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# The gap between the legal aid means regulations and financial reality

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## Summary

This paper will first summarise the means regulations. It will then explore the discord between the regulations and financial reality, and the way in which this can exclude applicants who lack the resources needed to maintain an acceptable standard of living, let alone pay for legal services. Finally, it will identify two household types who are put at a particular disadvantage.

## The position under the means regulations

The first of the ways in which people may be denied legal aid on financial grounds is the gross income limit. In almost all cases this is £2,657 per month. In fact, the only circumstance in which this figure increases is when the applicant has more than four dependant children, in which case an additional £222 is permitted for the fifth and each subsequent child.<sup>1</sup> Gross income includes money from all financial sources, not merely from a person's employment, and is generally calculated without any deductions – aside from an exhaustive list of benefits that are paid to cover rent or disability costs.<sup>2</sup> If the applicant has a partner, their income is aggregated.

The second test is disposable income. The upper threshold here is £733 per month.<sup>3</sup> This is calculated by deducting from gross income: the applicant's income tax and national insurance; accommodation costs (capped at £545 per month for those without dependants) that may include rent or mortgage payments, but excluding council tax and utility bills; allowances of £181.41 for a partner and £290.70 for each dependant child; up to £45 for employment expenses; and childcare costs 'where reasonable'.<sup>4</sup> Resultantly, an individual with a total income of less than £2,657 may still be excluded from legal aid because their disposable income exceeds this limit.

The third test is disposable capital. The upper limit here is £8,000 in most cases.<sup>5</sup> Capital is construed far more widely than the amount of money an applicant has direct access to. It also includes any interest in property, in businesses, and in life insurance and endowment policies.<sup>6</sup> When calculating disposable capital, deductions can be made from the applicant's interest in their main dwelling house, but this is limited to up to £100,000 for any mortgage, and up to £100,000 for their equity in the property.<sup>7</sup>

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<sup>1</sup> Regulation 7 of The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013. Any reference to Regulations hereafter refers to the same Regulations unless otherwise stated.

<sup>2</sup> Regulations 7(1b), 24

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<sup>3</sup> Regulation 8

<sup>4</sup> Regulations 23, 25, 26, 27, 28. The latest figures for partner and dependant deductions are laid out at page 15 of the 'Guide to Determining Financial Eligibility for Controlled Work and Family Mediation April 2018'.

<sup>5</sup> Regulation 8

<sup>6</sup> Regulations 33, 35, 36

<sup>7</sup> Regulations 37, 39

If an applicant falls foul of any one of these limits, they will be denied legal aid. In the case of disposable income and disposable capital there is also a 'lower limit'. Thus, if an applicant's disposable income is less than £733 but greater than £315, or their disposable capital is less than £8,000 but greater than £3,000, they must pay a graduated contribution towards their legal costs.<sup>8</sup>

The main exception to these exclusions comes in the form of 'passporting benefits': Income Support, Jobseekers' Allowance, Employment and Support Allowance, Guarantee Credit, and Universal Credit. Where an applicant is properly in receipt of one of these benefits, they are exempted from both of the income tests – but remain subject to the disposable capital test.<sup>9</sup>

### The stringent means test

None of the upper limits have increased since 2009,<sup>10</sup> despite £1 that year being the equivalent of £1.28 today.<sup>11</sup> Similarly, the amount deductible for accommodation costs for those without dependants has remained at £545 since December 2001, even though the average UK rent has increased by 15.7% in the last 7 years alone,<sup>12</sup> and currently stands at

£675.<sup>13</sup> Finally, £100,000 has been the disregard for both mortgage and equity since April 2000<sup>14</sup>, since when house prices have increased by over 200%.<sup>15</sup>

This failure to increase the financial thresholds in real terms has produced a situation that is unduly stringent for all types of applicants. Measured against the 'Minimum Income Standard' (MIS), which is based on the basket of goods required to maintain an acceptable standard of living, this is particularly clear. Recent research conducted by Professor Donald Hirsch of Loughborough University found that *all* household types who were assessed to have disposable income just above the upper limit already have a shortfall in the funds required to afford a decent life.<sup>16</sup>

This means that individuals and families who are already required to forego what most of us would consider necessities, such as occasionally socialising with friends, or replacing a child's clothes, are deemed to be too well off to receive legal assistance from the state. Accordingly, they are required either to suffer an even greater shortfall in what they need to live acceptably, or to abandon their legal rights altogether.

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<sup>8</sup> Regulation 44

<sup>9</sup> Regulation 6

<sup>10</sup> Regulation 7, Community Legal Services (Financial) (Amendment) Regulations 2009/502; Regulation 5, Community Legal Services (Financial) (Amendment) Regulations 2009/502 (disposable income); Regulation 6, Community Legal Services (Financial) (Amendment) Regulations 2007 (SI 2007/906) (capital).

<sup>11</sup>

<<https://www.bankofengland.co.uk/monetary-policy/inflation>>

<sup>12</sup>

<<https://www.ons.gov.uk/economy/inflationan>

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dpriceindices/bulletins/indexofprivatehousingrentalprices/march2018#growth-in-great-britain-private-rental-prices-slowng>

<sup>13</sup> Private Rental Market Summary Statistics – April 2016 to March 2017, Valuation Office Agency

<sup>14</sup> The Community Legal Service (Financial) Regulations 2000, Regulation 32

<sup>15</sup> Office for National Statistics, Housing affordability in England and Wales: 1997 to 2016

<sup>16</sup> Hirsch, D. (2018), Priced out of Justice? Means testing legal aid and making ends meet, page 21

Any suggestion that funds can be freed by avoiding certain kinds of expenditure may initially seem persuasive, but scratch beneath the surface and it is clear that this is unworkable. In the recent *Unison* litigation,<sup>17</sup> the Lord Chancellor ran precisely this argument: that people could temporarily do without clothing, personal goods and services, social and cultural participation, and alcohol. As pointed out by Lord Reed, this fails on several levels.

First, it ignores that whilst some expenditure can be ‘saved’, some can only be ‘postponed’. A parent could perhaps hold off on buying their child new school shoes for a month or two in order to help pay their fees, but replacements will be required at some point down the line, at which point the money to buy them will be gone. Second, it fails to recognise that funding legal services requires prompt payment of often large amounts of money, which is difficult to achieve by incremental cutbacks alone. Finally, and perhaps most importantly, it implies that foregoing things that most of us take for granted is a fair price to pay to access justice. This is hardly standing up for the ‘just about managing’.

Even if this were considered acceptable, merely cutting back on ‘less indispensable’ costs would not solve the problem for all who are denied legal aid on financial grounds. The ‘poverty line’ is a widely accepted measure of material hardship, set at 60% of median income. It is relied on by the European Union as part of their Europe 2020 Strategy,<sup>18</sup> and was used by the

British government during their campaign to end child poverty through the Child Poverty Acts.<sup>19</sup> Falling below this line can have severe adverse effects, not only in terms of practical choices but also psychological well-being, physical health, and personal relationships.<sup>20</sup>

Despite this, Professor Hirsch’s research found that in many cases households with a disposable income just above the upper threshold will already be in poverty; and in *all* cases, households that are required to pay a contribution to their legal costs due to being above the lower threshold will be forced into poverty as a result.<sup>21</sup> A system of legal aid that excludes people in such acute financial need is a system that is no longer fit for purpose.

PLP’s view is that the means regulations should be uprated in real terms, so as to ensure that nobody with insufficient finances to maintain an acceptable living standard is excluded from legal aid.

*The harsh situation created by the current means tests is aptly illustrated by a hypothetical example.*<sup>22</sup> Mary is a newly qualified nurse who earns £22,128 per year.<sup>23</sup> She works full time and claims no benefits. She rents a one bedroom flat in Birmingham, which

<sup>17</sup> *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51

<sup>18</sup> Europe 2020 indicators – poverty and social exclusion

<sup>19</sup> Hirsch, D. (2018), *Priced out of Justice? Means testing legal aid and making ends meet*, page 6

<sup>20</sup> Beresford et al. (1999), *Poverty First Hand: Poor People Speak for Themselves*

<sup>21</sup> Hirsch, D. (2018), *Priced out of Justice? Means testing legal aid and making ends meet*, page 33

<sup>22</sup> Example constructed by Matt Ahluwalia, Pupil Barrister at the Public Law Project, on behalf of the Law Society.

<sup>23</sup> <<https://www.rcn.org.uk/employment-and-pay/nhs-pay-scales-2017-18>>

costs her £700 per month.<sup>24</sup> It is close to her hospital, which is vital because she relies on public transport to get around, and she could be called into work at short notice. Mary spends £62.50 on her monthly bus pass.<sup>25</sup> She lives alone, and has no dependants.

Mary has been renting the same property since October 2016. She held an assured shorthold tenancy until October 2017, which became a statutory periodic tenancy thereafter, because the landlord was happy for her to stay provided she was able to continue paying the rent. She has never failed to pay on time, and has not heard of any complaints about her behaviour since she has been living in the property.

When Mary moved in she paid the landlord a deposit of £1,000. The landlord did not provide her with any written confirmation that the deposit had been protected, nor did he provide her with a gas safety certificate, or a government 'How to Rent' booklet.

In December 2017, Mary's landlord served her with a Section 21 notice, informing her that he wanted to sell the property and that he therefore needed to evict her.<sup>26</sup> Mary wants to stay in the property for the duration of the tenancy, and has clear defences that would help her to fight this eviction. However, she has neither the knowledge to bring her claim, nor the time to conduct legal research herself. The idea of filling in defence forms on her own is terrifying, because the consequences if she makes a mistake could be severe.

<sup>24</sup> Based on rough average of Birmingham prices courtesy of [Zoopla](https://www.zoopla.co.uk/).

<sup>25</sup> <http://nxbus.co.uk/west-midlands/miscellaneous/commute-by-bus>

<sup>26</sup> Issued under Section 21 of the Housing Act 1988.

This kind of case is in principle covered by legal aid.<sup>27</sup> It is less clear, however, whether Mary meets the means tests. She is certainly not excluded on the basis of gross income, because her £22,128 annual salary works out as £1,844 per month, considerably less than the limit of £2,657.

When tax and national insurance are deducted, Mary's take home pay is £1,527 per month.<sup>28</sup> Although her rent is £700 a month, and her travel to work £62.50 a month, she is limited to deductions of £545 and £45 respectively, taking her disposable income down to £937. Mary also has student loans to pay off, but these are not accounted for when assessing her eligibility for legal aid. Nor are other living expenses such as utility bills or council tax.

Mary is therefore excluded from legal aid altogether on the grounds that she has more than £733 disposable income. Even if her full rent and travel were deducted, Mary would still exceed the upper threshold.

Despite this, Mary is living off an amount of money that falls short of the Minimum Income Standard. For a single person with no dependants, this is £900.<sup>29</sup> When Mary's actual rent is deducted from her take home pay of £1,527, she is left with £827. Nevertheless, if she wants to prevent herself from being evicted from a house she has a legal right to

<sup>27</sup> Para. 33, Part 1 Schedule 1 of LASPO.

<sup>28</sup> Based on calculation using <https://www.moneysavingexpert.com/tax-calculator/>

<sup>29</sup> Hirsch, D. (2018), *Priced out of Justice? Means testing legal aid and making ends meet*, page 18

live in, she needs to further reduce her spending in order to fund legal assistance.

### The particularly prejudicial effect on certain social groups

If the financial requirements of legal aid are overly stringent on all household types, certain households are particularly prejudiced. The result of this is that one of LASPO's stated aims – to target legal aid at those who need it most<sup>30</sup> – is being subverted. We examine below two particular household types to illustrate this point.

#### *Families with children*

It is apparent that the way in which the financial eligibility criteria for legal aid are currently formulated penalises 'hard working families' even more than it penalises individuals. As stated, the gross income limit remains £2,657 per month for all applicants, unless they have more than four dependant children. By contrast, the disposable income limit increases by £181.41 for a partner and £290.70 for each dependant child. Even this, however, is far less than each additional member of the household costs to sustain.

According to Professor Hirsch's research, for a single parent, having just one child increases necessary household expenditure from £900 to £1,342,<sup>31</sup> a difference of £442. The additional figure for a second child is £355, and for a third it is a further £491.<sup>32</sup> This means that a working single parent with three children

on average requires £1,268 more than a single person to properly support their family – significantly more than the additional £872.10 they are permitted in the calculation of their disposable income.<sup>33</sup>

The situation is starker still for a couple with children. If they have one child, their household costs £829 more to run than a single person's – partly due to there being two adults, and partly due to the child.<sup>34</sup> Yet their total income is subject to a deduction of just £473.40; little more than half of what is actually required.

This means that families who do not meet the MIS, or who are in poverty, are more likely to be excluded from legal aid than single people. As well as being wrong in principle, this fact is worrying in practice, because studies have found that poverty can have particularly pernicious effects on children. They may struggle to make and maintain friendships,<sup>35</sup> begin to disengage with education,<sup>36</sup> and even suffer lasting damage to their sense of self-worth.<sup>37</sup> It is also clear that parents will invariably put their children's needs first,<sup>38</sup> increasing the risk that they will turn down the

<sup>30</sup> 'Proposals for the Reform of Legal Aid in England and Wales'.

<sup>31</sup> Hirsch, D. (2018), *Priced out of Justice? Means testing legal aid and making ends meet*, page 21

<sup>32</sup> *Ibid*

<sup>33</sup> It should be noted that child benefit and child tax credits are included in the calculation of gross and disposable income. Universal Credit is a passporting benefit.

<sup>34</sup> Hirsch, D. (2018), *Priced out of Justice? Means testing legal aid and making ends meet*, page 21

<sup>35</sup> Crowley A. and Vulliamy C. (2011), *Listen Up! Children and Young People Talk: About Poverty*, page 13

<sup>36</sup> Horgan G. (2007), *The impact of poverty on young children's experience of School*, page 20

<sup>37</sup> Ridge, T. (2009), *Living with poverty: a review of the literature on children's and families' experiences of poverty*, page 29

<sup>38</sup> *Ibid*, page 66



opportunity to uphold their legal rights in order to make ends meet.

Hardworking families have just as much of a pressing need for legal aid as anybody else, if not more. As such, PLP recommends that the allowance for dependant children and partners is increased, so that it reflects the actual cost of having a family, and allows legal aid to be directed to those who need it.

### *Homeowners on low incomes*

It is accepted that in many cases those who own homes will also have relatively high incomes. This is not, however, uniformly true. We inhabit a labour market that is both increasingly flexible, and increasingly unstable: in 2015 alone 14% of all jobs were removed and 15% were newly created,<sup>39</sup> requiring millions of people to transition between employers; and last year 901,000 people worked solely or mainly on zero hour contracts.<sup>40</sup>

This has created an environment where sudden changes in income are increasingly prevalent, and are often followed by debt.<sup>41</sup> The capital threshold ignores this fact, and operates to exclude many homeowners from legal aid, regardless of how dire their financial situation becomes. This has become more pronounced since the 2013 Means Regulations, which extended the disposable capital test so that it

<sup>39</sup> StepChange. (2015), Navigating the New Normal: Why working families fall into problem debt and how we need to respond, page 2

<sup>40</sup> Contracts that do not guarantee a minimum number of hours: April 2018, Office of National Statistics

<sup>41</sup> StepChange. (2015), Navigating the New Normal: Why working families fall into problem debt and how we need to respond, page 12

would also apply to recipients of passporting benefits.

In effect, therefore, anybody who owns a home worth more than £214,450 will exceed the capital threshold,<sup>42</sup> along with owners of lower value houses where the mortgage is less than £100,000. This is so despite the fact that the average house price in England is £240,325.<sup>43</sup> The government's justification for this is that those who have capital, whether liquid or otherwise, should be expected to utilise that, rather than relying on the state to fund legal assistance.<sup>44</sup>

The main problem with this position is that when capital is tied up in property it is difficult to access quickly, as will be required in order to use the money to bring or defend a claim. One method would be to sell the home and downsize, but this takes 14 weeks on average.<sup>45</sup> Another would be to obtain a secured loan against the property, such as a mortgage or second charge. This may not be as lengthy a process, but it will usually depend on the loan being deemed 'affordable' for the applicant,<sup>46</sup> a question that will be determined by reference to their income.<sup>47</sup> When the applicant is forced to rely on capital because of a lack of income, or even reliance on state

<sup>42</sup> When £100,000 is disregarded for both equity and mortgage, and 3% of the total value is deducted for nominal sale costs.

<sup>43</sup> <<https://gov.uk/government/news/uk-house-price-index-hpi-for-june-2017>>

<sup>44</sup> 'Proposals for the Reform of Legal Aid in England and Wales'.

<sup>45</sup> <<http://corporate.postoffice.co.uk/our-media-centre#/pressreleases/rate-of-sale-the-average-uk-property-takes-96-days-to-sell-2282828>>

<sup>46</sup> Mortgage Conduct Of Business 11.6.2(1)(b)

<sup>47</sup> Mortgage Conduct Of Business 11.6.5(2)



benefits, this will clearly be a significant obstacle.

## Conclusion

Despite the government's promises, it is apparent that the means regulations under LASPO are failing the 'just about managing'. The financial limits are unduly harsh, and exclude from legal aid people who are already unable to sustain an acceptable standard of living. . These applicants are thereby left with a decision: to spiral further towards poverty or to abandon their legal rights altogether.

Furthermore, the means threshold operates particularly harshly for certain types of households. Families with children and homeowners with little or no income are clear examples of this, although this is not to say that there are not other groups who are equally affected.



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