most without incurring additional costs to the taxpayer.

The need to advance equality of opportunity between those sharing a protected characteristic and those not

7.14 This part of the duty relates to the need to remove or minimise disadvantages suffered by people due to their protected characteristic, and to take steps to meet the needs of people who share a protected characteristic, where those needs are different from the needs of those who do not share that protected characteristic.

⁸ For legal aid in civil representation, or for legal aid in a Crown Court trial only

⁹ DWP quarterly statistical summary, published May 2016
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527629/quarterly-stats-summary-may-2016.pdf

¹⁰ ONS (2015) Families and households, 2015. Table 1. <http://www.ons.gov.uk/ons/rel/family-demography/families-and-households/2015/index.html>

7.15 We have compared the protected characteristics of households¹¹ currently eligible for legal aid to the protected characteristics of households eligible for legal aid under our policy proposal.

7.16 We have looked separately at those eligible for civil legal aid and criminal legal aid, because these two populations have quite different distributions of protected characteristics.

7.17 Because the policy tries to approximate closely the existing eligibility criteria, the eligibility status of most households would not change as a result of the policy proposal. Therefore the protected characteristics of the current eligible population and those of the population eligible under our policy proposal are very similar for both civil and criminal legal aid.

7.18 We have considered the potential for unlawful indirect discrimination on those with protected characteristics. On the basis of the data available we do not consider it likely that the changes to legal aid eligibility would result in any particular disadvantage for those with protected characteristics. We consider any changes to legal aid financial eligibility to be a proportionate means of achieving the legitimate aim of ensuring legal aid is targeted at those who need it most without incurring additional costs to the taxpayer.

The need to foster good relations between those sharing a protected characteristic and those not

7.19 Consideration has been given to this objective that indicates it is unlikely to be of particular relevance to the proposal.

7.20 In terms of our continuing duty, we have included some equalities questions in the consultation and will consider any responses and update this statement as necessary in due course.

¹¹ Using the Family Resources Survey (FRS) (see discussion in 'available data' section). We have looked at households rather than individuals because both Universal Credit and legal aid eligibility are in general assessed at the household level. The protected characteristics are those of the person in the household interviewed as 'Person 1' as part of the FRS.

Annex A – Movement in legal aid eligibility

Table I below outlines the possible ways in which a person's legal aid eligibility might change as a result of the policy proposal.

Examples

1. Annette has a housing disrepair case and needs legal advice.

Before: She is in receipt of Housing Benefit and contribution-based JSA, and is not working any hours. Neither are a passporting benefit, so she undergoes the full means test, conducted by the legal aid provider. Her disposable income is assessed as below the upper and lower income thresholds, and so she is eligible for non-contributory legal aid.

After: She is in receipt of Universal Credit (migrated from Housing Benefit). Because she is not working, she has no income from employment. The legal aid provider verifies her benefits and earnings status, and after a capital assessment, she is passported to non-contributory legal aid.

Summary: no change for Annette. The legal aid provider has reduced administration burden, as they only need verify UC and earnings status, rather than going through the whole means test.

2. Raymond has a family (private law) problem for which he's received initial legal advice, and now needs a solicitor to represent him in court.

Before: He is in receipt of Income Support and works 12 hours a week. Income Support is a passporting benefit, so after a capital assessment conducted by the LAA, he is passported to non-contributory legal aid.

After: He is in receipt of Universal Credit (migrated from Income Support). Because he has earnings from employment, he is not passported to non-contributory legal aid. He must undergo the full means assessment, conducted by the LAA. His income is assessed as being above the lower threshold, and he is asked to pay to a small monthly contribution.

Summary: Raymond is slightly worse off than before, as he is asked to pay a small monthly contribution to the costs of his representation. This corresponds to a small saving to the LAA, who will collect that contribution. There is an administrative cost to the LAA from conducting the full means assessment where they previously conducted a capital assessment and checked his benefit status only.

3. Paul needs representation in the Magistrates' Court.

Before: Paul is in receipt of Housing Benefit, and is in part-time employment. This is not a passporting benefit, so he is subject to a means assessment, conducted by the LAA on the basis of an online application submitted by the legal aid provider. The LAA assesses his disposable income as sufficiently low to be granted criminal legal aid representation (NB the means assessment at the magistrates' court operates on an 'in/out' basis: if the defendant is financially eligible, no contributions are ever required; if the defendant is not financially eligible, he/she will have to fund the entirety of their defence costs).

After: He is in receipt of Universal Credit (migrated from Housing Benefit). Since he has income from employment, he is subject to a means assessment undertaken by the LAA on the basis of an online application submitted by the legal aid provider. The LAA assess his disposable income as sufficiently low to be granted criminal legal aid representation.

Summary: No change for Paul, the provider or the LAA.

4. Saira needs representation in the Crown Court.

Before: Saira is in receipt of income-related Employment and Support Allowance, and does not work. The provider submits an online application for their client and as part of this process can verify their client’s passported benefit status. As a result of the application, Saira is granted non-contributory criminal legal aid by the LAA (NB – Under the means assessment used for the Crown Court, some defendants who are not in receipt of a passporting benefit may, subject to the outcome of their assessment, be required to contribute towards their publicly funded defence costs from their income and/or capital assets. If a Crown Court defendant’s annual disposable income exceeds £37,500 they will be excluded from public funding altogether).

After: She is in receipt of Universal Credit (income-related Employment and Support Allowance). Because she is not working, she has no income from employment. As before, the provider submits an online application for their client and as part of this process can verify their client’s passported benefit status. The LAA confirms her benefits and earnings status, and she is passported to non-contributory criminal legal aid.

Summary: No change for Saira or the provider.

Table 1: Current and future legal aid eligibility under proposed policy option

	Current arrangements	Proposed policy option (UC + 0)
Civil legal aid		
<i>Legal Help and mediation</i>		
In receipt of a legacy passporting benefit with 0 income from employment, migrated to UC	Non-contributory legal aid (via passporting), subject to assessment of capital	Non-contributory legal aid (via passporting), subject to assessment of capital
In receipt of a legacy passporting benefit with positive income from employment (1), migrated to UC	Non-contributory legal aid (via passporting), subject to assessment of capital	Non-contributory legal aid (via full means testing), subject to assessment of capital; or ineligible for legal aid (via full means testing), depending on the level of disposable income client is assessed to have

New recipient of UC	Non-contributory legal aid (via passporting); subject to assessment of capital	Non-contributory legal aid (via passporting, if 0 income from employment, subject to assessment of capital; non-contributory legal aid via full means testing if positive income from employment), subject to assessment of capital; or ineligible for legal aid (via means testing), depending on the level of disposable income client is assessed to have
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Civil representation

In receipt of a legacy passporting benefit with 0 income from employment, migrated to UC	Non-contributory legal aid (via passporting), subject to assessment of capital	Non-contributory legal aid (via passporting), subject to assessment of capital
In receipt of a legacy passporting benefit with positive income from employment (I), migrated to UC	Non-contributory legal aid (via passporting), subject to assessment of capital	Non-contributory or contributory legal aid (via full means testing), subject to assessment of capital; or ineligible for legal aid (via full means testing), depending on the level of disposable income client is assessed to have
New recipient of UC	Non-contributory legal aid (via passporting), subject to assessment of capital	Non-contributory legal aid (via passporting, if 0 income from employment, subject to assessment of capital; non-contributory or contributory legal aid via full means testing if positive income from employment), subject to assessment of capital; or ineligible for legal aid (via means testing), depending on the level of disposable income client is assessed to have

Criminal legal aid

Magistrates court (trials only)

In receipt of a legacy passporting benefit with 0 income from employment, migrated to UC	Granted criminal legal aid (via passporting)	Granted criminal legal aid (via passporting)
In receipt of a legacy passporting benefit with positive income from employment (I), migrated to UC	Granted criminal legal aid (via passporting)	Granted criminal legal aid (via full means testing); or Ineligible for criminal legal aid (via full means testing), depending on the level of disposable income client is assessed to have.

New recipient of UC	Granted criminal legal aid (via passporting)	Granted criminal legal aid (via passporting) if 0 income from employment; or granted criminal legal aid (via full means testing); or Ineligible for criminal legal aid (via full means testing), depending on the level of disposable income client is assessed to have.
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Crown Court (trials only)

In receipt of a legacy passporting benefit with 0 income from employment, migrated to UC	Granted criminal legal aid (via passporting)	Granted criminal legal aid (via passporting)
In receipt of a legacy passporting benefit with positive income from employment (1), migrated to UC	Granted criminal legal aid with zero contribution (via passporting)	Non-contributory or contributory criminal legal aid (via full means testing), subject to assessment of income and/or capital; or Ineligible for criminal legal aid (via full means testing), depending on the level of disposable income client is assessed to have. Granted criminal legal aid (via passporting) if 0 income from employment; Non-contributory or contributory criminal legal aid (via full means testing) subject to assessment of income and/or capital; or Ineligible for criminal legal aid (via full means testing), subject to an assessment of their client's disposable income
New recipient of UC	Granted criminal legal aid with zero contribution (via passporting)	Granted criminal legal aid (via passporting) if 0 income from employment; Non-contributory or contributory criminal legal aid (via full means testing) subject to assessment of income and/or capital; or Ineligible for criminal legal aid (via full means testing), subject to an assessment of their client's disposable income

(1) Dependent on a few factors, those on JSA, ESA and Income Support may earn a certain amount per week from paid employment

Annex B

Characteristics of legal aid clients, 2015-16 England and Wales, 2015-16

	Civil Representation	Legal Help	Criminal legal aid (Crown court)	Criminal legal aid (Magistrates' court only)	Criminal legal aid (all crime lower)	Family mediation	General population (ONS 2011 Census)
Age							
Under 18	31%	5%	4%	12%	-	N/A	21%
18-24	13%	16%	27%	21%	-	12%	9%
25-34	25%	32%	33%	31%	-	37%	13%
35-44	17%	22%	19%	22%	-	30%	14%
45-54	9%	14%	11%	11%	-	15%	14%
55-64	3%	6%	4%	3%	-	4%	12%
65 and over	1%	3%	2%	1%	-	1%	16%
Unknown	-	1%	0%	0%	-	1%	-
Long standing illness or disability							
Disabled	13%	30%	23%	-	7%	5%	18%
Not disabled	54%	51%	73%	-	68%	90%	82%
Unknown	33%	20%	5%	-	25%	5%	-
Ethnic Group							
White	60%	47%	62%	-	63%	87%	86%
Asian or Asian British	5%	9%	6%	-	5%	4%	8%
Black or Black British	6%	14%	7%	-	6%	3%	3%
Chinese or other ethnic group	1%	1%	0%	-	0%	0%	1%
Mixed or multiple ethnic groups	2%	2%	3%	-	2%	3%	2%
Unknown	27%	27%	22%	-	24%	3%	-
Sex							
Female	58%	46%	9%	-	15%	51%	51%
Male	40%	53%	83%	-	84%	49%	49%
Unknown	1%	1%	8%	-	1%	0%	-

Source Legal aid statistics quarterly: January to March 2016 (published 30 June 2016)

Notes

Percentages are rounded so may not sum to 100%

These above figures relate only to the clients of legal aid, and not all applicants.

While figures for most characteristics are available for the whole of crime lower, age data is only available for Magistrates' court work.

Family Mediation respondents under 18 were assumed to be an error, and included in unknown instead. They are below the legal marriage age without parental consent of 18.