

YLAL Submission to the Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

September 2018



**YOUNG
LEGAL
AID
LAWYERS**

Contents

1. Introduction	2
2. Objectives of LASPO	4
3. Social Mobility and Access to the Profession	5
4. Means Testing and Financial Eligibility	6
5. Scope and Early Legal Advice	14
6. Exceptional Case Funding	35
7. Use of Technology	40
8. Conclusion	49
9. Credits	51

1. Introduction

Young Legal Aid Lawyers ('YLAL') was formed in 2005 and has over 3,500 members.

We are a group of lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded. YLAL's members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales.

We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

a) The objectives of YLAL

YLAL was set up and operates to pursue the following objectives:

- To campaign for a sustainable legal aid system which provides good quality legal help to those who could not otherwise afford to pay for it
- To increase social mobility and diversity within the legal aid sector
- To promote the interests of new entrants and junior lawyers and provide a network for like-minded people beginning their careers in the legal aid sector

b) The introduction of the modern legal aid system in England and Wales

The modern legal aid system was introduced by the Legal Aid and Advice Act 1949. This Act was the result of recommendations made by the Rushcliffe committee, which reported to Parliament in May 1945. The Rushcliffe recommendations included:

- Legal aid should be available in all courts and in such manner as will enable persons in need to have access to the professional help they require
- This provision should not be limited to those who are normally classed as poor but should include a wider income group
- Those who cannot afford to pay anything for legal aid should receive this free of cost
- There should be a scale of contributions for those who can pay something toward costs
- The cost of the scheme should be borne by the state, but the scheme should not be administered either as a department of state or by local authorities
- Barristers and solicitors should receive adequate remuneration for their services

We believe these principles remain as relevant as they were then, and should form the basis of the legal aid system. Legal aid should not be limited only to those classed as poor but rather should be available to anyone who is unable to afford to pay for legal advice and representation. Equal access to justice for all irrespective of wealth should be the absolute core principle of our legal aid system. We believe that the cost of legal aid should be met by the state through general taxation. We believe that access to justice is a public good that should be classed by government in the same category as the rights to healthcare and education, which are free at the point of use.

Since the Legal Aid and Advice Act 1949, the system through which legal aid is provided within England and Wales has undergone many changes.¹ The most recent and swingeing of these changes to the system of publicly funded legal advice and assistance were implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO').

¹ Sir Henry Brooke 'The History of Legal Aid 1945 – 2010' Bach Commission on Access to Justice, Appendix 6, September 2017. <https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-6-F-1.pdf>

c) YLAL's submission to the LASPO post-implementation review

YLAL's submission to the post-implementation review of Part 1 of LASPO concentrates on key areas in which YLAL believes that LASPO has impacted upon access to justice within England and Wales.

This submission will cover the following key topics:

- The objectives of LASPO
- Means testing and financial eligibility
- Early legal advice
- Areas of scope
- Exceptional Case Funding
- Use of technology

For each of these sections, YLAL has considered the legal aid system pre-LASPO and compared this to the system post-LASPO. YLAL members have conducted a review of relevant literature, including reports published by YLAL and by other organisations with an interest in the state legal aid and access to justice in England and Wales. Each section contains feedback from YLAL members, including responses to surveys, qualitative feedback by members through contributions at YLAL meetings, and through the other means by which our members contribute to the work of YLAL, including our blogs.

Following this analysis, each section contains YLAL's conclusions and recommendations for solving problems faced by those individuals attempting to access justice via the legal system.

This submission concludes by setting out YLAL's key recommendations for ensuring the protection of the legal system of England and Wales for future generations to come. YLAL believes that wide-ranging reform is required in order to ensure that our justice system is protected and that all those in England and Wales are able to have their rights protected and promoted in a justice system that is accessible by all, regardless of their means.

2. Objectives of LASPO

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force on 1 April 2013. LASPO was based on a government response to a consultation on the legal aid system at the time published by the Lord Chancellor on behalf of the Ministry of Justice. This publication was entitled “Reform of Legal Aid in England and Wales: the Government Response”.

This publication set out the government’s proposals for the reform of the legal aid system in England and Wales and the four objectives that the government intended to achieve via LASPO. These four objectives were as follows:

- To discourage unnecessary and adversarial litigation at public expense;
- To target legal aid to those who need it most;
- To make substantial savings to the cost of the scheme; and
- To deliver better value for money for the taxpayer

YLAL notes that none of the four objectives of LASPO contain reference to protecting, promoting or ensuring access to justice. We believe that the impact of LASPO upon access to justice should be the key focus of the post-implementation review.

Access to justice is a fundamental right and YLAL believes that this right has been undermined by the changes to the legal aid system implemented by LASPO. YLAL believes that wide-ranging reform to the way in which legal aid is administered in England and Wales must be implemented if we are to ensure the legal rights of the most vulnerable in society are protected and in order to uphold the rule of law.

YLAL urges the government to ensure that any proposals made following this post-implementation review have access to justice, the rule of law and the protection of the vulnerable at their heart.

3. Social Mobility and Access to the Profession

In March 2018, YLAL published its third report on social mobility in the legal aid sector, 'Young Legal Aid Lawyers: Social Mobility in a Time of Austerity'.² YLAL launched the report across the country with events in Birmingham, Bristol, Liverpool, London, Manchester and Sheffield.

This detailed report was produced following a membership-wide survey and collates responses from students, paralegals, trainees and lawyers up to 10 years' qualification. Since YLAL's last social mobility report in 2013, the effects of the cuts introduced by LASPO have been felt. LASPO has profoundly affected social mobility in the sector. Legal aid providers, including law firms and not-for-profit organisations, are struggling to survive and often pay well below the living wage to their employees.

Following LASPO, some of our members have found it impossible to continue working in legal aid. One person responding to YLAL's survey stated that:

"Unfortunately, I no longer work in legal aid. The junior criminal bar became too much; the financial anxiety was overwhelming. Working ten hour days when you didn't know if you were going to be paid or not became too much."

YLAL's report identifies three key issues with social mobility in the legal aid sector:

- *Debt combined with low salaries is a barrier to the profession:* 72% of respondents have or will have debt over £15,000 as a result of their education and 26.5% will have over £35,000 of debt. This is an increase of seven per cent and 11.5% respectively since our last report in 2013. 53% of respondents earn less than £25,000 per year with 30% earning below £20,000. Our respondents listed low pay as the biggest challenge facing young lawyers in the legal aid sector.
- *Unpaid work experience is a barrier to the profession:* 13.5% of respondents described unpaid work experience as a significant barrier to entry into the profession.
- *Stress, lack of support and juggling legal aid work with other responsibilities are affecting retention in the profession:* stress was cited as the second biggest challenge faced by young legal aid lawyers, with 21% of respondents saying it has been their greatest challenge.

The report sets out a series of recommendations to address these issues, including: mandatory minimum salaries for trainee solicitors are reintroduced; organisations adopt YLAL's work experience charter; and improved welfare initiatives are introduced.

YLAL requests that, when considering this submission to the LASPO post-implementation review, the contents of our social mobility report be viewed by the Ministry of Justice in the context of the detrimental impact LASPO has had upon social mobility and access to the profession.

YLAL believes that if the recommendations made within this submission and our social mobility report are implemented, access to justice and social mobility can be significantly improved, and the resulting diversity – particularly with reference to socio-economic background – will encourage the profession to flourish and better serve the vast unmet public need for legal advice and representation.

² Young Legal Aid Lawyers: Social Mobility in a Time of Austerity, March 2018
<http://www.younglegalaidlawyers.org/sites/default/files/Soc%20Mob%20Report%20-%20edited.pdf>

4. Means Testing and Financial Eligibility

Introduction

As noted above, the Legal Aid and Advice Act 1949 resulted from the recommendations of the Rushcliffe committee which included:

- Legal aid should be available in all courts and in such manner as will enable persons in need to have access to the professional help they require
- This provision should not be limited to those who are normally classed as poor but should include a wider income group
- Those who cannot afford to pay anything for legal aid should receive this free of cost
- There should be a scale of contributions for those who can pay something toward costs

We believe these principles remain as relevant as they were then, and should form the basis of the legal aid system. Legal aid should not be limited only to those classed as poor but rather should be available to anyone who is unable to afford to pay for legal advice and representation. Equal access to justice for all irrespective of wealth should be the absolute core principle of our legal aid system. We believe that the cost of legal aid should be met by the state through general taxation. We believe that access to justice is a public good that should be classed by government in the same category as the rights to healthcare and education, which are free at the point of use.

The means tests to determine whether a person is eligible for criminal and civil legal aid are complex. In criminal cases, there are separate means tests for representation in the magistrates' court and the Crown Court³. In civil cases, non-means tested legal aid is available in very limited types of case, including where a child is the subject of care proceedings or where an adult who lacks mental capacity wishes to challenge a deprivation of their liberty. However, in the vast majority of areas of law which remain within the scope of civil legal aid, the means test applies.

Part 1 of LASPO was intended to reduce the civil legal aid budget by removing whole areas of law from scope and changing the financial eligibility criteria for legal aid. The primary changes to the financial eligibility criteria for civil legal aid were as follows:

- All applicants for legal aid became subject to means testing concerning their capital. Previously, applicants in receipt of certain benefits had been 'passported' for both the income and capital parts of the means test. Applicants in receipt of passporting benefits are now only passported in respect of the income part of the means test.
- The disregard for capital which is the 'subject matter of the dispute' (SMOD) is now capped at £100,000.
- The levels of income-based contributions were increased to a maximum of approximately 30% of monthly disposable income.

This part of our submission concerns the impact on access to justice of means testing and the financial eligibility criteria for legal aid.

Literature review

In relation to means testing and financial eligibility for legal aid, we believe the Ministry of Justice should take into account the following reports in its review of Part 1 of LASPO:

³ Legal Aid Agency guidance on criminal legal aid means testing, last updated 27 February 2017
<https://www.gov.uk/guidance/criminal-legal-aid-means-testing>

National Audit Office Report [2014]

- **Implementing reforms to civil legal aid**, by the National Audit Office, published on 17 November 2014.⁴ In particular, we note that this report concluded that the Ministry of Justice does not know whether or not all those eligible for legal aid are able to access it.

Public Accounts Committee Report [2015]

- **Implementing reforms to civil legal aid**, by the House of Commons Public Accounts Committee, published on 4 February 2015.⁵ In particular, we note that this report concluded that contrary to its assurances to Parliament, the Ministry of Justice does not know whether people who are eligible for legal aid are able to get it.

Justice Select Committee Report [2015]

- **Impact of changes to civil legal aid** under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, by the House of Commons Justice Select Committee, published on 12 March 2015.⁶

Amnesty International UK Report [2016]

- **Cuts that hurt**: The impact of legal aid cuts in England on access to justice, by Amnesty International UK, published in October 2016.⁷

Trades Union Congress Report [2016]

- **Justice denied**: Impacts of the government's reforms to legal aid and court services on access to justice, by Speak Up for Justice (the Trades Union Congress and others), published October 2016.⁸

Legal Aid Practitioners Group Manifesto [2017]

- **Manifesto for legal aid**, by Legal Aid Practitioners Group, second edition published in 2017.⁹ The financial eligibility criteria for legal aid are covered in chapter 4, at pages 20-22 of the manifesto. We support many of the specific recommendations made by Legal Aid Practitioners Group below.

Bach Commission Report [2017]

- **The right to justice**, final report by the Bach Commission on Access to Justice, published in September 2017.¹⁰ The financial eligibility criteria for legal aid are covered in chapter 3, at pages 23-27. In particular, we note the recommendation that: *"The government should introduce a significantly simpler and more generous scheme for legal aid. The means tests should be based on a*

⁴ National Audit Office, 'Implementing reforms to civil legal aid', 17 November 2014

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

⁵ House of Commons Public Accounts Committee, 'Implementing reforms to civil legal aid', 4 February 2015

<https://publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/808/80802.htm>

⁶ House of Commons Justice Select Committee, 'Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012', 12 March 2015 <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>

⁷ Amnesty International, 'Cuts that hurt', October 2016 https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf

⁸ Trades Union Congress, 'Justice denied: impacts of the government's reforms to legal aid and court services on access to justice', October 2016 https://www.tuc.org.uk/sites/default/files/Justice_Denied_Report.pdf

⁹ Legal Aid Practitioners Group, Manifesto for legal aid, 2nd edition, 2017

https://www.lapag.co.uk/wp-content/uploads/LAPG_Manifesto_A5_FINAL.pdf

¹⁰ The Bach Commission, 'The Right to Justice', September 2017

http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WFB.pdf

simple assessment of gross household income, following an adjustment for family size, with the eventual aim of significantly increasing the number of households eligible for legal aid.”

Loughborough University / Law Society Report [2018]

- **Priced out of justice: Means testing legal aid and making ends meet**, by Professor Donald Hirsch, Loughborough University, published in March 2018.¹¹ The central finding of this report is that the means testing of legal aid is set at a level that requires many people on low incomes to make contributions to legal costs that they could not afford while maintaining a socially acceptable standard of living.

Joint Committee on Human Rights Report [2018]

- **Enforcing human rights**, by the Joint Committee on Human Rights, published on 19 July 2018.¹² In particular, we note that this report found that the revised financial eligibility criteria have impacted disproportionately on disabled people, and concluded: *“The ongoing Government review of the legal aid reforms must look again at the financial eligibility criteria with a view to widening access to a larger proportion of the population. At the least, it should consider extending the passporting of those on welfare benefits so that the part of the means test focussing on capital is aligned with welfare benefits criteria, thus making it fairer and more administratively expedient.”*

Information from members

In July and August 2018, YLAL conducted a survey of our members and held a number of meetings across the country to find out what our members consider to be the impact on LASPO on access to justice. This section will focus on the findings in respect of the means test and financial eligibility for legal aid..

The means test: member feedback

28% of respondents to our survey identified reforming the means test as the best way to resolve the problems brought about by the LASPO cuts. A number of members described the current means tests for both civil and criminal legal aid to be *“unrealistic”* and *“unfair.”* The most common problems raised by members with the means test were:

- The cap on the allowance for housing costs (£545 per month) is unrealistic, particularly for clients who live in London and other large cities where housing costs are inevitably higher
- Living expenses (such as food, bills and debts) are not disregarded or even taken into account
- The LAA has no discretion when applying the means test, even when a client is £1 over the disposable monthly income limit or where their income differs from month to month (one member explained that a client working in retail was ineligible because her wages during the Christmas period were higher than every other month)
- For clients whose assessed disposable capital is between £3,000-£8,000, the requirement that they make a capital contribution within 28 days is not fair, particularly where it is not liquid capital (such as investments, equity in a property etc)
- The cap on employment expenses (£45 per month) is unrealistic and unfair, particularly for those working in large cities whose travel expenses will be much higher
- The eligibility limits have not been adjusted to reflect inflation

¹¹ Loughborough University, ‘Priced out of justice? Means testing legal aid and making ends meet’, March 2018 <https://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/legal-aid-means-test-report/>

¹² Joint Committee on Human Rights, ‘Enforcing human rights’, 19 July 2018 <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/669.pdf>

- The quality of decision-making at the LAA is poor. Often, means assessments are wrongly calculated and the applicant's solicitor has to challenge the incorrect calculation which wastes time and resources, and the cost of doing so is not recoverable

In relation to the requirement to provide a signed letter from any person financially supporting the client, one member commented that the LAA uses this as an excuse to refuse funding applications on the basis that the third party can meet the cost of legal representation. This respondent commented "it's a catch 22 – if they accept support they will be financially ineligible for legal aid, if they do not accept it they will be destitute."

95% of respondents had provided help and advice to clients who could not access legal representation because legal aid was not available. Of those, 70% reported assisting these clients more than once a week and 85% reported that this was because the client was financially ineligible for legal aid.

57% of respondents had turned a client away because legal aid was not available, of those, 50% have had to turn clients away once a week or more. The means test was the most common answer as to why clients had been turned away, with 75% of respondents reporting this to be the principal reason.

Who is most affected?

The majority of responses identified the 'squeezed middle' as those most affected by the stringent means testing – those whose financial means are just high enough to exclude them from qualifying for legal aid, but are nowhere near high enough to enable them to fund legal representation privately. As a result, a number of members commented that we now have a two-tier justice system in which access to justice is available to only the very poor and the very wealthy, and is out of reach to those in between, who constitute the majority of the population.

Supporting evidence

57% of respondents identified problems in obtaining proof of financial means as a difficulty in obtaining legal aid for clients. This was the most common problem for practitioners when applying for legal aid. One member explained that an application was refused on the basis that the bank statements provided by the client had not been stamped by the bank. Many members cited providing evidence of means for those who are self-employed to be particularly challenging.

One respondent explained the difficulties in obtaining this information for highly sensitive cases, such as inquests where clients are bereaved by the recent death of a loved one: *"it always feels inappropriate and intrusive to ask bereaved family members (often parents or spouses of the deceased) to provide a complete picture of their financial circumstances in circumstances where they are grieving the loss of a loved one."*

In private family law disputes, legal aid is only available if the applicant is financially eligible and can provide proof that they are a victim of domestic abuse. This evidence may include a letter from a health professional, an expert report or evidence that the perpetrator has been cautioned for a domestic violence offence.

One respondent, a family solicitor, commented on the difficulties in obtaining this evidence. They explained that the nature of domestic abuse means that victims often don't report the abuse because they are too frightened, therefore they won't have any 'evidence' to provide. Similarly, this respondent explained that the police are often reluctant to investigate allegations of domestic abuse unless allegations of physical violence are made. The police often see domestic violence as a civil issue and refer victims to the domestic abuse helpline. Similarly, GPs and counsellors are extremely reluctant to identify an individual as

the perpetrator (who has to be named) because they are concerned that this could lead to repercussions for them. Behaviour such as coercive control and financial abuse is also extremely difficult to prove.

Unrepresented defendants and litigants in person

A number of respondents identified a rise in unrepresented defendants in the criminal courts and litigants in person in the civil courts as the biggest impact of LASPO, resulting in inequality of arms and impeding access to justice. One respondent, a family barrister, explained said “*the family courts have seen an unbelievable increase in litigants in person. I am against a litigant in person at least once per week.*”

Another civil and family practitioner commented “working in cases involving litigants in person is extremely draining, time and resource intensive (for lawyers, judges and court staff) and puts the lawyer-client relationship for the represented party under pressure. It is becoming untenable in the family courts, in particular.” This respondent also noted that the Litigant in Person Network is now developing mental health awareness training and support for volunteers and caseworkers who assist litigants in person regularly, presumably because the stress and pressure is escalating to an unmanageable level.

Problems with the current system

In our submission to the Bach Commission on Access to Justice¹³, we identified the stringency of the means tests for legal aid as one of our three biggest concerns about the state of access to justice:

“The extensive denial of access to justice resulting from overly stringent financial means tests for legal aid, which undermine one of the founding principles of the legal aid system: that provision should not be limited to those normally classed as poor, but rather should be available to anyone who is unable to afford to pay for legal advice and representation”.

Civil legal aid

When the civil legal aid scheme came into operation in 1950, it is estimated that 80% of the population had a means-tested entitlement to legal aid.¹⁴ However, as the eligibility criteria for civil legal aid have been restricted, this figure has fallen significantly, to 29% in 2008.¹⁵ It is likely to have fallen further since the introduction of LASPO: indeed, the Haldane Society of Socialist Lawyers has estimated that the figure is now 20%.¹⁶ In 2015, the Ministry of Justice itself estimated that around 25% of the population were eligible for free or contributory legal aid.¹⁷

While it is true that at its inception, legal aid was predominantly used for family and criminal law, we do not believe it is fair that the vast majority of the population should be financially ineligible for any form of publicly-funded legal advice or representation in civil matters. By comparison with the system in England and Wales, it is reported that in Scotland, 70% of the population are eligible for legal aid.¹⁸

In addition to significantly restricting the scope of civil legal aid, LASPO introduced changes in respect of means testing for legal aid. The strictness of the means test for civil legal aid today means that anyone whose ‘disposable’ household income exceeds £733 per month or whose ‘disposable’ capital exceeds £8,000 is automatically ineligible for almost any form of publicly-funded civil legal help.

¹³ YLAL submission to the Bach Commission on Access to Justice, May 2016:

<http://www.younglegalaidlawyers.org/sites/default/files/YLAL%20Submission%20to%20Labour%20Party%20Legal%20Aid%20Review.pdf>

¹⁴ *The Justice Gap: Whatever Happened to Legal Aid?*, Steve Hynes & Jon Robins, Legal Action Group, published 2009, p.21

¹⁵ *Ibid*

¹⁶ Bach Commission on Access to Justice: Appendix 2, September 2017, compiled by Sir Henry Brooke, p.83:

<https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-2-F.pdf>

¹⁷ Joint Committee on Human Rights, ‘Enforcing human rights’, 2018, p.14.

¹⁸ *Ibid*

In the calculation of 'disposable' capital, the value of a person's home is now taken into account. This results in people being ineligible for legal aid despite having no real access to funds to pay for legal advice. In the vast majority of cases, people cannot raise funds on the equity in their main home, yet are treated as having 'disposable' capital. Even people who are in receipt of means tested welfare benefits are now also means tested on their capital for legal aid. These are people who have already been means tested by one department of the state, and have been assessed as needing assistance, yet another government department applies a different test, the result of which being that they are not entitled to legal help. This is unfair and illogical.

The means test for civil legal aid does not bear a direct relationship to applicants' actual ability to meet the costs of privately obtaining legal advice and representation, and fails to take into account the real cost of living. The result of the current financial eligibility criteria is that almost anyone who is not in receipt of means tested state benefits will be financially ineligible for civil legal aid. In our view this represents a widespread denial of justice to the people of this country.

We also consider that the statutory charge for legal aid operates to unfairly prevent people from receiving compensation which they are entitled to receive following civil claims. We do not believe it is fair that a person with a meritorious claim which results in a settlement or is successful in court should then be faced with the prospect of losing most or all of the compensation to which they are entitled in order to repay their legal aid costs.

Criminal legal aid

In criminal legal aid, we believe it is vital that anyone charged with a criminal offence should have access to publicly-funded legal advice and representation, from attendance at the police station to trial. When the state chooses to prosecute somebody for a crime, financial considerations should never lead to that person being unrepresented. This must be a red line for a justice system in any civilised society.

While the right to publicly-funded representation in criminal cases is largely recognised and accepted by government, reform of criminal legal aid contracts and significant fee cuts have meant that many criminal defence firms risk going out of business and have led to criminal barristers taking direct action in protest against the government. It is vital to the legitimacy of the criminal justice system that there is a sufficient number of lawyers with expertise and experience in criminal law to advise and represent defendants.

The basic principles set out above lead to the following conclusions:

- The means threshold in the Crown Court should be significantly increased. The cost of any private criminal case is prohibitive – precisely because legal aid rates are so low that firms can only afford to stay open if they charge high rates for private cases.
- People facing any criminal charge in the magistrates' court who the magistrates deem to be struggling to deal with proceedings – even in non-imprisonable cases – should be offered the publicly-funded services of a lawyer. A criminal record is a serious outcome for anyone, and the reality for any lawyer who has spent any time prosecuting in the magistrates' court is the knowledge that an unrepresented defendant stands no chance at all.
- Acquitted defendants must be able to reclaim their reasonable legal costs from the state, not only at legal aid rates. People have bankrupted themselves defending themselves against charges of which they were innocent. This situation, also known as the 'innocence tax', is unconscionable.
- More power should be given for a portion of acquitted defendants' costs to be paid by the prosecution, where appropriate, at the discretion of the judge. The Crown Prosecution Service (CPS) often causes inflation of costs by failing to reply to correspondence, resulting in unnecessary hearings. In the worst cases, the CPS brings unmeritorious prosecutions. There are very limited powers to hold the CPS to account, and it is defendants who pay for these mistakes. Increasing the

ability to do this would firstly lead to better decision making, and secondly to a greater willingness of individuals to pay privately even if they did qualify for legal aid

Recommendations

Summary

In our submission to the Bach Commission on Access to Justice, we argued that one of the three most important practical steps which could be taken to ensure that access to justice for all is a reality would be to:

“Increase the thresholds and simplify the financial means tests for civil and criminal legal aid to ensure that legal aid is not reserved for only the poorest and most vulnerable in society, but rather is available to anyone who is unable to afford to pay for legal advice and representation”.

We maintain that it is necessary to significantly increase the thresholds for the financial means tests for civil and criminal legal aid to ensure that legal aid is not reserved for only the poorest and most vulnerable in society, but rather is available to anyone who is unable to afford to pay for legal advice and representation. Eligibility for legal aid should be regularly reviewed and could be fixed to a percentage of average earnings to ensure that eligibility keeps pace with inflation. We also believe that the means tests should be simplified to reduce the vast amount of unnecessary bureaucracy in the legal aid scheme which also serves as a practical barrier to access to justice.

Specific recommendations

We believe the government should take the following steps to reform the means tests for legal aid:

1. Link the monthly disposable income limit to inflation and ensure this is reviewed annually to account for changes in the cost of living (including from 2010 to present)
2. Remove the capital test for people in receipt of means-tested benefits
3. Restore the equity disregard for an applicant's home, so this is not taken into account in the calculation of their 'disposable' capital
4. Remove the cap on the allowance for housing costs which can be disregarded (£545 per month) and replace this with the applicant's actual housing costs
5. Remove the cap on the allowance for employment costs which can be disregarded (£45 per month) and replace this with the applicant's actual employment costs
6. Include an allowance for utility bills, food costs and the repayment of debts (including student loans) in the calculation of an applicant's disposable income
7. Review the allowances for dependents to ensure they reflect the real cost of living
8. Remove children's savings from the calculation of capital where the children are not the applicant
9. Where a child is the applicant, remove the requirement to aggregate the means of the child's parents/primary caregivers in the same way that this is disregarded for adult children living in the family home
10. Remove student loans from the means calculation
11. Disregard additional expenditure, such as costs arising from disability, care costs etc, in the means calculation
12. Improve the flexibility of the means process, in particular for disabled and vulnerable applicants, including those who are homeless or who lack mental capacity
13. Reintroduce the discretion for the LAA to disregard income or capital, or both, if it is reasonable to do so
14. Simplify the means evidence and processing issues generally to save costs for the LAA and practitioners

15. Extend the availability of non-means tested legal aid to all cases concerning life, liberty and the roof over an applicant's head, including:
 - a. To bereaved families in inquests concerning state-related deaths
 - b. In cases concerning the provision or withdrawal of life-sustaining treatment, and other end of life cases
 - c. Housing possession proceedings
16. Review the operation of the statutory charge for legal aid
17. Provide for acquitted defendants in criminal cases to be able to reclaim their reasonable legal costs, not just at legal aid rates

5. Scope and Early Legal Advice

Introduction

One of the most radical changes brought about by LASPO was that whole areas of law were removed from the scope of legal aid funding. Although this seemed to be driven partly by a 'fear of a compensation culture'¹⁹ the areas of law excluded include most private family law disputes over child arrangements, immigration, disrepair, education and welfare benefits. For those areas that remain, the stringent merits criteria applied mean that legal aid is rarely available at the very outset of a problem and is often only available for cases when they have already reached a tribunal or full court hearing, or if the situation has reached, effectively, a crisis point for the people involved.

Kenneth Clarke in his Ministerial Foreword for the government's 2010 consultation²⁰ stated: *"I want to discourage people from resorting to lawyers whenever they face a problem, and instead encourage them, wherever it is sensible to do so, to consider alternative methods of dispute resolution which may be more effective and suitable. I want to reserve taxpayer funding of legal advice and representation for serious issues which have sufficient priority to justify the use of public funds..."*

However, by 2014, the National Audit Office (NAO) reported that *"the Ministry implemented the reforms without a good understanding of why people go to court to resolve their disputes."*²¹ When asked about the NAO report's conclusions by the Public Accounts Committee, Dame Ursula Brennan, the Permanent Secretary at the Ministry of Justice, candidly told that Committee *"the Government was absolutely explicit that it needed to make these changes swiftly. Therefore, it was not possible to do research about the current regime before moving to the cuts."* Dame Ursula admitted the primary motivation for the changes was financial: *"I was simply saying in terms of the evidence, the most critical piece of evidence that was relevant to the decision that was made was the size of the spend."*²² So focused was the MoJ on the size of the spend alone it did not appear to notice that 20% of the cuts were negated by loss in revenue (VAT) to HM Treasury.²³

YLAL considers that the implementation of LASPO has gone too far in pursuing these aims and that removing access to legal advice at an early stage and leaving individuals to litigate in person has:

- Inhibited access to justice
- Inflicted additional financial burdens on other public sector services, and, consequently, the taxpayer
- Had a disproportionate impact on certain groups, including some of the most vulnerable in society
- Undermined the legal profession and advice sector to an unsustainable level

One of the formal stated objectives of LASPO was to *"target legal aid at those who need it most"*²⁴ however YLAL believes that the government's approach to identifying problems which are of sufficient priority to merit legal advice - in other words, identifying who needs legal aid the most and at what stage they need it - is fundamentally flawed. The government's focus on seriousness as the major criterion has resulted in legal problems unnecessarily escalating, resulting in higher personal and financial cost to the individual, the community and the state.

¹⁹ Foreword to Ministry of Justice, Reform of Legal Aid in England and Wales: the Government Response, June 2011 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228890/8072.pdf

²⁰ Proposals for the Reform of Legal Aid in England and Wales, Ministry of Justice consultation paper, November 2010: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf

²¹ National Audit Office, 'Implementing reforms to civil legal aid', 2014, para 2.5

²² House of Commons Justice Committee, 'Impact of changes to civil legal aid under Part 1 of LASPO 2012', 2015, para 8

²³ National Audit Office, 'Implementing reforms to civil legal aid', 2014, para 14.10

²⁴ Ibid

YLAL also firmly believes that LASPO has not met this objective on the government's own terms, in the sense that those who need legal aid 'the most' are increasingly unable to access it and that, if they are able to access it, the advice is often provided too late to achieve proper access to justice.

The loss of early legal advice: literature review

The Law Society's campaign²⁵ to bring back early legal advice following the implementation of LASPO summarises the issue concisely on the campaign's website:

"Everyone knows that if you catch a problem early, you're more likely to stop it getting worse. The same is true for legal problems - most of the time, these are easier, and cheaper, to address early on."

Bach Commission Report [2017]

- The final report produced by the Bach Commission on Access to Justice in September 2017²⁶ is highly critical of the cuts made by LASPO, and in particular reiterates the need to focus on provision of legal advice at an early stage. In his introduction, the chair of the Commission, Lord Willy Bach, states that the evidence they heard in 2017 when producing their report demonstrated *"an urgent need to bring some areas of civil law back into the scope of legal aid, with a focus on early legal help in order to help prevent problems developing further down the track."*
- The report highlights that there was an 84% decrease in 'legal help matter starts' [N.B. 'legal help' is a type of public funding for legal advice provided before a matter reaches court] when comparing 2009/10 to 2016/17, meaning that significantly fewer people are accessing professional legal advice before a matter goes to court, if at all. The report states: *"This leaves legal aid provision in these areas skewed towards the courts, even though it would be significantly cheaper to resolve disputes at an earlier stage."*
- The report states that LASPO *"may well have cost the exchequer more than it has saved"*. The report uses the example of a person who is unable to challenge a decision in respect of their welfare benefits, which can then result in problems in other areas of their life spiralling out of control and ultimately placing a burden on other parts of the public sector, such as the NHS and local authorities.
- The Bach Commission is of the view that spending on early legal advice is not just *"morally"* and *"constitutionally"* the right thing to do but is also *"economically"* the right approach.
- In addition, the key findings of the interim report by the Bach Commission are referred to, highlighting, in particular, the unrealistic reliance on the not-for-profit sector to fill the gap in provision of early legal advice, or, alternatively, the lack of public legal education available to help people to help themselves [emphasis added]: *"Public legal education and legal advice are inadequate and disjointed. Levels of legal aid support are falling and public legal education continues to be ineffective. The number of not-for-profit legal advice centres fell from around 3,226 in 2005 to 1,462 by 2015. The services that do exist are not effectively integrated."*
- The report also refers to the work of the Low Commission, whose report in 2014 the Bach Commission say demonstrated that early legal help is *"as important"* as legal representation (meaning being represented in court proceedings).

Low Commission Report [2014]

- The Low Commission's report²⁷ addresses six main principles, one of which is *"early intervention and action rather than allowing problems to escalate"*.
- The Low Commission report states firmly that the cutbacks in legal aid for social welfare law and the simultaneous reductions in local authority funding of advice and legal support have

²⁵ Law Society Early Legal Advice Campaign: <http://www.lawsociety.org.uk/policy-campaigns/campaigns/early-advice/>

²⁶ The Bach Commission, 'The Right to Justice, 2017

²⁷ The Low Commission, 'Tackling the Advice Deficit', January 2014

<https://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>

“destabilised and reduced the advice and legal support sector at a time of increased need. As a result, instead of saving money, the cutbacks are very likely to end up costing more elsewhere in the system.”

- The report calls the removal of early legal advice “counterintuitive” and describes the approach as “creating a perverse incentive to wait until things reach a crisis point. If the government wishes to see individuals resolve their problems outside the formal justice system, removing the availability of early advice to help people resolve their problems before they become more intractable does not make sense.”
- The Low Commission highlights what it terms the “revolving door” problem, whereby clients are only able to access support on crisis issues, rather than receiving advice in respect of the fundamental cause of the problem, or issues relating to it, at an earlier stage. This means that the individual is more likely to keep returning to that crisis point, as “the problem will only be temporarily masked, not solved”.
- In addition, the Low Commission also acknowledges the likely increase in those trying to represent themselves “leading to increased time and costs for the courts and tribunals” [p14].

The Baring Foundation Report [2013]

- A report produced by the Baring Foundation²⁸ focusses on not-for-profit legal advice agencies working in social welfare law and highlights the benefits of, and barriers to, early action in social welfare issues in a wider context.
- The report acknowledges that one of the barriers to early intervention is that “the coalition government’s current approach to legal aid is directly at odds with an early action approach, and is aimed quite explicitly at rationing legal assistance only to those with problems which have reached crisis point.”
- The report looks at ways in which future demand for advice can be alleviated, for instance by provision of information and early advice to help people help themselves in the future, thus saving money in the longer term. It identifies three “dividends” resulting from early action across society. These are:
 - Social benefits, such as greater confidence, assertiveness and decision-making skills in people, avoiding certain problems arising altogether
 - Reduced costs
 - Increased growth, both national and local, arising from the creation of “more legally capable” citizens, who would place less of a burden on local public services. The report cites “numerous studies [which] show that high quality advice, by ensuring that people access their entitlements, significantly benefits the local economy”.

Justice Select Committee Report [2015]

- The House of Commons Justice Committee produced a report²⁹ which is also critical of the changes made by LASPO and again addresses the unintended financial burdens of the removal of early legal advice to other public services.
- The Committee state that [emphasis added]: “The Ministry’s significant savings are potentially undermined by its **inability to show that it has achieved value for money for the taxpayer**. The Ministry’s efforts to target legal aid at those who most need it have suffered from the weakness that they have often been **aimed at the point after a crisis has already developed**, such as in housing repossession cases, rather than being preventive. There have therefore been **a number of knock-on costs, with costs potentially merely being shifted from the legal aid budget to other public services**, such as the courts or local authorities. This is another aspect of the reforms about which there is insufficient information; the Ministry must assess and quantify these knock-on costs if it is to be able to demonstrate it has met its objective of better value for the taxpayer.”
- The Committee stated that their witness evidence was “unanimous” in demonstrating that “early intervention is considerably cheaper than allowing legal aid to kick in only when an individual faces a threat to life, liberty, physical safety or homelessness.”

²⁸ The Baring Foundation, ‘Social Welfare Legal Advice and Early Action’, January 2013
<https://baringfoundation.org.uk/wp-content/uploads/2013/09/STVSEA9.pdf>

²⁹ House of Commons Justice Select Committee, ‘Impact of changes to civil legal aid’, 2015

- The Committee gave a number of examples of the shift of costs on to other public authorities as a result of a lack of early legal advice and intervention. For instance, a client involved in possession proceedings who is unable to access housing benefit to pay his rent, and cannot obtain legal aid to help him with the housing benefit appeal may subsequently find himself homeless and having to turn to the local authority for housing [p61]. The Committee noted, *“in particular, the frustration experienced by housing and debt advisors when clients stand in danger of losing their homes because of an inability to access advice earlier due to the scope changes.”*
- Another example given is the situation for immigration detainees who are unable to access advice as to the merits of their case, leaving them unable to take any action and resulting in additional cost to the state, in addition to, as the report describes, *“a human cost to the individuals”* [p62]. The Committee described how those under benefit sanctions may suffer from ill-health as a result of *“limited food and other necessities”* and also gives the example of those having to address issues around contact with children after a break-up suffering from considerable stress when attempting to resolve their own case [p62].

Amnesty International UK Report [2016]

- Amnesty International UK’s Report³⁰ also addresses the consequences of, as Amnesty describe it, *“getting advice too late”* and states that *“Early legal advice has the potential to forestall an escalating sequence of problems.”*
- The report provides evidence of the pressure on other advice services, the struggle to meet demand and the difficult situations faced by services who are having to turn vulnerable people away, with nowhere else to signpost them to for help. The report notes that *“while provision has decreased, demand on organisations providing free legal help and advice has increased.”*

Coram Children’s Centre Report [2018]

- Coram produced a report in February 2018³¹ highlighting the impact on children and young people of the removal of areas from the scope of legal aid.
- In particular, the report discussed the problems arising from private family law being removed from scope, except in cases involving evidenced domestic violence, and recommended that *“Funded early legal advice, with the offer of follow-up in writing, should be provided in private family law cases, and widely advertised. This would help ensure that individuals are aware of the system, and of their rights and options.”*
- The report also addresses the issues with reliance on the not-for-profit sector as an alternative to early legal advice funded by legal aid and notes that *“Limited alternative provision exists and any alternative free sources of information and advice that do exist are rarely able to meet the scale of demand, or are unsuitable for individuals who require more intensive or specialist services.”*
- In addition to being a legal aid provider, Coram also provide a free advice line service to children, young people and families which they state is *“one of the very few alternative sources of free advice on out-of-scope family and education law issues.”* The statistics in Coram’s report demonstrate the difficulties in coping with this increased demand for free legal advice in circumstances where legal aid is not available:
 - *“The volume of calls almost doubled in the year following changes to legal aid coming into effect. The total volume of callers to the line rose from 23,017 in 2012/13 to 40,192 in 2013/14.”*
 - *“The changes in call volumes happened virtually overnight and were stark: in April 2013, the month following the LASPO cuts coming into effect, the number of unique callers rose to 2,839, up from 1,492 in April 2012.”*
 - *“This number has continued to rise: between April 2016 and March 2017 the service was contacted by an average of 6,897 unique callers per month.”*

³⁰ Amnesty International, ‘Cuts that hurt’, 2016.

³¹ Coram Children’s Legal Centre, ‘Rights without remedies: legal aid and access to justice for children’, February 2018: https://www.childrenslegalcentre.com/wp-content/uploads/2018/05/Rights-without-remedies_Final.pdf

- *“Although CLAS has increased its capacity by 240% since 2012, through the use of volunteers, the scale of provision has not been able to keep with such increased demand.”*

The Law Society Campaign and Report [2017]

- In November 2017, the Law Society commissioned a research-led report³² which analysed the difference between how quickly an individual was able to resolve a problem (a) when receiving early professional legal advice and (b) without receiving early professional legal advice.
- The report’s summary of key findings concluded that *“early advice has a statistically significant effect on the timing of the resolution of people’s legal issues”*
- The Parliamentary Briefing for the Law Society’s Early Advice Campaign³³ summarises the issues as follows:-
 - *“Early legal advice helps address problems before they escalate.”*
 - *“A lack of early legal advice can create unnecessary costs for the taxpayer due to cases going to court which could have been resolved earlier.”*
 - *“Worsening legal problems can also create other knock-on costs for the public purse, potentially causing issues such as poor health, homelessness and debt.”*
- The Briefing lists three clear impacts of the lack of free legal advice early on:
 - *Legal problems escalating unnecessarily*
 - *Increased pressure on the justice system through (a) litigants in person; (b) decrease in mediation*
 - *A barrier to access to justice, which is an essential part of the rule of law*
- The Briefing highlights a number of specific examples in which early legal advice has been unavailable since 2012. These include: -
 - *Housing: early advice is no longer available to deal with rent arrears, unless loss of a home is imminent, and is not available for housing disrepair cases, unless it is so serious that it is causing harm to health*
 - *Family: early advice is no longer available in divorce, family breakdown and child custody disagreements.*
- The Briefing states that *“Removing legal aid for early advice has increased the numbers of litigants in person... This places a substantial time and financial burden on the courts”* and also highlights evidence from the National Audit Office in 2014 which estimated that the increase in litigants in person in the family courts had cost the Ministry of Justice an extra £3.4 million.
- The Briefing makes the clear point that [emphasis added] *“Ensuring people have access to early legal advice from a lawyer is **essential in tackling the delays, confusion and costs arising from an increase in litigants in person.** Additionally, even if someone does ultimately end up representing themselves in court, **if they have had early advice, they will be a better-informed litigant in person.**”*
- The Briefing highlights how the number of mediation cases, supposedly an alternative to the court process, actually fell by 38% in the year after the LASPO reforms were introduced and concludes that *“the Government did not take into account the fact that solicitors providing early advice were a significant source of referrals to mediation”*.

Evidence from our members

The reduction in the scope of legal aid brought about through LASPO is a significant issue for YLAL’s members, who as junior members of the profession are on the front line of legal advice and representation. 67% of YLAL members responding to our recent survey had experience of having to turn someone away due to legal aid having been removed from scope for the area of advice required. The same percentage

³² The Law Society, ‘Analysis of the potential effects of early legal advice/intervention’, November 2017:

<http://www.lawsociety.org.uk/support-services/research-trends/documents/impact-of-early-legal-advice/>

³³ Law Society Parliamentary Briefing on legal aid for early legal advice, 2017:

<http://www.lawsociety.org.uk/policy-campaigns/documents/parliamentary-briefing-early-advice-campaign/>

cited the restrictions to the scope of legal aid as being the biggest impact of LASPO, and highlighted the ensuing effect on impact to justice. 37% of respondents considered that bringing back into scope areas of law such as housing, debt, welfare benefits, employment and immigration could help resolve the issues brought about by the legal aid cuts. In a recent Twitter poll of YLAL's members, 60% said that their number one priority for improved access to justice was widening the scope of legal aid.

Problems

Significant and important areas of law have been wholly or partially removed from the scope of legal aid, meaning that vulnerable people are unable to access legal advice in these areas. It is clear from the evidence that there are a number of knock-on problems with this that are specific to the removal of provision of legal advice at an early stage. YLAL considers that the main problems are as follows:

Having to wait until a 'crisis point' before legal aid is available

One devastating impact of LASPO has been to make legal aid available only to those who have reached absolute crisis point, for instance, being at risk of homelessness, illness or severe harm or suffering from domestic abuse. In these situations, by the time legal aid is available, if it is at all, the people accessing it have often gone through unimaginable hardship, frustration and distress, which severely impacts their health and welfare, not to mention their ability to function in society. This in turn places increasing pressure on other services to provide practical, emotional, and advisory support to vulnerable people facing difficult and complex problems. The result is a system in crisis: vulnerable people who are not receiving the support they need and increasing pressure on physical and mental health services, social services and the charity sector.

As Amnesty International said: *"The legal aid cuts have also impacted organisations' ability to provide holistic advice to people. People frequently experience legal issues in clusters reflecting the inter-connected nature of social problems. However, following the introduction of LASPO organisations reported that they were often only able to assist in relation to one or two aspects of a person's problem. This in turn can mean they are unable to address the underlying and fundamental cause of the problem. As one advice provider explained to Amnesty International: "Pre-LASPO cases could be looked at as a package, for example we could look at welfare, debt and housing together. Now we can often only afford to do housing, but that usually can't be really solved without addressing debt and welfare issues and they are often the underlying cause. So you feel like you're just sticking a plaster on it you are never healing the wound."*³⁴

This impacts particularly on some of the most vulnerable client groups (see more below). A mental health lawyer commented to Amnesty International on their client's ineligibility for legal aid to challenge a 'fit to work' notice that put her employment and support allowance at risk: *"She will get no legal aid for advice as to how to deal with that and she can't manage it on her own. I can't help, I'm her representative for the mental health tribunal and that's legally aided. The other problems she might have to face alone. That's the key issue that people with serious mental health issues struggle to navigate the system. They often have a cluster of problems, debt, housing, relationship problems, and they struggle to access the advice they need."*

A lack of holistic advice in respect of problems at an early stage also means that individuals are not equipped to deal with those same problems when they arise again. Instead they must, again, wait until a crisis point is reached and then seek legal representation at that stage. The Low Commission term this a "revolving door"³⁵ problem. This means that the fundamental cause of the issue is never properly addressed, the problem never fully solved, only "masked" temporarily³⁶ and the individual eventually returns to the

³⁴ Amnesty International, 'Cuts that Hurt', 2016

³⁵ The Low Commission, 'Tackling the Advice Deficit', 2014

³⁶ Ibid

same crisis point at some stage in the future, thus incurring further costs in legal representation and court proceedings.

In summary, providing early and comprehensive legal advice can prevent problems from escalating³⁷ and is cheaper than allowing legal aid only when a problem has reached crisis point, when an individual faces a threat to their life, liberty or physical safety or is at risk of homelessness³⁸. Early legal advice also reduces the time it takes to resolve a legal issue³⁹ and so in the longer term also saves costs in this way.

The information deficit

One of the objectives of LASPO was to encourage individuals to attempt to resolve their own problems before seeking legal representation. YLAL considers that the lack of public legal information (both about the law and legal process itself, and what help is available), in addition to the lack of early advice to assist people with resolving their problems at an early stage, makes this objective not only unachievable but unfair and unrealistic.

In 2015, the Justice Committee recommended that *“the Ministry of Justice undertake a public campaign to combat the widespread impression that legal aid is almost non-existent....The Government has a duty to ensure that the public are aware legal aid may be available as this is part of its commitment to ensure access to justice and cannot be left to legal aid providers who in any event may not have the resources to ensure it is effective.”*⁴⁰

In March 2015, the charity Public Law Project (PLP) produced ‘Keys to the Gateway’⁴¹, an independent review of the Mandatory Civil Legal Advice Gateway. A Freedom of Information request made by PLP to the LAA found that there had been *“no separate dedicated communications budget for the changes brought about by LASPO, nor the CLA helpline”*. PLP considered that the MoJ had given communication strategy documents limited prominence. CLA Specialist Telephone Advice Providers raised the issue of poor awareness of the Gateway in meetings with the LAA but were told that the LAA was *“not planning on doing any advertising of the service”*.

Of the front-line advice agencies surveyed by PLP in July 2014, including Citizens Advice Bureaux (CABx) and Law Centres, 28% stated that the reason they had made no referrals to the Gateway was because they were *“not aware of it, or of the role that it played in the potential provision of publicly funded advice”*. One CAB office manager said *“whilst we have a lot of promotional material for all sorts of other legal advice services... I am not aware of ever having received any promotional or awareness raising material about the Gateway. We certainly have no posters about it.”*

There are also information deficits among those who have been forced onto the frontline of advice: Hogan Lovells and the APPG on Pro Bono conducted a survey of MP surgeries⁴², and concluded that training for MPs and caseworkers on identifying legal issues, legal aid availability and referral resources is vital to ensure that legal aid and law firm referrals are being made when full legal representation is available, and also that a comprehensive database of free legal advice was necessary to help MPs’ caseworkers and constituents. The report recommends that this database include: (i) what areas of the law they cover, (ii) what they can offer, e.g. casework or one-off advice, (iii) any eligibility criteria for assistance, and (iv)

³⁷ Amnesty international, ‘Cuts that Hurt’, 2016

³⁸ House of Commons Justice Select Committee, ‘Impact of changes to civil legal aid’, 2015

³⁹ Law Society Parliamentary Briefing on legal aid for early legal advice, 2017

⁴⁰ House of Commons Justice Select Committee, ‘Impact of changes to civil legal aid’, 2015

⁴¹ Public Law Project, ‘Keys to the Gateway: An Independent Review of the Mandatory Civil Legal Advice Gateway’, March 2015, pp.25-27

<https://publiclawproject.org.uk/wp-content/uploads/data/resources/199/Keys-to-the-Gateway-An-Independent-Review-of-the-Mandatory-CLA-Gateway.pdf>

⁴² Hogan Lovells and the APPG on Pro Bono, ‘Mind the Gap: An Assessment of Unmet Legal Need in London – A Survey of MPs’ Surgeries Oct–Nov 2016,’ 24 April 2017, p. 29

<http://asauk.org.uk/wp-content/uploads/2018/02/Mind-the-gap-an-assessment-of-unmet-legal-need-in-London.pdf>

geographic location. A comprehensive database could take many forms; one option would be the use of smartphone technology through the creation of an app to locate services in geographic proximity to the constituent and identify services available to help with the constituent's specific issue.

Crisis in the family justice system

We discuss below the pressure on the family courts in terms of time, resources and the welfare of professionals created by dealing with a vastly increased number of litigants in person. We highlight here three further major concerns:

1. Far from diverting family cases into mediation, the legal aid cuts have increased the number of children cases in the family courts
2. The lack of legal advice and representation in private family law is inhibiting access to justice and in some cases preventing children and their parents from having a relationship with their children
3. The difficulties in obtaining evidence of domestic violence are exposing victims of domestic violence to cross-examination by their abusers in a way which could adversely affect their health and wellbeing and undermine their ability to represent themselves

Prior to introducing LASPO, the government was of the view that the reforms would mean *“people will instead use alternative, less adversarial means of resolving their problems (notably, in divorce cases, where the taxpayer will still fund mediation).”*⁴³ However, the above literature review notes that mediation figures have dropped as the government did not anticipate that taking away legal aid for early legal advice would stop families being channelled into mediation by solicitors. In August 2018, referrals to Cafcass were up by 10.5% in comparison to 2017. A total of 4019 referrals were made, which is the first time referrals have been over 4000 since July 2013.

Barriers to justice

In 2015, the Public Accounts Committee *“heard from the Magistrates’ Association that some people have difficulties with the court forms and processes involved in family law matters. For example, the application form for a case involving contact with children is 24 pages long, and the guidance document for that form is 32 pages long. The Magistrates’ Association told us that this complexity may prevent people from accessing support to maintain a relationship with their children.”*⁴⁴

Amnesty International is also of the view that the early stages of a family law case are particularly challenging for unrepresented litigants: *“For example, many litigants in person struggle with handling paperwork, understanding disclosure requirements, how to prepare bundles and what evidence to file. Whilst carrying out the research for this report, Amnesty International witnessed many of these challenges first hand, including individuals who struggled to understand deadlines set by the court to file evidence, how to draft and what to include in a position statement, how to prepare a Scott’s schedule (a table that sets out information about the claim), understanding what legal terms meant, what a legal bundle was and how to fill in the appropriate forms for their case.”*

The House of Commons Justice Committee reported that *“the Association of Lawyers for Children told us that they were ‘particularly worried’ that applications for Special Guardianship Orders by members of the extended family, made because the parents were struggling to look after the children, did not receive legal aid. The Association pointed out that the alternative, that the local authority take the children into care, would see the court application funded by the taxpayer in addition to the costs of looking after the child. Other witnesses agreed. Dave Emmerson, of Resolution, said public funding for members of an extended family seeking Special Guardianship Orders, could save local authorities ‘huge sums’. Susan Jacklin QC, Chair of the Family Law Bar*

⁴³ Ministry of Justice, Reform of Legal Aid in England and Wales: the Government Response, June 2011

⁴⁴ House of Commons Committee of Public Accounts, ‘Implementing reforms to civil legal aid’, 19 January 2015, para 2.12 <https://publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/808/80802.htm>

Association sounded a note of caution, however, when she told us that applications for this type of court order in private family law applications meant the parents of the child were also not represented.”

Family justice is an area of critical concern because often the primary loser is the child. Speak Up for Justice’s survey of justice staff revealed genuine fear on the front line that children were missing out on a relationship with one or more parents:⁴⁵

“Children are being forgotten. Contact applications from the absent parent are more difficult and take longer without the expertise of a solicitor. Absent parents are giving up without trying and the child will often be the one who loses out.”

“Due to the reforms to legal aid, there is a generation of children without appropriate arrangements in place to enable them to have a positive relationship with their parents.” - Emma Pearmaine, Director of Family Services, Simpson Millar Services

In 2016, Amnesty International⁴⁶ said that the central concern raised in its consultation with lawyers and NGOs was that *“if a parent cannot understand the evidence requirements in a case, cannot effectively navigate the procedures and processes required, and cannot represent themselves effectively in a hearing by presenting their argument and advocating their position, judges are more likely to lack the necessary information to ensure that the outcome of a case is in the best interests of the child. This concern has been articulated clearly by Sir James Munby, the President of the Family Division, in the case of Q v Q, a child contact case where legal aid had been denied to one of the parties: ‘[I]t seems to me that these are matters which required to be investigated in justice not merely to the father but I emphasise equally importantly to the son, as well as in the wider public interest of other litigants in a similar situation to that of the father here. I emphasise the interests of the son because, under our procedure in private law case like this where the child is not independently represented, fairness to the child can only be achieved if there is fairness to those who are litigating. There is the risk that, if one has a process which is not fair to one of the parents, that unfairness may in the final analysis rebound to the disadvantage of the child.’”*¹¹⁵

Amnesty International’s report gives numerous, and disturbing, examples of litigants in the family court being inhibited from access justice for themselves and their children. These include:

“This woman had come for advice. She had real concerns about the father’s behaviour around the kids, but did want him to be part of children’s lives. She didn’t want to deny access completely. But when the judge asked if she was OK that he had access she just said, ‘Yes.’ She didn’t realise it was at that point where she needed to request supervised access. She just didn’t understand the process, and the judge couldn’t have known she had concerns without her saying so, so how could he have made the right decision about what was best for the kids. So we’ve given her advice now about what she needs to do next, but she will have to do that alone, she’ll have to go back to court to change the terms of access, which is more time, money and stress for everyone.”

A lawyer for an organisation providing free family legal advice in one region in the north of England – a geographic area that includes hundreds of thousands of people – told Amnesty International: *“I had one woman who came to see me who needed help. She had no money, but desperately needed advice on her case concerning child access arrangements, as she was worried about the father’s behaviour. We couldn’t help her due to a conflict of interest. She asked where else she could go to get help and my response had to be nowhere, there is simply nowhere for you to go. That felt just awful, to not be able to signpost her anywhere, to know that she will be left to do it all alone”.*

“I find the court papers hard to understand, I don’t know what I’m meant to do and when. I find it so hard to go into court on my own. I don’t know what I’m meant to say. I feel like if I had a solicitor they

⁴⁵ Trades Union Congress, ‘Justice denied’, 2016, ps. 16 & 23

⁴⁶ Amnesty International, ‘Cuts that Hurt’, 2016

could have helped me explain my case properly, made sure I saw my kids from the beginning. But with being on my own the whole thing is so difficult and takes so long.”

Rachel Francis, a barrister (and former co-chair of YLAL) explained: *“I have seen people in court attempting to represent themselves when they lack capacity, have very significant learning disabilities or are otherwise incapable of representing themselves effectively. These clients are in an impossible situation and the court is ill-equipped to deal with their needs. For example, I was representing a father in a contact case where the mother had capacity issues and no representatives. It was incredibly difficult, the mother didn’t understand what was happening and what she was meant to do. It took four adjournments to resolve the matter, which caused significant stress and financial hardship for these parents, and an unacceptably long delay for the child. Vulnerable litigants in person are often not being supported properly, they don’t know where to go to get support.”*

Domestic violence

In 2015, the Justice Committee heard that *“Lack of knowledge of the domestic violence gateway among healthcare professionals in particular, was noted as a weakness of the scheme. Emma Scott told us ‘The Ministry of Justice has some very useful guidance on its website and some very useful precedent letters that can be used’ however there is perhaps an issue around making sure that it is disseminated effectively among the kind of professionals that are going to be asked for this evidence.... Ms Scott had told us the impact of poor knowledge was seen when some victims of domestic violence had met with a refusal or given a letter which did not qualify as evidence because ‘the wording was not quite right’... Philippa Newis, of Gingerbread, expressed concern that a requirement to pay for some of the forms of evidence was a barrier to the gateway for those on low income.”*⁴⁷

In August 2018, a YLAL member who had been working for the Civil Legal Advice Line (telephone gateway) reported that difficulties obtaining evidence from health professionals to obtain legal aid was a constant problem. Health professionals often believe there may be negative implications for them if they name the alleged abuser (which is required) and there are also practical barriers to obtaining a letter such as needing an appointment, as well as the £10 charge (in 2016, Women’s Aid reported charges of up to £70).⁴⁸ The YLAL member reported that the professional checklist is very strict and if certain information is missing it will not be accepted as evidence. We believe this up to date evidence, mirroring that put to the Justice Committee in 2015, highlights that the problems reported then have not been resolved, placing victims of domestic violence at risk of being denied access to justice and failing to meet the Justice Committee’s recommendations that the Ministry of Justice ensure all relevant parties are aware of their role in the domestic violence legal aid gateway and take measures to ensure that victims of domestic violence are not expected to pay for the production of the required documentary evidence.

The same YLAL member also reported that callers to the advice line had difficulties obtaining evidence from the police who would view the situation as a civil matter, and difficulties obtaining timely evidence from health visitors or social workers due to their workloads and absences through leave. The revised definition of domestic violence, while a progressive step, has also created evidential issues, the YLAL member added: for example, it is hard to determine what could be evidence of financial abuse as this may not be evidenced through documentary material such as bank statements. Women’s Aid have argued that other criteria, for example calls to domestic violence hotlines and contact with women’s specialist organisations, should also be recognised as evidence. We believe this needs to be reviewed urgently with a view to safeguarding victims of abuse and children.

The Justice Committee in 2015⁴⁹ concluded that *“the family courts make decisions which often have life-long consequences for the children involved. The courts need the best evidence possible to make the right decisions; this will not be achieved by putting vulnerable witnesses through cross-examination by their abuser. On its own this is a powerful case for ensuring such cross-examinations do not occur and consideration of the trauma*

⁴⁷ House of Commons Justice Select Committee, ‘Impact of changes to civil legal aid’, 2015, para 71

⁴⁸ Trades Union Congress, ‘Justice denied’, 2016, p. 23

⁴⁹ House of Commons Justice Select Committee, ‘Impact of changes to civil legal aid’, 2015, para 107

experienced by the witness in such a case strengthens it enormously. The rise in litigants in person in the family courts further strengthens the case for a statutory bar. We therefore recommend the Ministry of Justice bring forward legislation to prevent cross-examination of complainants by alleged abusers in the family courts while ensuring justice is done to all parties.”

In 2016, Women’s Aid commented: *“We are seeing women and children having unsafe contact with perpetrators of domestic violence. Legal aid cuts mean that lack of access to representation, and therefore the ability to protect the child, is more limited.”*⁵⁰

This issue is far from resolved. Family judges struggle on a daily basis with managing cases featuring litigants in person where one has accused the other of abuse. In May 2017, Hayden J said, after commenting on the ordeal of an abuse victim cross-examined by her ex-partner who had at times *“looked both exhausted and extremely distressed”*, that:

*“It is a stain on the reputation of our Family Justice system that a Judge can still not prevent a victim being cross examined by an alleged perpetrator. This may not have been the worst or most extreme example but it serves only to underscore that the process is inherently and profoundly unfair. I would go further it is, in itself, abusive. For my part, I am simply not prepared to hear a case in this way again. I cannot regard it as consistent with my judicial oath and my responsibility to ensure fairness between the parties.”*⁵¹

In July 2018, Hayden J himself allowed an appeal by a father where the trial judge had been put in the *“invidious position”* of cross-examining the mother himself and who had not managed to do so to the requisite standard, not least because this role was *“plainly unfamiliar”* to a judge whose primary role is to act independently of the parties.⁵² The result of such appeals is both greater financial cost to the courts and personal cost to all family members of going through the adversarial process three times.

A YLAL member attending a family court training session which discussed these cases heard family law practitioners commenting on the improbability of judges having sufficient time to prepare cross-examination of litigants in person, especially because litigants in person tend to rely more on allegations of abuse than represented parties, or may need to if relying on types of abuse that occur as patterns, for example controlling or coercive behaviour.

Undermining international human rights: asylum, immigration and statelessness

Article 8 ECHR

In July 2018, the Joint Committee on Human Rights said that the removal of legal aid for Article 8 ECHR immigration cases has restricted the ability of migrants to enforce their human rights and exposed individuals to destitution and homelessness.⁵³ Amnesty International agrees:

“The government has argued that Article 8 immigration cases do not require legal aid because the process of making applications is straightforward and if an individual is required to go to tribunal, this is an accessible process. Amnesty International believes this view is not tenable given the challenges people face in these cases. Firstly, immigration law is complex and immigration rules often change. Indeed, for this reason immigration advice is heavily regulated, which greatly limits what sources of advice and assistance are permitted in the absence of legal aid. Small errors and mistakes will lead to applications being returned or refused. Without advice, given the complexity of the law, people can be

⁵⁰ Trades Union Congress, ‘Justice denied’, 2016, p. 23

⁵¹ *Re A (A Minor : Fact Finding; Unrepresented Party)* [2017] EWHC 1195 (Fam)

⁵² *PS v BP* [2018] EWHC 1987 (Fam) (27 July 2018)

⁵³ Joint Committee on Human Rights, ‘Enforcing Human Rights’, 2018, para 52

left without knowing what their legal rights and entitlements are or how to argue their case based on the current law and immigrations rules.

Although Amnesty International acknowledges that not every individual who wishes to make an Article 8 immigration claim will necessarily be successful with their application on its merits, lawyers and early legal advice can play a role in assessing a case and deterring a person from making a claim if it is not likely to succeed. On the other hand, the challenges facing those with prima facie compelling Article 8 immigration cases are daunting. Those who spoke with Amnesty International emphasised that the complexity of the law in this field meant that people frequently do not have an adequate understanding of the substance of the law, how it applies to their case and how to articulate their arguments in writing or before a tribunal or court. Whilst a lack of substantive understanding of the law clearly inhibits effective engagement with legal proceedings, many NGOs and lawyers emphasised that a lack of knowledge of legal procedure in immigration proceedings can be just as prohibitive, be it issues such as timeliness and invalidity; holding the other party to account through disclosure; understanding and completing forms and so forth.

Furthermore, a critical issue raised across the board was the matter of evidence gathering and presentation. Expertise and specialist knowledge are required to examine a case file, identify what evidence is needed and how it can be obtained. In addition, evidence gathering often costs money. The loss of legal aid encompasses a loss of assistance with fees for disbursements, including translators and expert reports, such as an Independent Social Worker report to examine the best interests and needs of a child or a country expert report, that are frequently a key part of the evidence in an immigration case raising human rights concerns. In immigration cases a tribunal or court judge is not generally empowered to repair absence of evidence or lack of capacity to seek, sift and present evidence. So while a judge may (but might not) address an individual's incapacity to deal with legal complexity in their case, they cannot plug evidential gaps. Legal aid is critical therefore both in order to get an expert to identify what evidence is needed and how it can be obtained, but also to get disbursements to pay for it. The Immigration Law Practitioners' Association has made clear this means that 'even where pro bono assistance is available, and it is very limited, a case cannot proceed because the costs of disbursements cannot be met.'⁵⁴

YLAL agrees with Amnesty International that *"Without access to legal help and representation people struggle to advocate effectively for their rights and as a result risk having their right to a family life violated."* Fundamentally this means the UK could end up in breach of its obligations under the European Convention on Human Rights and act contrary to the principles set out in the the United Nations Convention on the Rights of the Child.

Refugee family reunion

Provision for refugee family reunion is recommended by UNHCR and incorporated into the UK Immigration Rules, recognising the importance of a victim of persecution to be able to be reunited with their family when they cannot return to their country of origin. However this is fundamentally undermined by the unavailability of legal aid for applications. Again we agree with Amnesty International's assessment:

"Amnesty International believes that, given what is at stake for families, there should be an automatic provision for legal assistance in family reunification applications made by refugees. Separation of families can have a devastating impact on people's lives, their rehabilitation from experiences of trauma and their ability to integrate and adapt to their country of asylum. Those applying for family reunification are often dealing with the fact that their family members are left in precarious and often unsafe conditions. Many refugees seeking family reunion also often present with additional vulnerabilities. Emotional or physiological issues for applicants are common. Many have experienced serious trauma which can be exacerbated by ongoing separation from their families.

⁵⁴ Amnesty International, 'Cuts that hurt', 2016, section 3.1

Furthermore, Amnesty International considers that the government's argument that family reunion is a 'straightforward immigration matter' underestimates the complexities that exist in these cases. Legal advisers play an essential role in identifying and obtaining alternative evidence that can support an application. Essential documentation may be unavailable for a variety of reasons, including the nature of flight and the environments from where people have come. Legal advisers play a critical role in helping to explain this in cover letters to applications and in identifying alternative evidence. Some documentation requires legal advisers to qualify what is sufficient and effective for an application. Furthermore, as in immigration cases obtaining evidence, such as DNA testing, which can be critical in demonstrating family links, is expensive and no longer funded through legal aid.

In addition to the above complexities present in most 'standard' reunification cases there are a number of types of family reunion applications which bring additional challenges. Notably, cases involving adoption, de facto adoption, stepchildren and siblings are inherently complex. They require legal advice in determining the eligibility of the applications, support in documentation gathering, and reference to precedent and existing policy and guidance....where family reunion is applied for outside of the immigration rules on compassionate grounds...That's tough for a lawyer to do, let alone a person with no knowledge and experience of the system."

Statelessness

In September 2016, Asylum Aid recommended that legal aid be available for applications for stateless persons because they are:

"usually complex, both factually and legally, and require specialist legal advice and representation. UNHCR's Statelessness Handbook recommends that free legal assistance is available for stateless applicants who cannot afford to pay for it. At present, however, legal aid is not available for applications to remain in the UK as a stateless person (including at the internal administrative review stage), unless exceptional case funding is granted. Bringing statelessness applications within scope for legal aid, in line with asylum and other protection claims, would also assist the Home Office in making fair decisions, as applications made with appropriate legal advice are more likely to be better prepared and supported by adequate evidence. Exceptional case funding is not an adequate alternative, because legal advisors must undertake a significant amount of work to apply for it, for which they receive only limited remuneration if successful, and many legal advisors cannot take the risk of doing work which may not be funded. We are concerned that the absence of legal aid exacerbates the inherent difficulties of proving lack of nationality and makes the process of seeking to remain in the UK based on statelessness unfair.⁵⁵

Again, these problems directly undermine the position of the United Kingdom as a state party to the 1954 Convention Relating to the Status of Stateless Persons.

Overarching disproportionate impact on the vulnerable

When asked who they thought had been impacted most by the legal aid cuts, YLAL survey respondents highlighted 'the most vulnerable in our society', for whom the reduction in the scope of legal aid brought about through the implementation of LASPO has hit particularly hard. The examples given include migrants, those with insecure housing, those with disabilities, and those with low incomes or on means-tested benefits.

The Legal Aid Practitioners Group in its 2017 Manifesto on Legal Aid⁵⁶ highlighted the following vulnerable groups for whom the cuts in the scope of legal aid have had a disproportionate impact:

⁵⁵ Asylum Aid, 'The UK's Approach to Statelessness: Need for Fair and Timely Decisions,' September 2016:

<https://www.asylumaid.org.uk/wp-content/uploads/2016/11/Policy-briefing-statelessness-22-September-final.pdf>

⁵⁶ Ibid, pp. 14 - 17

1. **Children:** *“a whole generation risks growing up without the right to see one of their parents or grandparents”.*
2. **Disabled children and adults:** barriers to access legal advice results in even further marginalisation in a client group already disadvantaged by their disabilities. Amnesty International has also highlighted this group, in the context of welfare benefits. Lambeth Law Centre told Amnesty: *“people don’t self-identify with mental health issues, they might say they are a bit down, but the stigma means they won’t admit to behaviour that stops them doing certain jobs. That means that they lose certain entitlements and then get into all sorts of problems as they struggle to manage finances.* Another client, Anne, whose Personal Independence Payment was refused was referred to an organisation that gives advice on welfare benefits who sent a mandatory reconsideration request and when that was turned down supported her at tribunal stage. Anne subsequently got the enhanced care and mobility support she was entitled to. Her support worker told Amnesty International: *“There is no way she could have navigated the process alone. Getting through the system is a minefield and she needed support, she was vulnerable and I think she would have given up after the first refusal without help to show her she was entitled to support and should fight the refusal.”*
3. **Carers including extended family members:** carers have lost rights to be represented or even access basic legal advice to protect their loved ones across a range of legal problems. The stresses of caring for a relative, coupled with the inability to access early legal help, is creating an additional unnecessary burden for a whole group of people who are already disadvantaged.
4. **People with impaired mental capacity:** *“there is a dearth of suppliers specialising in mental capacity law but even when help is sought the system presents additional administrative requirements which are often a barrier to justice. The removal of whole areas from scope adversely impacts on this group precisely because they are less able to understand the legal issues they face and seek advice.”*
5. **Victims of sexual exploitation, trafficking or slavery:** *“they often have no financial resources and limited English, and are at risk of harm.”*
6. **Victims of domestic abuse:** *“Over 40% of victims of domestic abuse were unable to access the support which is ring-fenced for them to secure representation. Increasing numbers are now subjected to further abuse within the court system, because of the rise in litigants in person, and having to face their ex-partner without legal representation.”* Speak up for Justice⁵⁷ also analysed published by the Legal Aid Agency and found that between 2011–12 and 2015–16 the number of domestic violence applications received fell by 16%, and the number granted declined by 17%.
7. **People who are homeless or living in disrepair:** *“Whilst limited homelessness cases are within scope the causes of homelessness are not, with for example welfare benefits being excluded... As housing issues go hand in hand with many other issues people are doubly disadvantaged at a time when they and their families are often in desperate need.”*
8. **People in detention:** *“Restrictions on contact with the outside world and special rules which apply in institutions all serve to create additional hurdles for this group in accessing advice.”* Dr Laura Janes, the Legal Director of the Howard League for Penal Reform and the founder of YLAL, said *“The financial savings from reforms to prison legal aid are tiny. But the human and social cost is huge and out of kilter with the rest of the government’s policy. If prisoners can’t access prison law legal aid, they are less likely to have respect for prison rules and regulations....The climate is dire – prisoners are suffering from terrible resource cuts in prisons. [Howard League] staff are dealing with increasingly desperate people – some are suicidal, some call while self-harming. The work is increasingly stressful, not only for lawyers but also prison and probation officers.”*⁵⁸
9. **People fleeing persecution:** The complex regulations imposed on those providers with contracts have led to a massive loss of advisers, making it even more difficult alongside mounting pressure on support agencies, for those who are seeking safety, to access the appropriate advice they need to secure their protection. The removal of legal aid for family reunion creates additional obstacles

⁵⁷ Trades Union Congress, ‘Justice denied’, 2016, p. 28

⁵⁸ Trades Union Congress, ‘Justice denied’, 2016, pp. 24 - 25

for the ability of those able to secure refuge in the UK who face ever growing isolation and anxiety as to the situation of loved ones overseas who may themselves be at risk. Removal of funding for what can be an increasingly complex process for those whom the UK accepts have established a genuine entitlement to international protection seems unduly harsh and draconian.

Most recently, the Legal Services Board in its response to the LASPO review consultation found that:

1. **Pakistani, Black African and Mixed ethnic groups** were proportionately the highest users of legal aid
2. Consumers coming from **lower social grades** tend to use legal aid around twice as much in percentage terms as consumers coming from higher social grades
3. Affordability of legal services is a key concern for people with **mental health problems** and their carers and consumers with **learning disabilities**. Changes in legal aid could therefore have a particular impact for such vulnerable consumers

Cuts to legal aid result in higher costs elsewhere

For all of the problems that removing early legal advice has evidently caused, whether it has achieved its aim of reducing financial burdens to the taxpayer is not actually known. The Ministry of Justice has been unable to demonstrate that it has achieved overall better value for money for the taxpayer.⁵⁹

YLAL believes that in all likelihood, and based on the evidence from the reports and statistics that are available, the removal of early legal advice has not achieved this objective, as it has had the consequence of inflicting financial burdens on other public sector services and placing increased pressure on the court service.

The human cost: impact on the individual's physical and mental health and well-being

The government has not adequately considered the human cost to individuals of having to wait until the problems they are facing have reached crisis point before being able to access legal advice to resolve the issue. People facing eviction, struggling to make ends meet due to benefits issues, being unclear about their immigration status or worrying about losing custody of a child are all placed in situations of extreme emotional pressure, and accordingly face a high likelihood of suffering from mental health issues such as anxiety and depression and also physical health issues. The cost to individuals of being unable to access any legal intervention at that early stage can therefore spiral out of control, creating additional issues and costs to the state.

In contrast, the social benefits of early legal advice and information are not to be underestimated. A more confident, assertive population, who know their rights and are better equipped to make decisions can avoid certain problems arising altogether,⁶⁰ but without receiving legal advice at an early stage, individuals are not equipped to help themselves in the future.

The long-term effect of a better legally informed and assisted population should be a decreased burden on local public services and resultant benefits for the economy, as well as the positive social capital associated with empowering people to help themselves and each other, as and when problems arise in their lives.

Pressure on the courts

⁵⁹ House of Commons Justice Select Committee, 'Impact of changes to civil legal aid', 2015

⁶⁰ The Baring Foundation, 'Social Welfare Legal Advice and Early Action', 2013

If one of the aims of LASPO was to reduce reliance on the courts then we say this aim has not been met. A decrease in legal help matter starts demonstrates a fall in those accessing legal advice at an earlier stage in a case. Legal aid provision is, as the Bach Report says, now “skewed”⁶¹ towards the courts, despite the fact that it would be cheaper to resolve disputes at an earlier stage.

Waiting until things reach a crisis point before providing funding for legal advice simply “does not make sense”⁶² as individuals are unable to access advice on how to resolve problems outside of the justice system. A key example of this is the dismal failure of the government to divert family cases into mediation, because it had not taken account of the fact that most mediation referrals used to come from solicitors at the early advice stage.⁶³ The Discrimination Law Association also wrote in its evidence to the Bach Commission that “the provisions of initial advice enabled many claims to be explored with an expert, and resolved without the need for litigation.”⁶⁴ A lack of early advice therefore creates costs for the taxpayer due to cases going to court which could have been resolved earlier⁶⁵. Even if a matter ultimately ends up in court, then litigants in person would be better informed and prepared if they had access to early legal advice⁶⁶ and therefore better able to represent themselves, enhancing fairness and reducing the burden on the courts.

An example given by Amnesty International is welfare tribunals:

“Though welfare tribunals are inquisitorial in nature (not adversarial as with family proceedings for example), legal help and advice equips people with the knowledge and information to understand and effectively claim their rights. The removal of welfare benefits from scope means that vulnerable people could miss out on this crucial support. This view has been echoed by those providing free advice and support in welfare benefit cases.”

“The government argues that because the process is inquisitorial you don’t need help, you have nothing to fear, but if the person has no legal knowledge when they answer then the question goes begging. The failure to provide legal support means that the process is actually not inquisitorial but is interpretative. The Judge has to guess what the client means and what their concerns are.” – a lawyer’s comment

“Even when it’s better for a client to present their case in person at the tribunal, they will always need legal advice and support to do the preparatory work. These aren’t simple cases and people with these claims are generally more vulnerable, often we see poor literacy, or people with learning disabilities. They need help to understand their claim, what they can ask for, what they can’t ask for, people often don’t know why benefits have stopped and how to argue their case based on their circumstances and the law. They don’t know what evidence they need or if they do they don’t know how to ask for that evidence and how to make sure it’s in the correct form.” – an advice provider’s comment⁶⁷

At court, legal aid is now not available for many areas of law. Inevitably, the number of people having to represent themselves has increased. This leads to confusion, delays and increased costs with cases in the courts and tribunals taking longer.⁶⁸ 87% of respondents to the Speak up for Justice survey⁶⁹ in 2016 of 141 justice sector staff said that the increase in litigants in person has had a detrimental impact on the ability of family and civil courts to deliver justice fairly, effectively and efficiently. One respondent to YLAL’s

⁶¹ The Bach Commission, ‘The Right to Justice’, 2017

⁶² The Low Commission, ‘Tackling the Advice Deficit’, 2014

⁶³ Ibid

⁶⁴ The Bach Commission, ‘The Right to Justice’, 2017

⁶⁵ Law Society Parliamentary Briefing on legal aid for early legal advice, 2017

⁶⁶ Ibid

⁶⁷ Amnesty International, ‘Cuts that hurt’, 2016, p. 45

⁶⁸ Ibid

⁶⁹ Trades Union Congress, ‘Justice denied’, 2016, p. 4

survey stated that the situation was becoming untenable in the family courts in particular: *“working on cases involving litigants in person is extremely draining, time consuming and resource intensive”*.

A survey for BuzzFeed News in December 2017 by the Magistrates Association⁷⁰ found a 65% increase in litigants in person appearing in family court hearings before magistrates since 2014. Of the magistrates surveyed, 68% of the people before them at their most recent family court hearing represented themselves, up 41% from 2014. One magistrate commented *“I fail to see how removing legal aid from private law family proceedings is saving any money at all, given the number of extra hearings and additional time spent in court. The situation is becoming a joke.”*

Sir James Munby, former President of the Family Division, and the Family Bar Association pointed out to the Justice Committee in 2015⁷¹ that prior to LASPO, the typical litigant in person had chosen not to use a lawyer and was generally confident and effective. However, evidence post LASPO showed that there had been a *“shift in the nature of litigants in person, who are increasingly people with no choice other than to represent themselves and who may therefore have some difficulty in effectively presenting their cases. The result is that the courts are having to expend more resources to assist litigants in person and require more funding to cope, alongside increased direct assistance by the Ministry for litigants in person.”* The National Audit Office noted that *“judges have estimated that hearings involving litigants in person take around 50% longer on average and have reported that more cases are going to court hearings that would have been ‘filtered out’ with accurate advice on their legal merits. Family law professionals have reported an increase in hearing duration, which may result in fewer hearings per day.”*⁷²

In 2014, the National Audit Office estimated the additional cost of litigants in person to HM Courts & Tribunals Service at £3 million per year, plus direct costs to the Ministry of approximately £400,000. It noted: *“The Ministry has committed to approximately £2 million for additional support for litigants in person over the next 2 years. There may also be costs to the wider public sector if people whose problems could have been resolved by legal aid-funded advice suffer adverse consequences to their health and wellbeing as a result of no longer having access to legal aid.”*⁷³

Costs to other public services

In 2015, the Ministry of Justice claimed to the House of Commons Public Accounts Committee that it was not possible to quantify the likely knock-on costs to the public sector as a result of increased physical and mental health problems arising from the inability to access advice to resolve legal problems. The Committee treated this with scepticism, since *“other government departments (for example, Transport) are only too willing to estimate wider benefits to the public purse, despite the inherent difficulties, when carrying out cost benefit analysis to justify spending”* while the Ministry of Justice seemed *“unwilling to even ask other departments about any impacts on their spending.”*⁷⁴

The Committee had also received evidence from Citizens Advice about the *“considerable work it has done to estimate the likely savings to the public purse as a result of the advice it provides.”* Reported elsewhere, Citizens Advice has estimated that for every £1 spent on debt advice the state potentially saves £2.98, and for every £1 spent on employment advice, the state potentially saves £7.13.⁷⁵

⁷⁰ ‘Magistrates Say Children Suffer In Family Court Hearings When Their Parents Have No Lawyers’, *Buzzfeed News*, 17 December 2017 <https://www.buzzfeed.com/emilydugan/magistrates-say-children-suffer-in-family-court-hearings>

⁷¹ House of Commons Justice Select Committee, ‘Impact of changes to civil legal aid’, 2015

⁷² National Audit Office, ‘Implementing Reforms to Civil Legal Aid’, 2014

⁷³ *Ibid*

⁷⁴ House of Commons Committee of Public Accounts, ‘Implementing reforms to civil legal aid’, 2015, para 7

⁷⁵ Trades Union Congress, ‘Justice denied’, 2016, p. 10

The House of Commons Justice Committee concluded that there had in fact been number of knock-on costs, with costs potentially merely being shifted from the legal aid budget to other public services, such as the courts or local authorities: *“The Ministry’s efforts to target legal aid at those who most need it have suffered from the weakness that they have often been aimed at the point after a crisis has already developed, such as in housing repossession cases, rather than being preventive.”*⁷⁶

The Low Commission also found that cutbacks to early legal advice are likely to end up costing more elsewhere in the system.⁷⁷ Aside from the obvious cost to the health service of treating those with physical and mental health issues caused, or exacerbated, by the desperate situations they find themselves in, the likely additional cost to other public services is clear. For instance, a person may fail to resolve an issue with their welfare benefits, resulting in other areas of their life going wrong, their health deteriorating and them requiring medical treatment on the NHS;⁷⁸ a person involved in possession proceedings and unable to access legal advice in respect of housing benefit may be evicted and then need to be housed by the local authority;⁷⁹ an individual who is unable to access advice on the merits of their legal case, such as immigration detainees, add an additional cost to the state⁸⁰ and are unable to resolve the situation they find themselves in. Providing legal aid only at the point when a crisis has already developed, rather than taking a preventative approach, means that the costs are simply moved from the legal aid budget to the budget of other public services.⁸¹

There is also direct evidence of cost-shifting on to MPs’ surgeries (as predicted by YLAL in our 2012 report, ‘Nowhere to Turn’). This evidence was obtained by the commercial law firm Hogan Lovells in conjunction with the All Parliamentary Group on Pro Bono. Hogan Lovells’ pro bono volunteers observed 325 constituents’ appointments at their MPs’ surgeries, between October and November 2016 and found that 89% of appointments related to issues of legal concern.⁸² These mostly related to areas of law involving local or national government (housing, benefits, immigration) rather than private matters (family, employment - Hogan Lovells refers to LawWorks evidence that their clinics had seen a large uptake in those areas). The same report also noted a survey commissioned by Legal Aid Practitioners Group which showed GPs noting an increase in patients with issues relating to debt, community care, employment, housing, welfare benefits, implying that both social and health problems, and an increased burden on the NHS, have resulted from the legal aid cuts.⁸³

Unsustainable demands on the advice sector

Cuts to legal aid, especially for early legal advice, mean that people are increasingly turning to the not-for-profit sector for support when problems arise. However, provision in this sector has decreased as the demand on organisations offering free legal help and advice has increased.⁸⁴ The number of not-for-profit legal advice centres fell from around 3,226 in 2005 to 1,462 in 2015⁸⁵ and advice services are struggling to meet demand and having to turn vulnerable people away with nowhere else to signpost them to.⁸⁶ Those organisations that are still in existence are either rarely able to meet the demand or are unable to offer the specialist advice required⁸⁷.

⁷⁶ House of Commons Justice Select Committee, ‘Impact of changes to civil legal aid’, 2015

⁷⁷ The Low Commission, ‘Tackling the Advice Deficit’, 2014

⁷⁸ The Bach Commission, ‘The Right to Justice’, 2017

⁷⁹ House of Commons Justice Select Committee, ‘Impact of changes to civil legal aid’, 2015

⁸⁰ Ibid

⁸¹ Ibid

⁸² Hogan Lovells and the APPG on Pro Bono, ‘Mind the Gap’, 2017, p. 7

⁸³ Trades Union Congress, ‘Justice denied’, 2016, p. 27

⁸⁴ Amnesty International, ‘Cuts that hurt’, 2016

⁸⁵ The Bach Commission, ‘The Right to Justice’, 2017

⁸⁶ Amnesty International, ‘Cuts that hurt’, 2016

⁸⁷ Coram Children’s Legal Centre, ‘Rights without remedies’, 2018

The burden on the free advice sector is unsustainable and the result is that vulnerable people are left without any help or support. One respondent to YLAL's survey raised the issue of front-line staff in under-resourced charities and small centres "*bearing the brunt*" of the cuts through deciding to take on more pro bono clients: lawyers stepping up to plug the gaps in areas where legal aid is no longer available. This is consistent with evidence highlighted as early as 2014 by the National Audit Office:

*"among legal firms/advocate respondents, 49% told us they were referring more clients to third-sector organisations since April 2013 and 70% of third-sector respondents told us they could meet half or less of the demand from clients who were not eligible for civil legal aid... Citizens Advice reports that there has been a 62% increase in people seeking advice online about help with legal costs since the reforms, while 92% of Citizens Advice Bureaux are finding it difficult to refer people to specialist legal advice since the reforms were implemented. Similarly, the Bar Pro Bono Unit reports that requests for assistance have increased by almost 50% since April 2013."*⁸⁸

The Justice Committee added "*the Law Centres Network said 'our offices have experienced a surge in enquiries after help in the areas now out of scope, primarily family, immigration and employment'. As an example, 'Hackney Community Law Centre... in winter 2013 reported a 400% increase in people looking for help with welfare benefits, a 200% increase in people looking for immigration help and a 500% increase in calls to their telephone advice line.'*"⁸⁹ Citizens Advice gave evidence to the Justice Select Committee⁹⁰ that they had lost 350 specialist advisors since the implementation of LASPO. In late 2015, LawWorks reported that their network of independent clinics operating in London has seen an overall increase of 95% in the demand for pro bono legal advice in the previous year.⁹¹

The Joint Committee on Human Rights notes that the direct effects of the LASPO reforms have been "*compounded by the fact that they coincided with a significant reduction in civil legal aid fees.*"⁹² The National Audit Office calculated in 2014 that this has amounted to a 34% real-terms reduction over a 13-year period between 1998–99 and 2011. There are many examples of solicitors' firms ceasing (generally with reluctance) to undertake legal aid work in order to keep the firm in business. The Law Centres Network told the Justice Committee that legal aid work is barely viable for non-commercial providers (who cannot subsidise it), and for many small or medium sized firms the level of subsidy now required is unaffordable.⁹³

The massive increase in housing law enquiries at MPs' surgeries in London was explicitly tied by one MP to Law Centres and Citizens Advice operating at full capacity and being overwhelmed by the number of people seeking legal advice.⁹⁴

In July 2018, the Joint Committee on Human Rights concluded that "*the pressures caused by the reforms to legal aid are having a severe impact on legal aid professionals, damaging morale and undermining the legal profession's ability to undertake legal aid work, leading to consequent grave concerns for access to justice, the rule of law and enforcement of human rights in the UK.*"⁹⁵

We agree. Pushing members of the profession - legal aid lawyers committed to serving the public - beyond their limits has had and will continue to have a major impact on access to justice. Three major implications are:

⁸⁸ National Audit Office, 'Implementing reforms to civil legal aid, 2014, paras 2.14 and 2.15

⁸⁹ House of Commons Justice Committee, 'Impact of changes to civil legal aid', 2015, para 80

⁹⁰ House of Commons Justice Committee, 'Impact of changes to civil legal aid', 2015

⁹¹ LawWorks, "Clinics Network Report 2014 – 2015" November 2015, p. 12

<https://www.lawworks.org.uk/sites/default/files/LawWorks%20Clinic%20Network%20Report%202014-15.pdf>

⁹² Joint Committee on Human Rights, 'Enforcing Human Rights', 2018, para 81

⁹³ House of Commons Justice Committee, 'Impact of changes to civil legal aid', 2015, para 81

⁹⁴ Hogan Lovells and the APPG on Pro Bono, 'Mind the Gap', 2017, p. 17

⁹⁵ Joint Committee on Human Rights, 'Enforcing Human Rights,' 2018, para 88

1. **Quality of service delivery:** Where legal aid providers are not paid enough and are under significant mental strain, there is a significant risk of a knock-on effect on the quality of service delivery. The House of Commons Public Accounts Committee referred to evidence gathered by the National Audit Office that the fees paid for legal aid do not cover the costs of providing the service and added that the “[Legal Aid] Agency’s own quality assurance processes indicate that the quality of face-to-face legal advice is unacceptably low, with almost one in four providers failing to meet the quality threshold. This has serious implications in terms of both value for money for the taxpayer and access to justice for legal aid claimants. The Agency could not explain why these results were so bad, or whether they are related to the reduction in fees paid for civil legal aid.”⁹⁶
2. **Legal aid deserts,** as noted above in respect of early legal advice and specifically by the Joint Committee on Human Rights.⁹⁷
3. **Future of the profession:** our recent social mobility report, published in March 2018, revealed that 53% of junior legal aid lawyers were earning less than £25,000, while debt levels had increased since our previous report in 2013, especially for 18-20 year old aspiring legal aid lawyers who had not even reached the expensive professional course stage. At one of our report launch events, we heard from one member who had been actively discouraged by their law school careers advisor from going into legal aid areas of law. Another major challenge facing YLAL members surveyed for the social mobility research was stress: 21% said this was the biggest challenge they faced.⁹⁸

The quality of decision-making by public bodies

YLAL believes that serious attention needs to be given to the quality of decision making by local and national government and other public bodies. The Justice Committee in March 2015 said: *“We have long been concerned about poor decision-making at Government Departments, particularly the Department for Work and Pensions and the Home Office... We are particularly alive to the fact that poor decision-making by other Government Departments leads to increased costs for the Ministry of Justice through increased use of HM Courts and Tribunals Service and grants of legal aid.”*

Asylum Aid has also noted this problem in the context of statelessness, saying *“some decisions are of very poor quality and do not correctly apply relevant law and policy. This is likely due, at least in part, to inadequate legal knowledge of some Home Office staff., which indicates a need for further training.”*⁹⁹

We would add to this that there is often extremely poor decision making at local authority level in respect of issues such as homelessness, allocations and housing benefits. We consider it improper and unethical for cuts to be made to public funding to challenge unlawful decisions on the grounds that the amount of challenges are too costly, when the amount of challenges is directly and in some cases largely connected to the poor process and decision-making in underfunded and poorly managed local or national government departments. Any review of the provision of legal aid must take a holistic look at how this can be improved to reduce costs across the system.

In the context of poor decision-making by public bodies at both local and national level, the government’s attempts to further limit access to justice by restricting legal aid for judicial review (including by the LAA delaying making decisions on applications for legal aid until lawyers are forced to work pro bono, then refusing to pay even when the case is successful) must be reversed.

Recommendations

⁹⁶ House of Commons Committee of Public Accounts, ‘Implementing reforms to civil legal aid’, 2015, para 6

⁹⁷ Joint Committee on Human Rights, ‘Enforcing Human Rights,’ 2018, paras 79 - 80

⁹⁸ Young Legal Aid Lawyers, ‘Social Mobility in a Time of Austerity’, 2018, pps. 6, 7, 9

⁹⁹ Asylum Aid, ‘The UK’s Approach to Statelessness,’ 2016

It is the view of YLAL's membership that restoring early legal advice to pre-LASPO levels is a key priority and that it is essential for the government to bring a number of areas of law back into scope. YLAL makes the following recommendations:

1. The government should widen the scope of early legal help in key areas. The priority areas, as identified by the Bach Commission (at pages 29-30 of its final report), should be family, welfare benefits, employment and housing law.
2. Research the overall costs to other parts of the public sector that result from the current legal aid system. The government must make sure that any purported savings for the taxpayer are not outweighed by costs incurred elsewhere.
3. The government should allocate a further £120 million¹⁰⁰ a year to fund early legal advice. Effective early legal advice necessarily consists of lawyers and caseworkers advising clients. Leaflets, guidance documents, and technology are no substitute for lawyers with expertise providing face-to-face guidance. YLAL recognises that this will cost money. However, evidence from the Law Society and others shows that effective early legal advice prevents issues from escalating, which saves the taxpayer money overall.
4. The means test for early legal advice should be liberalised. YLAL advocates updating the means test in all areas of legal aid, however, the moral and economic arguments for updating the means test for early legal advice are particularly compelling.
5. Restoring early legal advice should be part of a wider strategy of eliminating legal advice deserts. For example, there is currently only one legal aid solicitor in the entirety of Cornwall, despite it being the second poorest region in northern Europe. This is entirely unacceptable. The government urgently needs to identify legal aid advice deserts and prioritise funding for these areas when restoring early legal advice.
6. The government should also consider innovative approaches to ensuring access to advice. Sir James Munby when retiring suggested considering using services such as Skype, queried why judges cannot go to litigants rather than the other way around, and proposed consideration of 'mobile courts' along the lines of mobile libraries and mobile X-ray units.¹⁰¹ As recommended by Hogan Lovells and the APPG on Pro Bono, the government should also fund a comprehensive database of legal provision and consider providing it in location-sensitive app form.
7. The government should ensure that legal aid or other public funding is available to ensure that in family cases where there are allegations of violence, the alleged abuser and victim do not have to cross-examine each other and nor does the judge.
8. Legal aid should be made available for statelessness and refugee family reunion applications and for Article 8 ECHR applications involving children or vulnerable adults.
9. Improve the quality of decision-making by made across local and national government, and ensure that individuals are able to access proper rights of appeal against such decisions.

¹⁰⁰ This is the figure proposed by the Bach Commission, which is fully costed.

¹⁰¹ 'Access to justice in family courts "inadequate," says outgoing head,' *The Guardian* 27 July 2018
<https://www.theguardian.com/law/2018/jul/27/access-to-justice-in-family-courts-inadequate-says-outgoing-head>

6. Exceptional Case Funding

Introduction

Section 10 of LASPO introduced Exceptional Case Funding (ECF). ECF is available where a matter is out of scope, but without legal aid there would be a breach of the individual's rights under the European Convention on Human Rights (ECHR) or EU law rights, or where the Director of Legal Aid Casework determines that it is appropriate to do so because of a risk of such a breach. During the passage of the Bill, ECF was described as a 'safety net' to offset the effects of the government removing areas of legal aid from scope.¹⁰²

It is YLAL's view that the scheme is a wholly inadequate 'safety net'. While there have been improvements to the scheme following litigation, there are very few successful ECF applications. The complicated and time intensive application process and the limited prospects of success mean that the current scheme is not fit for purpose.

Literature review

In relation to Exceptional Case Funding, we believe the Ministry of Justice should take into account the following reports in its review of Part 1 of LASPO:

Justice Select Committee Report [2015]

- **Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012**, by the House of Commons Justice Committee, published on 12 March 2015. In particular, the report's conclusion that *"The number of exceptional case funding applications granted has been far below the Ministry of Justice's estimate. We have heard details of cases where the refusal of exceptional cases funding to vulnerable litigants is surprising on the facts before us. We conclude therefore that the low number of grants together with the details of cases refused exceptional cases funding means the scheme is not acting as a safety net."*

Amnesty International UK Report [2016]

- **Cuts that hurt: The impact of legal aid cuts in England on access to justice**, by Amnesty International UK, published in October 2016. In particular, we draw attention to the case studies cited that highlight the difficulties of unrepresented individuals accessing ECF.

Legal Aid Practitioners Group Manifesto [2017]

- **Manifesto for legal aid**, by Legal Aid Practitioners Group (LAPG), second edition published in 2017. ECF is addressed in chapter 3, at page 17. We endorse LAPG's recommendation that: *"[p]roper provision to protect those in need must be readdressed urgently, so that, far from being exceptional, the legal aid scheme as a whole operates to ensure those in need of advice and representation are able to access it."*

Bach Commission Report [2017]

- **The right to justice**, final report by the Bach Commission on Access to Justice, published in September 2017. The financial eligibility criteria for legal aid are covered in chapter 4, 'Broadening the scope of civil legal aid', at pages 28-33. In particular, we note the recommendation that: *"[t]he exceptional case funding scheme has manifestly failed, and needs urgent review and reform."*

¹⁰² HL Deb 5 Mar 2012 : Column 1570

Public Law Project Research Paper [2018]

- **Research Paper on Exceptional Case Funding**, by the Public Law Project (PLP), published in May 2018. PLP has been instrumental addressing the failings of the ECF scheme, from making ECF applications to providing training to organisations and bringing litigation to challenge the scheme's systemic failings. Despite some improvements, PLP does not consider ECF to be an effective safety net and remains *“concerned that ECF remains inaccessible in practice for many people, particularly those who are trying to apply without the assistance of a legal aid provider.”*

Joint Committee on Human Rights Report [2018]

- **Enforcing human rights**, by the Joint Committee on Human Rights, published on 19 July 2018. In particular, we note that this report found that ECF is an ineffective safety net: *“The Exceptional Case Funding scheme was expected to support up to 7,000 cases per year, whereas in reality it only funds hundreds of cases. Urgent reform is needed to ensure that human rights cases are properly supported and therefore to ensure meaningful and effective access to justice. The LASPO review should consider how to remove barriers to accessing Exceptional Case Funding where this is needed to secure effective enforcement of human rights. This should include ensuring simplification of the application process, and access to legal advice and assistance (legal aid funded where necessary) to navigate complex legal process forms.”*

Problems

Despite improvements having been made to the ECF scheme following the cases of *Gudanaviciene v Director of Legal Aid* [2014] EWCA Civ 1622 and *IS v Director of Legal Aid* [2016] EWCA Civ 464, there remain serious problems with its functioning. YLAL has identified three key issues with the scheme:

1. The complexity of the application process
2. The lack of support for lay applicants
3. The barriers preventing providers from making ECF applications

The complexity of the application process

YLAL believes the ECF application process remains overly complex and inaccessible. This makes the process difficult to navigate for lay applicants. Applicants for ECF must complete an 'ECF1' form. The following are examples of the problems with the ECF1 form that result in lay applicants being disadvantaged:

- There are not separate versions of the ECF1 to be completed by lay applicants and providers. The ECF1 form requires a level of understanding of the law and civil legal aid scheme throughout. Accordingly, the ECF1 form asks questions which are not reasonably answerable by a lay applicant.

An example of this is question 3 found on page 4 of the ECF1 form which states, *“How complex are the proceedings, the area of law and the facts/evidence in the case?”*. A lay applicant is not well-equipped to answer this question in an informed manner that may be supportive of their application. This question is geared towards providers who will be better placed to answer it.

- If the ECF1 form was accessible, it would particularise what an applicant needs to demonstrate to secure funding. However, the questions posed in the ECF1 are vague and fail to expressly address the assessment criteria.
- It is unclear from the ECF1 form how much detail is required by the decision-maker. For example, question 5 on page 5 of the ECF1 asks for *“Any additional information that is relevant to the determination”*. Unlike question 4 on page 5 of the ECF1 form, there are no examples of what may

be relevant in answering the question. What may be considered relevant to the application and the extent of detail that is included is unclear. Providers completing ECF1 forms on behalf of applicants also experience these issues and this contributes to the low ECF application success rates.

- The LAA insists on applicants providing means evidence/forms alongside what is already a lengthy ECF application process. This increases the chance of a mistake being made by the applicant – a risk compounded by the lack of means guidance written directly with lay applicants in mind. Increased risk of mistakes in the application process increases the risk of an applicant's application being returned with further questions, resulting in unnecessary delay.

The lack of assistance, support and guidance available to lay applicants

Given the inaccessibility of the ECF application process, lay applicants require assistance, support and guidance. As legal representation is usually unavailable to lay applicants until funding is secured, other assistance, support and guidance is necessary.

YLAL acknowledges that there are helpful guides produced by charities, most notably the Public Law Project, that has produced useful guidance on how lay applicants can apply for ECF. In addition, there are Law Centres and other civil society organisations that provide much-needed support to individual applicants. However, YLAL believes that LASPO does not provide sufficient safeguards in respect to this assistance. Laws LJ, in his leading judgment in *IS* [55], identified the absolute need for assistance in the application process for people with disabilities.

Legal aid providers have raised several concerns with the LAA telephone helpline. Notably, the call handlers on the single customer service helpline have little knowledge of the ECF scheme and frequently respond to queries by saying they will pass them on to the ECF team who will provide a response to the provider. YLAL members have found that those call backs are rarely followed up.

Barriers to providers making ECF applications

ECF is not a delegated function and providers must submit an ECF application for legal help. If the application is unsuccessful, the provider is not remunerated for the hours spent preparing the application or undertaking initial investigative work in support of the application. Given the complexities of the application process, providers sometimes consider it financially more prudent to conduct further unpaid investigative work and submit an ECF application for full representation. However, this exacerbates the problem for the provider of not being paid for the investigate work in the event the application is unsuccessful.

The problem above is compounded by the length of time taken to complete an ECF application being, on average, significantly more than that of a comparably complex non-ECF legal aid application. Based on anecdotal evidence from YLAL members, it can often take as long as five or six hours to complete an application for ECF.

As there are additional criteria to meet in the form of s.10(3) LASPO and an additional application form (ECF1), it is clear why these applications take longer. When considered together with the ongoing poor success rates of ECF applications and the lack of clarity as to how much detail applicants should include in an application, this problem has the effect of seriously restricting the willingness of providers to make ECF applications.

There is no right of appeal to a refusal of ECF following an unsuccessful internal review. When applications are refused for non-ECF legal aid, providers may seek an internal review of that decision and, if unsuccessful, appeal the refusal decision to an independent adjudicator. The appeals process ensures an element of consistency in the quality of legal aid determinations.

As there is no right of appeal in ECF applications, the only option available to unsuccessful applicants wishing to challenge a refusal of ECF following an internal is to bring judicial review proceedings. This is not an equivalent or sufficiently accessible remedy. In a judicial review claim, the applicant would not merely have to show the Director of Legal Aid to have made an incorrect decision, but would have to show that the Director's decision was irrational or otherwise unlawful on public law grounds.

YLAL members have experienced significant delays in receiving a determination by the LAA in ECF applications. The LAA states that 20 working days is the normal timeframe for providing a decision, but providers report waiting times far longer than this. Reasons given for delay vary, but include requests for further information in the case which reset the timeframe the LAA has for responding to a request – even if that information was shown to be provided with the initial application. It is clear from providers that delay also affects applications to amend a legal aid certificate (for example, to increase the costs limit). These substantial delays can seriously harm the conduct of a case.

Linked to the problem above, the LAA deems very few circumstances to be so urgent to warrant an expedited decision on an application for ECF. YLAL members have found that the ECF team's reliance upon their ability to backdate effective start dates of certificates further reduces what they consider to be urgent. In circumstances where work is required on a case pre-certification or pre-amendment to an existing ECF certificate, this puts further pressure on providers to undertake at risk work to avoid missing the likes of a deadline which falls more than 48 hours in advance.

Recommendations

In its current form, ECF is an inadequate safety net. The first priority should be bringing areas of law back into scope (see section 5, above, which sets out YLAL's position in relation to scope). There should be nothing 'exceptional' about legal aid when people of limited means with meritorious cases require legal assistance. However, if scope is not going to be reformed then YLAL believes that certain changes to the ECF scheme could make it more effective.

1. We believe that as a matter of priority, a more user-friendly version of the ECF1 form should be designed for lay applicants. This should be distinct to any form expected to be completed by providers.
2. The new form for lay applicants should be more prescriptive, incorporating a simplified version of guidance on how to answer precise questions set out in the Lord Chancellor's Guidance. This would reduce the need for lay applicants to cross-refer between these sources, decreasing the opportunity for confusion. It should also be designed in a manner to better elicit the information required of an applicant to demonstrate how they meet the eligibility criteria.
3. In addition to a new paper form, an alternative application process should be developed for lay applicants with disabilities in mind. This may include access to CCMS to submit applications on a simplified version of the current provider assessment on CCMS. Similarly, steps should be taken to provide equal opportunity to those with poor understanding of English to be able to apply for ECF without disadvantage.

4. In terms of the government's website guidance, it should be made clearer which forms are necessary for a lay applicant's ECF application, and these forms should be renamed to be more user-friendly, for example by describing what they are. It is preferable that the entire application process is contained within a single document, reducing the potential for confusion.
5. The requirement for a means assessment to be undertaken, at least at the same time as submitting the initial application for ECF, should be immediately removed. In place of it, a preliminary determination should be made by the LAA subject to passing a means assessment.
6. The telephone helpline should immediately be re-introduced with a distinct option for lay applicants to speak with a caseworker about queries they have about their application and any possible accessibility problems they have.
7. The government website provides a list of minimum requirements for applications to be considered. We welcome this approach, which is more flexible than the requirement to submit several application forms. However, we think the ability to provide this information in place of the forms is insufficiently publicised and could be made clearer.
8. Providers should be afforded the delegated function of granting ECF in at least urgent cases, but also for legal help ECF.
9. At risk costs for providers must be reduced to ensure a sustainable legal aid sector.
10. An independent adjudicator should be introduced in the same manner as is available for non-ECF legal aid applications.
11. Delay in responding to applications should be minimised. To achieve this, better communication by the LAA as to the stage the application is currently at would be helpful for providers. It would also reduce unnecessary chasing by the provider. Equally, at the stage of each application/amendment application, providers should be provided with an estimated date of response.

7. Use of Technology

In this section, YLAL considers the use of technology for legal aid advice, including:

- a) **Client and Costs Management System**
- b) **Telephone Gateway**
- c) **Use of technology in advice**

Pre and Post-LASPO Situation and Context

CCMS

Prior to April 2016, CCMS was not mandatory for certificated civil work. That meant that legal aid lawyers completed paper applications, and submitted these along with supporting documents to the Legal Aid Agency by post. LASPO's aim of making savings encouraged the MoJ to rush through the mandatory rollout of CCMS despite difficulties and crashes. Reliability remains an issue to date. What should be a simpler and more efficient process than paper applications is as, or indeed often more, complicated and time-consuming than the previous paper-based application process. There is duplication of questions. Special characters are not supported. Responses are restricted due to the size of boxes or options on drop-down menus and therefore supporting statements are uploaded. The site is slow-loading between pages, and when first introduced, would log-off whilst applications were being completed, leading to the loss of data inputted. This leads to significant wasted time and costs.

Using CCMS can be straightforward with training, some of which the LAA provides using free online training modules. There are clear benefits of online applications, including uploading documents quickly, saving paper and postage, making urgent applications, allocating and viewing costs. When a certificate's scope needs to be increased, the data is retained and does not have to be re-entered. Access to some support has improved. The telephone line can be used to resolve issues, however, it is not always answered, and practitioners report spending a significant amount of time on hold. Applications marked urgent are not always dealt with within published working times, leading to unacceptable delays in grants of funding which in turn impedes access to justice.

CCMS has improved certain aspects of the legal aid application and billing process but still has technical flaws.

Telephone Gateway

Prior to LASPO, providers gave advice to clients directly on the areas of law which are now filtered via the telephone gateway. Before it became mandatory in April 2013, the government predicted large numbers of individuals would use the telephone gateway. However, the number of people using the gateway has been significantly lower than expected. There is no dedicated website for the gateway, therefore individuals who may search online for sources of advice may not be able to find it.

There are reports of the service being confusing, it being difficult to be referred to a Specialist Telephone Advice Provider without legal support, and inconsistent advice given by non-legally trained operators¹⁰³. There is insufficient oversight of advice given, with no peer reviews in the first year of its existence.

In February 2018, the Legal Aid Agency was forced to cancel the procurement process when insufficient bids were made for the gateway services in Discrimination and Education. Just two of the current Education providers and one Discrimination provider agreed to the extension of their contracts¹⁰⁴. This indicates that providers do not believe that the system is viable.

Accessing advice through technology

Prior to the enactment of LASPO, smartphones were not as commonly used and the internet was usually accessed on computers. Many more people now access the internet on devices other than a computer. The recent Universal Credit Service Survey ('UCSS') found that three in 10 people did not have access to a computer at home, but did have access to the internet on their phone¹⁰⁵.

The device used affects how individuals consume and input information online. For example, it is not possible to complete online forms using a mobile phone if they are in PDF form. These include a Form SSCS1 Notice of Appeal, which is used to appeal a Department for Work and Pensions decision on benefits such as Job Seekers' Allowance, and N11R Defence form, used in repossession proceedings. This means that whilst technically members of the public can access the form and/or the information, practically many people may not be able to do anything with it. Even if the forms are completed on a computer, they are often unclear. The UCSS indicates that just under half of participants were not able to complete the online application for Universal Credit without assistance. This explains why the National Audit Office suggests that the UCSS would (or from YLAL's perspective should, if access is to be democratised and fair) create additional costs for local organisations that support claimants¹⁰⁶.

Smartphones give more people access to the internet and to vast quantities of information. However, they do not enable the interpretation of that information, or the correct legal application of that information to a vulnerable person's complex needs and circumstances. Services such as Advice Now¹⁰⁷ should be better advertised and/or paid for to be at the top of search engine results.

What evidence is currently available?

CCMS

An early report¹⁰⁸ by the Association of Cost Lawyers (ACL) highlighted the concerns around CCMS in 2015. The issues ranged from technical issues such as slow speeds and bugs which affected core functionality to flaws in basic provisions, such as not catering for high cost cases, an inability to see information about a claim after it had been submitted, and no contingency guidance in the event that the system fails. The report is scathing and indicates that their warnings went unheeded:

"ACL was engaged in the LAA [Legal Aid Agency] extensively from early 2014. Yet hardly any actual system issues have been addressed. CCMS still has multiple issues in every way a system can: it

¹⁰³ Public Law Project, Research Briefing Paper, The Civil Legal Advice Telephone Gateway Service, published May 2018 <https://publiclawproject.org.uk/wp-content/uploads/2018/05/The-Civil-Legal-Advice-telephone-Gateway.pdf>

¹⁰⁴ Public Law Project Research Briefing Paper, The Civil Legal Advice Telephone Gateway Service, 2018

¹⁰⁵ Department for Work and Pensions, Universal Credit Full Service Survey, June 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714842/universal-credit-full-service-e-claimant-survey.pdf

¹⁰⁶ National Audit Office, Rolling out Universal Credit, June 2018 <https://www.nao.org.uk/report/rolling-out-universal-credit/>

¹⁰⁷ <https://www.advicenow.org.uk>

¹⁰⁸ Association of Cost Lawyers, 'Report on the Legal Aid Agency's Client and Cost Management System (CCMS)', 1 May 2015 <http://www.associationofcostlawyers.co.uk/write/MediaUploads/ACL-Report-on-CCMS.pdf>

deteriorates existing business processes, functionality has been poorly implemented and some required functionality has been missed completely” (p.1).

It is interesting to compare how this has changed over time with the results of the more recent survey by Legal Aid Practitioners Group (LAPG). It found that despite practitioners supporting online working in principle, and that “CCMS had improved by the mandatory use date of April 2016, providers still regularly contact [LAPG] to vent their frustration at the system”¹⁰⁹. 400 individuals from 207 different firms and organisations responded to the survey. Key suggestions for improvements included addressing illogical processes (e.g. despite the fee earner knowing what documents must be submitted, they must wait for a request before uploading), problems with quality (inconsistent, at times poor quality advice, lack of training for those responding), long waiting times in urgent cases (specifically those involving court-imposed time-limits), and technical faults (slow speeds, freezing, getting signed out, losing data or lack of records that documents had been uploaded). Many of these issues are similar to those highlighted by the ACL report. In addition, the survey returned 309 examples of what was working - among them, reducing postage costs, paper use, billing fixed fee cases, helpful staff on phone lines - but 77 participants used this section to report that they felt nothing was working well.

Pre-CCMS guidance was that the reasonable amount of time for a legal aid application is 30 minutes. Tweets and blogs (Legal Aid Handbook¹¹⁰ and Legal Voice¹¹¹) raise issues around ex gratia payments which have been the only remedy for claiming extra time than would have been spent applying by paper. In 2017 an appeal was made relating to an application that took 3 hours. Following this, PLP began talks with the LAA about amended guidance.¹¹²

Telephone Gateway

The Ministry of Justice carried out its own research into the operation of the mandatory Civil Legal Advice Gateway four years ago. The findings from interviews with service providers, published alongside the report, contain useful insights. Interviewees were “broadly positive”, whilst attributing much discontent towards wider issues of legal aid reform. More recent reports offer specific points and clear recommendations for improvement of the mandatory gateway.

One of the most comprehensive reports in this area is that entitled ‘Keys to the Gateway’,¹¹³ by Public Law Project. The report raises serious concerns about the access to justice through the gateway; not only are parliamentary policies and intentions not being met, but they are being undermined. The findings highlight limited use of the service (the number of Legal Help matters in Debt have fallen by 50% and Discrimination by 58%; the largest decreases in Legal Help matters starts across all areas of law¹¹⁴) and low referral rates for face-to-face advice. It draws on frontline experiences to conclude that promotion and marketing of the existence of the service had been limited, with no communication strategy, thus creating an apparent reduction in demand for advice. The report asserts that the gateway is confusing and bureaucratic to users and poor value for money. It criticises the lack of monitoring of advice given (despite there being requirements in the service contracts for ‘mystery shopper’ style reviews), resulting in the inconsistencies and flaws in the advice given by non-trained professionals going undetected. It is suggested that operators respond to ‘buzzwords’ rather than context and that many clients stopped engaging with the service prematurely. The report makes recommendations such as improving transparency on the quality of advice, publishing meaningful statistics regularly, and issuing clearer guidance on referrals to face-to-face advice.

¹⁰⁹ ‘What next for the CCMS?’, Legal Voice, 15 June 2017 <http://www.legalvoice.org.uk/what-next-for-the-ccms/>

¹¹⁰ See <https://legallaidhandbook.com/tag/ccms/>. For example, “Claiming costs for #CCMSfail”, Legal Voice, 10 March 2016 <https://legallaidhandbook.com/2016/03/10/claiming-costs-for-ccmsfail/>

¹¹¹ ‘Compensation for LSC maladministration’, 20 June 2012, <http://www.legalvoice.org.uk/compensation-for-lsc-maladministration/>

¹¹² ‘Legal aid agency agrees to reconsider guidance on time allowed to make applications on CCMS’, Public Law Project, 27 June 2017 <https://publiclawproject.org.uk/latest/legal-aid-agency-agrees-to-reconsider-guidance-on-time-allowed-to-make-applications-on-ccms/>

¹¹³ Public Law Project, ‘Keys to the Gateway’, 2015

¹¹⁴ Ibid

The final report by the Bach Commission on Access to Justice lays out the statistics clearly, providing analysis of the key issues from the perspective of frontline practitioners. Islington Law Centre said *“that this problem has diverted money away from front-line provision, has created duplication, and has been a major barrier to many people, without any evidence that other equally high needs are being effectively met”* (Brooke, 2017, p.41).

Criticism of the gateway extends to legal blogs, mainstream¹¹⁵ news providers and social media. BuzzFeed¹¹⁵ and the Law Society Gazette¹¹⁶ reported on government figures which showed that *“only one client received face-to-face education advice through the gateway in 2016/17. No clients received face-to-face discrimination advice in 2016/17”*.

Accessing advice through technology

Much of the commentary in this area also relates to the use of the Mandatory Telephone Gateway but could be more widely interpreted. The common suggestion is that

“those that most need advice by way of legal aid are the most disenfranchised and therefore often the least likely to pick up the phone: the elderly, those who don’t speak English as a first language, those who don’t have a phone in their homes or don’t have a mobile (or can’t afford the bills), plus those who are so anxious that they want the reassurance of some human contact”.¹¹⁷

The report by the Equality and Human Rights Commission (EHRC), ‘Being Disabled in Britain’¹¹⁸, found that telephone advice can be inappropriate for people with *“communication-related impairments, mental health conditions or learning difficulties”*.¹¹⁹ Campaigners say the introduction of the telephone gateway has had a dramatic and negative impact on the ability of disabled people to access legal advice and support, despite those individuals often requesting reasonable adjustments and specialist provisions.

The Bach Commission report reminds us that many of those who require legal aid will not necessarily *“have a clear idea of why they need advice or be able to provide a coherent account of their experiences”*.¹²⁰ Given the complexity of some areas of law, this cannot be seen as uncommon or unexpected.

Problems

CCMS

CCMS is impeding access to justice

In a recent survey of our members, 67% cited CCMS as an obstacle to helping their clients access legal aid. The system regularly crashes, there are consistent difficulties with uploading documents and it is time consuming to prepare the applications. As the Bach Commission remarked, *“every hour spent on unnecessary administration is an hour not spent helping people with their problems”*.¹²¹ Administrative issues discourage people from seeking legal help and firms from continuing legal aid work.

¹¹⁵ ‘Not A Single Discrimination Case Was Referred To A Legal Aid Lawyer In The Past Year’, *Buzzfeed News*, 22 November 2017

https://www.buzzfeed.com/emilydugan/not-one-person-with-a-discrimination-case-was-referred-to?utm_term=djrxK1zL7#pqXe20rxZ

¹¹⁶ ‘Moj urged to abandon mandatory telephone gateway’, *Law Society Gazette*, 9 February 2018

<https://www.lawgazette.co.uk/law/moj-urged-to-abandon-mandatory-telephone-gateway-/5064743.article>

¹¹⁷ ‘The right call? Jon Robins questions the mandatory telephone gateway’ *New Law Journal*, 11 July 2013

[https://www.newLawjournal.co.uk/content/right-call](https://www.newlawjournal.co.uk/content/right-call)

¹¹⁸ Equality & Human Rights Commission, ‘Being Disabled in Britain’, 1 April 2017

<https://www.equalityhumanrights.com/sites/default/files/being-disabled-in-britain.pdf>

¹¹⁹ ‘Legal advice concerns after government abandons search for new contractors’, *Disabled Go News*, 26 February 2018

<https://www.disabledgo.com/blog/2018/02/legal-advice-concerns-after-government-abandons-search-for-new-contractors/#.W7EOthKjfa>

¹²⁰ Bach Commission on Access to Justice, 2017

¹²⁰ Bach Commission on Access to Justice, 2017

https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach_Commission_Appendix_5_final.pdf

¹²¹ Bach Commission on Access to Justice, 2017, p.35

Legal aid providers and young legal aid lawyers are negatively affected

The digital system is not bespoke and is not fit for purpose. There are widespread technical and design difficulties which render processes inefficient. The system has been criticised as “*slow, cumbersome and susceptible to technical errors*”.¹²² LAPG has recorded that many providers have had to create and/or agree ‘workarounds’ with the LAA to mitigate CCMS’ limitations.¹²³ LAPG has also found that the problems with CCMS have “*pushed the supplier base to an operational precipice*”.¹²⁴ The bureaucracy “*adds to the demoralisation of the profession, which has significant ramifications for its future sustainability*”.¹²⁵

Providers are not sufficiently compensated for the time they have spent on each case

This threatens their financial viability, which forces providers to rely heavily on YLAL’s members: junior lawyers, trainees and paralegals, frequently working on low salaries with little or insufficient guidance and training. This raises serious concerns because it compromises the quality of legal assistance providers can offer to their clients.

Telephone Gateway

The telephone gateway is not protecting access to justice

The government stated that the gateway was intended to “*protect access to justice whilst modernising the service and ensuring that it is affordable*”.¹²⁶ YLAL believes that the gateway is not meeting this policy rationale.

There is a lack of accessible information about the telephone gateway

The general public and service providers (such as MPs, caseworkers, GPs) are unaware of the gateway’s existence or how it operates. It is difficult to find information about the gateway online.¹²⁷ As a result, people are unable to access the legal advice.

The telephone gateway is not flexible enough to accommodate individual needs

People who have English as a second language, physical or mental health problems, learning disabilities, or low numeracy and literacy levels, can find it difficult to articulate their problems. In its evidence to the Bach Commission, Coram Children’s Legal Centre stated that “*there is a high risk of callers being diverted from specialist legal advice because they are unable to fully explain the scope and nature of their problem*”.¹²⁸ This discourages people from seeking legal assistance early on and also leads to claims being misdiagnosed as less complex than they in fact are.

A reduction in the number of legal matters started since the introduction of the gateway does not mean there is a reduction in legal need. PLP’s findings indicate that debt and discrimination account for the largest decreases in the number of Legal Help matter starts across all areas of law. According to the Trade Union Congress, in 2016 there were 3.2 million households (1 in 8 households) in debt, including 1.6 million in extreme debt (1 in 16 households) with a household income below £30,000.¹²⁹ These statistics suggest that those who would be eligible for legal aid are being prevented from accessing it through the gateway.

The gateway has caused a significant drop in the number of legal aid providers. LAPG reported in 2017 that the implementation of the mandatory gateway has led to contracts for legal aid being “*artificially limited*”.¹³⁰

¹²² Legal Aid Practitioners Group, Manifesto for legal aid, 2nd edition, 2017, p.27

¹²³ Ibid, p.28

¹²⁴ Ibid, p.27

¹²⁵ Bach Commission on Access to justice, 2017, p.35

¹²⁶ HC Deb 17 April 2012, vol 543, col 204.

¹²⁷ Ministry of Justice Analytical Series, ‘Civil Legal Advice mandatory gateway: Overarching research summary’, 2014 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384307/cia-gateway-research-summary.pdf

¹²⁸ The Bach Commission, ‘The Right to Justice, 2017, p.36

¹²⁹ Trades Union Congress, ‘Britain in the Red: why we need action to help over-indebted households’, 2016 <https://www.tuc.org.uk/sites/default/files/Britain-In-The-Red-2016.pdf>

¹³⁰ LAPG Manifesto, p.35

LAPG found when the gateway was introduced, the number of contracts given to providers dropped from 27 to three “overnight”.¹³¹ This caused a lacuna of local services for clients as they lost longstanding providers. Often the limitation of legal aid contracts creates what are known as ‘legal aid deserts’ in large areas across the UK. This means that vulnerable clients, who are otherwise eligible for legal aid, are unable to meet with a legal adviser due to being unable to travel, or are discouraged from doing so because of the impracticalities of the journey. Furthermore, the restriction of legal aid providers directly impacts the quality of legal aid services as providers are expected to work beyond their capacity with a fraction of the resources and/or staff.

It is clear that advice from the telephone gateway is not sufficient to ensure that access to justice is achieved, and it should not be introduced for other areas of law.

Modernisation does not guarantee quality of service

As stated above, the migration to a telephone system for debt, discrimination and special educational needs claims has not secured a sufficient quality of advice. Accessing independent legally aided advice via the gateway has been reduced, especially in the context of vulnerable people, including when they have a legitimate claim to it.

The quality of gateway advice has not been monitored, which is inherently problematic. Without regular monitoring, the MoJ is unable to consider, let alone address any shortfalls in the standard of service that may be preventing access to legal advice.

It is not providing value for money

PLP found that the cost per gateway Debt matter in 2013/14 (including gateway costs) was 110% compared to that in 2012/13. Their comparison of the cost per matter of gateway debt advice with face-to-face advice, where the case resulted in a positive outcome for the client, is about 170% more expensive than Debt advice provided by the not-for-profit sector in 2012/13, and about 100% more expensive than that provided by solicitors’ firms in the same year.¹³²

There are potential knock-on costs to the public sector. The English and Welsh Civil and Social Justice Panel Survey 2010 found that 50% of respondents eligible for legal aid reported their civil legal problem had a negative effect on their health and wellbeing.¹³³ It would be unsurprising if future research concluded that there were a strong connection between debt and ill-health given its stressful nature. The MoJ is yet to conduct research into the overall level of additional costs to public services as a result of the reforms (including the gateway), despite calls from many, including the House of Commons Justice Committee.¹³⁴

Accessing advice through technology

In our recent survey, many of our members expressed strong views that technology alone could not solve the legal aid system’s problems. This can be seen from the following responses:

- *“It simply isn’t sufficient for the government to suggest that the catastrophic impact the cuts have had can be remedied by technology.”*
- *“In so many ways we shouldn’t be quick to use technology just for technology’s sake.”*
- *“Technology can help to connect people with legal advisors and to provide information about people’s rights but it cannot solve all of the issues in access to justice - particularly as many of those who are most vulnerable are not always able to access technology effectively.”*

Technology is not a panacea for all of the legal aid system’s current problems

¹³¹ Ibid

¹³² Public Law Project, ‘Keys to the Gateway’, 2015, Chapter Eight

¹³³ National Audit Office, ‘Implementing reforms to civil legal aid’, 2014, para 1.34

¹³⁴ House of Commons Justice Committee, ‘Impact of changes to civil legal aid’, 2015

Whilst accessing short pieces of general advice¹³⁵ online can offer people useful guidance, technology does not compensate for the vast cuts made to the scope of legal aid. People are often left to find information on their own in areas of law no longer provided for by legal aid. In most cases people do not know what to look for. The CEO of Law for Life has remarked that people are *“hindered from using digital help effectively because they struggle to frame their problems in a way that enables them to search for what they need. If they do find information, they are often unable to assess its quality and veracity properly. In addition, they cannot always correctly identify whether the information they have accessed applies to the relevant jurisdiction.”*¹³⁶ In other words, technology cannot make up for people’s lack of legal understanding created by a deficit in public legal education.

Both the public and service providers are unaware of the information available online or how to locate services. This is in part because information and advice provided by the government on the internet is poorly coordinated and under-promoted. The APPG on Pro Bono found that in dealing with constituents’ legal matters, MPs did not commonly refer them to websites, predominantly because they did not know these online resources existed.¹³⁷ Consequently, access to justice is at risk because, as the Bach Commission highlights, *“the law is meaningless unless people are supported to have the knowledge to understand it and the power to enforce it.”*¹³⁸

It is difficult to find comprehensive and transparent information about legal aid eligibility especially on areas no longer within the remit of legal aid. The Children’s Society examined the Law Society database for immigration law solicitors. It found many errors, including out-of-date information about firms providing such advice, incorrect contact details and even the inclusion of firms which no longer exist. As the Children’s Society also raised, a database does not guarantee quality of advice or a firm’s capacity to take on a case.¹³⁹

Many of our members pointed out in our recent survey that the majority of our clients do not have access to technology, particularly the most vulnerable. Just 25% of people use the internet to solve legal problems.¹⁴⁰ It is clear that enforced, mandatory reliance on technology to solve legal matters would impede access to justice.

Technology is not plugging the gap in legal advice created by the LASPO reforms

LASPO resulted in an 80% reduction in civil legal aid and led to a significant number of advice agencies being closed across the UK.¹⁴¹ Third sector organisations have seen an ever-increasing demand for their services despite already working at full capacity. Whilst the Citizens Advice Bureau had 43 million visits to its website last year, it had the capacity to see to fewer than three million people in person.¹⁴² In a study of MPs surgeries, 89% of concerns raised by constituents related to legal issues.¹⁴³ In many cases MPs and caseworkers are inadequately trained on the availability of legal advice, resources and eligibility. This situation is not sustainable. Reliance on technology, third sector organisations and MPs’ surgeries cannot be treated as a substitute for vital face-to-face intervention by legal practitioners.

In conclusion, whilst the internet has the potential to be highly effective in providing initial signposting for sources of legal advice, the government must be cautious about what services it puts online in its attempt

¹³⁵ See for example Christian Weaver’s ‘The Law in 60 Seconds’ YouTube channel:

<https://www.youtube.com/channel/UJCKOjycCuKwNShDbEseAuZIA>

¹³⁶ The Bach Commission, ‘The Right to Justice, 2017, p. 42

¹³⁷ Hogan Lovells and the APPG on Pro Bono, ‘Mind the Gap’ 2017

¹³⁸ The Bach Commission, ‘The Right to Justice, 2017, p. 11

¹³⁹ The Children’s Society, ‘Cut off from Justice: the impact of excluding separated migrant children from legal aid’, August 2017, Chapter 4, p. 23

https://www.childrensociety.org.uk/sites/default/files/cut-off-from-justice_the-impact-of-excluding-separated-migrant-children-from-legal-aid.pdf

¹⁴⁰ Written statement of Law for Life in appendix 4 at p. 73 from the Bach Commission report, 2017

¹⁴¹ LawWorks, ‘Clinics Network Report 2014 – 2015’, 2015, p. 3. See also Ministry of Justice, ‘Legal Aid Statistics in England and Wales 2013-2014’, 2014, p. 19

¹⁴² APPG meeting on Legal Aid, 7 March 2018

¹⁴³ Hogan Lovells and the APPG on Pro Bono, ‘Mind the Gap,’ 2017, p.7

to cut costs. Without appropriate safeguards and consideration, an individual's inability to access a computer could infringe on their access to justice.

Other areas of technology

Registering Universal Credit claims online could be inhibiting access to justice. The government's survey on Universal Credit highlights the accessibility issues associated with digitalisation. Only 54% of respondents were able to register their claim online without help. 25% were unable to submit their claim online at all, and the remaining 21% completed the registration online with help.¹⁴⁴ Those unable to register their claim online were predominantly older people (aged 55 or older) and those with long-term health conditions.¹⁴⁵ These claimants are arguably some of the most vulnerable in society. Thus, there are concerns that those who are not able to register their Universal Credit claim online, but are eligible for legal aid, are prevented from accessing their passporting benefit.

Digitalisation does not guarantee efficiency, access to justice or value for money. An assessment of the Universal Credit service, the first major government service to be digital, makes this clear. The National Audit Office (NAO) has outlined that the Department for Work and Pensions (DWP) greatly overestimates the number of people that are able to confirm their identity online using Verify, the government's online identity verification tool. The NAO detailed that the DWP expected 90% of people to successfully use Verify, compared to the 38% that did so in practice.¹⁴⁶ It therefore takes longer for people who are desperately in need of Universal Credit to register their claim. By analogy, heavy reliance on digitalisation in the legal aid system would create barriers (and in some cases would exclude) the most vulnerable - for example those with mental or physical illnesses - from accessing legal assistance. In any case, there is no evidence that digitalisation is worth the investment of taxpayers' money. The NAO has concluded that the digital Universal Credit system "*is not value for money now, and its future value for money is unproven.*"¹⁴⁷

Recommendations

The following recommendations address ways of improving access to justice via technology and/or the detrimental impact of the LASPO reforms on legal aid lawyers and their clients.

CCMS

1. Make CCMS fit for purpose. It needs to be tailored to the need of legal aid lawyers and their clients. Improvements must be made by identifying the key issues with legal aid practitioners, then developing and implementing solutions that work well in practice.
2. Review the level of remuneration for providers completing CCMS applications. Improved financial viability of services will increase resources and training given to junior lawyers, improving the quality of the legal assistance and encouraging providers to continue legal contracts, contributing to the sustainability of the system.

The Telephone Gateway

3. Start a public information campaign promoting the telephone gateway. This must include how to access the gateway and what to expect from the process. Information leaflets could be dispensed in frequently used community spaces such as GP surgeries.

¹⁴⁴ Department for Work and Pensions, Universal Credit Full Service Survey, 2018, p.13

¹⁴⁵ Ibid, p.33

¹⁴⁶ National Audit Office, Rolling out Universal Credit, 2018, p.57

¹⁴⁷ Op cit, p.10

4. Deliver training to MPs, caseworkers and other relevant service providers on how to use the gateway. People often turn to these people when they have no idea where else to seek advice. Appropriate training will facilitate better use of the gateway.
5. Remove the mandatory requirement for debt, special educational needs and discrimination law to be accessed through the telephone gateway. There should be more flexibility to refer people for face-to-face advice, particularly vulnerable clients.
6. Commission an independent review into the decrease in legal matter starts. This will ensure that any issues are addressed so that the most in need are able to access legal aid, and therefore justice.
7. Review the limitation of legal aid providers in areas of law covered by the gateway. There should not be large areas in the UK without local services.
8. Conduct regular reviews of the Operator Service. This will provide consistency and certainty that difficult, unfamiliar or poorly presented cases are not misconstrued as not requiring legal advice.
9. Review the overall cost of the gateway. The government must review whether the best possible service is being delivered for the best value for money.

Accessing advice through technology

10. Public legal education must be made a priority. Initiatives to improve people's legal understanding should receive funding.
11. Online advice needs to be better coordinated and better promoted. Access to justice is inhibited if people are unaware of how to enforce their legal aid rights.
12. Create a comprehensive online database detailing what legal advice is available. The database should include:
 - (i) areas of law each provider offers;
 - (ii) what services they offer;
 - (iii) any eligibility requirements for assistance; and
 - (iv) the provider's geographic location.

This database must be accessible to both the public and service providers. It must be maintained by the Legal Aid Agency and regularly updated.

13. Reinstate legal aid for early advice. This decreases the risk of legal problems escalating and therefore becoming more costly.

Other

14. Review whether Universal Credit passporting is benefiting those who most need it. Analysis is needed of whether the Universal Credit system and passporting for legal aid is hindering or helping access to legal advice.
15. Ensure a research-led approach is adopted before services are completely digitalised. Digital services must be fit for purpose before they are implemented.

8. Conclusion

YLAL concludes this submission by setting out our analysis of the impact of LASPO in comparison to the stated aims of the legislation, within which our key proposals for reform will be summarised.

a) Discouraging unnecessary and adversarial litigation at public expense

The first of LASPO's stated aims was to reduce the number of "unnecessary" cases funded at public expense. Whilst it is the case that significantly less publicly funded litigation has been conducted since the implementation of LASPO, this decrease has not occurred simply because people are not bringing unnecessary cases post-LASPO. The Ministerial Foreword to the government response to the consultation asserted that *"legal aid too often encourages people to bring their problems before courts, even when they are not the right place to provide good solutions, and sometimes for litigation that people paying from their own pocket would not have pursued."* YLAL does not agree that this is the case, nor are we aware of any research which supports this assertion.

The Bach Commission report states that legal aid provision is now skewed towards the use of the courts system, regardless of the fact that it would be cheaper to resolve disputes at an earlier stage. Restrictions to scope mean that, rather than dealing with issues as soon as they arise, individuals must wait until they reach crisis point in order to obtain legal advice and representation. For example, early legal advice for a welfare benefits matter may prevent an individual from incurring rent arrears, leading to other debt issues, potentially going so far as to become repossession proceedings.

YLAL would like to draw the MoJ's attention to our recommendations that (1) the scope of the areas of law which may be funded under the legal aid system should be widened and (2) that early legal advice should be reintroduced to ensure that issues may be solved prior to a court hearing becoming necessary. YLAL believes that, in principle, legal aid should be available for all areas of law which relate to individual rights. However, in the event that the MoJ does not accept that this is possible in the short-term, we propose that the key areas of law which should be brought back into the scope of legal aid are those in relation to family, welfare benefits, employment and housing law.

b) Targeting legal aid to those who need it most

This aim is two-fold and the impact of the objective has been seen through reforms to both the means test for determining financial eligibility, and the scope of areas in which legal aid is available. For example, removing private family law from scope unless the person is a victim of domestic violence and/or abuse.

In terms of the means test, this objective was intended to ensure that those who could pay their own legal fees do so. However, as set out in the means test and financial eligibility section of this submission, this has not been the case. Due to a combination of issues - some inherent to the means test as provided for in LASPO, and others which have become more concerning over time - the current means test is not fit for purpose. It neither succeeds at ensuring that those who are not able to afford private lawyers are able to access publicly funded legal advice, nor does it involve a reasonable calculation of a person's means. For example, the monthly disposable income limit is currently not index-linked and therefore these limits have not increased in line with inflation.

YLAL has set out a series of recommendations for revolutionising the current means test to ensure that it is fit for purpose. These recommendations include removing the cap on housing costs which can be disregarded, providing an allowance which can be deducted for utility bills, food costs and the repayment of debts, allowing the Legal Aid Agency some discretion in the assessment of the applicant's means, which

could be exercised where reasonable to do so, and the removal of the 'innocence tax' which means that privately paying defendants who successfully defend against the state's attempt to prosecute them are only able to reclaim the fees they have paid at legal aid rates.

c) Making substantial savings to the cost of the scheme

The government estimated that the measures implemented by LASPO would deliver a saving of £350 million by 2014/15. Legal aid spending is now £950 million less than it was in 2010. On the face of it, LASPO has succeeded in achieving the government's objective of making substantial savings to the cost of the scheme. However, the knock-on effect of these savings is that there has been such a detrimental impact upon access to justice that having achieved the objective should not be viewed as a positive.

The savings to the MoJ's budget have been substantial, but this has also resulted in increased costs elsewhere, across other government departments, other services and sectors.. This assertion has been supported by reports from various organisations and committees, including the National Audit Office, Citizens Advice, the House of Commons Justice Committee, the Law Commission and the All Party Parliamentary Group on Pro Bono. The various research and reports compiled by these organisations have demonstrated the costs-shifting and knock-on costs impact on a variety of other public services including General Practitioners, MP surgeries and the NHS.

Putting aside the false economy of the cuts to the legal aid budget, on a fundamental level, the reductions in the legal aid budget have had a corresponding reduction in access to justice. LASPO has effectively created a two-tier justice system where outcomes depend more on the wealth of the individual than justice and the rule of law.

d) Delivering better value for money to the taxpayer

One example of the way in which LASPO attempted to provide better value for money was through the telephone gateway service, which was set up to deal with matters relating to debt, discrimination and special educational needs. This has not only reduced the quality of the advice and service being provided, but has also not provided value for money. For example, the comparison of the costs of gateway advice with face-to-face advice, shows the former is 170% more expensive than debt advice provided by the not-for-profit sector.

Conclusion

Whilst it is undeniable that some of these aims – for example, making financial savings – have been achieved, YLAL believes that the overall impact of LASPO upon the justice system and access to justice in England and Wales has been hugely detrimental and urges the government to take urgent steps to repair our justice system before it is too late.

All of the issues we have identified in this submission both feed into the crisis facing access to justice and cause huge obstacles in access to the profession for aspiring and junior legal aid lawyers.

We are grateful to the MoJ for considering our submission. We look forward to working with the MoJ to improve access to justice and to ensure that future generations of legal aid lawyers are able to fulfil their vital public service.

9. Credits

YLAL is very grateful for its members' contributions to this report, including:

Andrew Barlow
Alice Beech
Lucie Boase
Oliver Carter
Tudor Etchells
Abigail Grace
Claire Hall
Mark Hylands
Emily McFadden
Katie McFadden
Elena Michaels
Katy Moulton
Tara Mulcair
Ollie Persey
Cleo Prevost
Natalie Wilkins

September 2018

Young Legal Aid Lawyers

<http://www.younglegalaidlawyers.org>

ylalinfo@gmail.com

[@YLALawyers](#)