



# Ministry of Justice

## Annex C

### The Current Legal Aid Financial Eligibility Rules – Summary

In order to understand our proposed changes to the financial eligibility rules we have set out below a summary of the current rules for comparison. This is a basic overview and is not meant to be a detailed outline of the means tests including all the different exceptions.

The framework for the provision of civil and criminal legal aid is contained in Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The rules on financial eligibility are set out in section 21 of LASPO and regulations made under that section. The rules on contributions to be made by an individual to that person's legal aid costs are set out in section 23 of LASPO and regulations made under that section. The relevant regulations are: the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (SI 2013/480)<sup>1</sup>; the Criminal Legal Aid (Financial Resources) Regulations 2013 (SI 2013/471)<sup>2</sup>; the Criminal Legal Aid (Contribution Orders) Regulations 2013 (SI 2013/483); and the Criminal Legal Aid (Recovery of Defence Costs Orders) Regulations 2013 (SI 2013/511).

#### Civil legal aid

Civil legal aid provides support for claimants in civil disputes requiring legal advice, mediation or representation in court. The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 ("Civil Financial Regulations") set the rules for all forms of civil legal services.

Civil legal aid is not means tested for certain types of proceedings, for example, for children, parents and those with parental responsibility in care proceedings. None of the proposals in this document seek to change the current exceptions from the means test. Civil legal aid is also subject to a merits test. The merits test to be applied varies according to the type of legal services provided and the category of law to which the application relates.

#### The means tests

Where civil legal aid is means tested, the means test looks at both the applicant's income and capital. The general rule is that the resources of the partner of the individual applying for legal aid are to be included in the calculation of the financial resources of the applicant. However, resources are not to be aggregated if the individual has a contrary interest in the dispute in respect of which the application is made. In order to be eligible for civil legal aid, the applicant must pass both the income and the capital eligibility test.

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<sup>1</sup> <http://www.legislation.gov.uk/ukSI/2013/480/contents/made>

<sup>2</sup> <http://www.legislation.gov.uk/ukSI/2013/471/contents/made>

Full details of how the determination of how much income and capital a person has is made can be found in the Civil Financial Regulations.

### *Gross income test*

The gross income test is an upper threshold, above which an applicant will not be financially eligible for civil legal aid. This upper threshold is where an applicant has a gross monthly income which exceeds £2,657.<sup>3</sup> An applicant who is in receipt, directly or indirectly, of qualifying benefits<sup>4</sup> automatically satisfies the gross income test. This is called 'passporting'.

### *Disposable income and disposable capital tests*

If an applicant satisfies the gross income test, account is then taken of the applicant's disposable income and disposable capital in order to assess whether they are eligible for civil legal aid. If an applicant's disposable income or their disposable capital are above the relevant limits, the applicant will not be eligible for civil legal aid.

An applicant who is in receipt, directly or indirectly, of qualifying benefits automatically satisfies the disposable income test. Those in receipt of qualifying benefits must, however, satisfy the disposable capital test. An applicant who is in receipt of other benefits may have those benefits disregarded for the purposes of the financial eligibility calculation.

Subject to the exceptions described below, an applicant will be eligible for civil legal aid where their monthly disposable income does not exceed £733 and their disposable capital does not exceed £8,000.

The exceptions are where the applicant is seeking legal representation in respect of certain immigration matters before the First-tier Tribunal or the Upper Tribunal. In those cases, an applicant will be eligible for civil legal aid where their disposable monthly income does not exceed £733 and their disposable capital does not exceed £3,000.

### *Waiver of eligibility limits*

The eligibility limits may be waived in certain circumstances. For example, in certain proceedings relating to domestic violence, female genital mutilation and forced marriage the eligibility limits may be dis-applied if it is considered equitable to do so. Thus an individual applying for legal aid for such cases may still receive legal aid even if their income or capital exceeds the eligibility limits described above.

### Contributions

Applicants who satisfy the gross income, disposable income and disposable capital tests may be required to make contributions towards the cost of their legal aid. In respect of the types of civil legal aid, in some a contribution will be required from the applicant and in some no contribution may be required from the applicant. We are not proposing to make any change to this split.

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<sup>3</sup> The upper limit is higher for those with four or more dependent children in respect of whom the individual receives child benefit – an increment of £222 is added for the fifth and each subsequent child.

<sup>4</sup> Qualifying benefits are currently income support, income-based jobseeker's allowance, income-based employment and support allowance, state pension guarantee credit and universal credit.

*Work for which no contribution is required from the applicant:*

- (a) Legal Help;
- (b) Help at Court;
- (c) Help with Family Mediation;
- (d) Family Mediation;
- (e) Family Help (Lower);
- (f) Legal Representation for certain immigration proceedings; and
- (g) Any other civil legal services as are the subject of a determination under section 10 of LASPO.

*Work for which a contribution may be required from the applicant:*

- (a) Legal representation (except for legal representation in the proceedings listed above); and
- (b) Family Help (Higher).

Contributions are payable where the individual's monthly disposable income exceeds £315 or their disposable capital exceeds £3,000. The requirement to make contributions may be waived in certain circumstances for example in relation to legal aid provided for multi-party actions of significant wider public interest.

### **Criminal legal aid**

There are a number of different forms of criminal legal aid, as set out below:

- advice and assistance for individuals in custody<sup>5</sup> – this type of criminal legal aid is unaffected by the proposals in this consultation;
- advice and assistance for criminal proceedings;<sup>6</sup>
- representation for criminal proceedings;<sup>7</sup>

The Criminal Legal Aid (Financial Resources) Regulations 2013 (“Criminal Financial Regulations”) set the rules on financial eligibility for all forms of criminal legal aid. Contributions in the Crown Court are provided for in the Criminal Legal Aid (Contribution Orders) Regulations 2013. The Criminal Legal Aid (Recovery of Defence Costs Orders) Regulations 2013 provide, in certain circumstances, for a contribution towards legal aid costs at the end of the criminal proceedings in courts other than magistrates’ courts and the Crown Court.

#### Advice and assistance for individuals held in custody

Legal aid for advice and assistance for individuals held in custody is not means tested. When making a determination (which in practice is delegated by the DLAC to providers in this instance) regard must be had to the interests of justice (merits test). “Interests of justice” is not defined, but in these circumstances it is deemed to be satisfied where a person has a right to legal advice at the police station and has requested such advice.

#### Advice and assistance for criminal proceedings

Legal aid for advice and assistance for criminal proceedings is subject to a merits and means test.

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<sup>5</sup> S13 LASPO

<sup>6</sup> S15 LASPO

<sup>7</sup> S16 LASPO

### *Merits test*

When making a determination regard must be had to the interests of justice. This applies for both the magistrates' court and superior court venues such as the Crown Court. The "Interests of justice" is not defined, but in practice will be deemed to have been passed by any defendant facing a custodial sentence and will be automatically passed by a defendant in the Crown Court or a Higher Court venue. There is, however, a link to the Standard Crime Contract which requires that work only be undertaken where it is of "sufficient benefit" to the client.

### *Means test*

As with civil legal aid, where criminal legal aid is means tested, the means test looks at both the applicant's income and capital. The general rule is that the resources of the partner of the individual applying for legal aid are to be included in the calculation of the financial resources of the applicant. However, resources are not to be aggregated if the individual has a contrary interest in the dispute in respect of which the application is made. In order to be eligible for criminal legal aid, the applicant must pass both the income and the capital eligibility test.

An individual will be eligible for advocacy assistance where the matter relates to the individual's discipline in a prison or young offender institution, or in relation to proceedings before the Parole Board, and where the individual's disposable income does not exceed £209 and disposable capital does not exceed £3,000.

In other cases, an individual is eligible for advice and assistance if that individual's disposable income does not exceed £99 and disposable capital does not exceed £1,000.

An applicant who is in receipt of qualifying benefits will automatically be passported and deemed eligible for legal aid. An applicant who is in receipt of other benefits may have those benefits disregarded for the purposes of the financial eligibility calculation.

### *Contributions*

There are no contributions for this type of legal aid.

### Representation for criminal proceedings

Legal aid for representation in criminal proceedings is subject to a merits and means test. The means test is different in the Crown Court and the magistrates' Court.

### *Merits test*

The person determining whether the individual qualifies for legal aid must make that determination in accordance with the interests of justice. There are certain factors that must be taken to account. These are set out in section 17 of LASPO. The LAA and HMCTS have also produced guidance on considering these applications.

### *Means test – Crown Court*

In the Crown Court there is means testing against income. An individual is eligible for legal aid if that individual's gross annual income does not exceed £12,475, or where their gross annual income is greater than £12,475 and disposable annual income is less than £37,500. There is

an upper financial eligibility threshold and so where an individual's disposable annual income is £37,500 or greater they are not eligible for legal aid. There is a hardship procedure to guard against this operating unfairly in an individual case.

### *Contributions*

If an individual's annual disposable income is £3,398 or less they are not required to pay a contribution from their income. If it exceeds £3,398 they are required to make six monthly payments under an income contribution order of up to 90% of their monthly disposable income (subject to upper limits set on the total payable according to particular classes of case). Applicants in direct or indirect receipt of passporting benefits are not required to make a contribution from their income.

At the conclusion of the case, an applicant who is acquitted is refunded any payments made under an income contribution order. An applicant who is convicted may in addition be required to pay an additional amount from their disposable capital towards the balance of their defence costs. While the individual's income is considered for the purposes of the contribution order at the outset and during proceedings, an individual's capital is only considered for this purpose at the conclusion of proceedings.

Appeals to the Crown Court from the magistrates' courts in proceedings against conviction, sentence or order qualify for representation for criminal proceedings in the Crown Court without reference to means, but they may be liable to make a contribution to the costs.<sup>8</sup> Liability to make a contribution of either £500 or £250 to the costs is dependent on assessment of gross and disposable income; there are no capital contributions.

### *Means test - Magistrates' courts and certain committals to the Crown Court for sentence*

In the Magistrate's Court there is means testing against income. For an applicant to be eligible for representation for criminal proceedings, the applicant's gross annual income must be less than the upper threshold of £22,325. Where an applicant's adjusted gross income is more than £12,475 and less than £22,325, a more detailed assessment to determine annual disposable income is carried out. If the applicant's annual disposable income does not exceed £3,398, the applicant will be financially eligible for representation for criminal proceedings. If the applicant's annual disposable income exceeds £3,398, the applicant will be expected to pay for their own defence in the magistrates' courts. There is a hardship procedure to guard against this operating unfairly in an individual case.

An individual who is in receipt of qualifying benefits will automatically be passported and deemed eligible for legal aid. There are also certain age-related criteria which also confer automatic eligibility. Certain other benefits may be disregarded in the calculation.

### **Hardship review**

In both the magistrates' courts and the Crown Court means testing schemes, a hardship review exists. If it is determined that an applicant is not eligible for criminal legal aid for representation in criminal proceedings and the applicant believes that they do not have sufficient financial resources to pay for the cost of legal assistance, the applicant may apply for a review of the decision. Applicants may also apply for a review of a decision that they must pay contributions on the grounds that the applicant is suffering, or would suffer, financial hardship as a result of making the payment. An example may be if the applicant has higher than usual essential expenditure.

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<sup>8</sup> Part 3 of the Criminal Legal Aid (Contribution Orders) Regulations 2013

## Other Courts (Recovery of Defence Cost Orders)

Criminal proceedings that take place in courts other than a magistrates' courts and in the Crown Court are not subject to means testing (the rules are set out in full in regulation 17 of the Criminal Financial Regulations).

The provisions on Recovery of Defence Costs Orders (RDCOs) apply in particular in the Criminal Court of Appeal and the Supreme Court and are the only means by which to recover legal aid costs from appellants in those courts. An RDCO must be made, other than in certain circumstances, at the end of the proceedings and requires the individual to pay all or a proportion of the costs of their representation. The circumstances in which the court must not make an RDCO include where the represented individual:

- was under the age of 18 on the date they made an application for representation for the purposes of criminal proceedings was made;
- has successfully appealed against every criminal conviction which was the subject of the proceedings, unless the court considers it reasonable in the circumstances to make an RDCO;
- is directly or indirectly properly in receipt of a qualifying benefit;
- has financial resources below certain limits;
- where the court considers that making an RDCO would be unreasonable on the basis of the evidence and information available, or would, owing to the exceptional circumstances of the case, involve undue financial hardship.<sup>9</sup>

The diagram below summarises the financial eligibility criteria for civil and criminal legal aid.

### Civil

Eligibility assessment Legal Help and Representation

	Capital < £3,000	Capital between £3,000 and £8,000			Capital > £8,000
	<b>And</b>	<b>Or</b>			<b>Or</b>
		Disposable income exceeds £315			
	Passported or Pass Gross and Disposable Income Test	Band A - 35% of DI between £311 and £465	Band B - 45% of DI between £466 and £616 + Band A contributions	Band C - 70% of DI above £616 + Bands A and B contributions	Monthly disposable income >£733
Legal Representation	Non-contributory Legal Aid	Contributory Legal Aid			No Legal Aid
Legal Help and Mediation	Non-contributory Legal Aid				No Legal Aid
Public Family Law cases	No means test				

### Criminal - Magistrates' Court

Eligibility Assessment Magistrates' Court

	Passported	Disposable income <£3,398 annually	Annual disposable income >£3398
Income Assessment outcome	Non-contributory Legal Aid		No Legal Aid

### Criminal - Crown Court

Eligibility Assessment Crown Court

	Passported	Disposable income <£3,398 annually	Annual disposable income between £3,398 and £37,500 Contribute 90% of <i>all disposable income</i>	Annual disposable income >£37,500
Income Contribution	Non-contributory Legal Aid		Contributory Legal Aid	No Legal Aid
	<b>Capital test following eligibility assessment</b>			
	Passported	Capital < £30k	Capital > £30k	
Capital Contribution	No capital contribution		Lump sum capital contribution	
Police Station Work	No means test			

<sup>9</sup> Regulation 11(1)(a) and (b) Criminal Legal Aid (Recovery of Defence Costs Orders) Regulations 2013