



Civil Justice Council response to Justice Committee inquiry:

Impact of changes to civil legal aid under the Legal Aid, Sentencing & Punishment of Offenders (LASPO) Act 2012

April 2014

Introductory remarks

The Civil Justice Council (CJC) is a statutory body designed to keep an oversight of the civil justice system, and to consider ways of making it more “accessible, fair and efficient”.¹ The Council’s membership is widely drawn from judges, lawyers, and representatives from all aspects of civil justice. This response has been particularly informed by those working in front-line legal roles. The CJC’s focus means that we will not be commenting on the family justice aspects of the reforms.

While there have been successive reductions in the scope and eligibility for civil legal aid over a long period, the April 2013 changes have had a significant adverse impact, particularly when taken in the context of wider reforms that have affected people’s access to justice, such as increased court fees and judicial review reforms.

As the answers to the individual questions illustrate, there are areas of real concern in terms of people’s ability to seek justice, and the support available to the most vulnerable in society.

We welcome this Justice Committee inquiry as an opportunity to objectively assess how the reforms are working and the impact they are having on access to justice and saving public funds. The inquiry should help establish how many people are no longer receiving legal advice or representation, and the consequences of this for them, society as a whole and the public purse. The lack of firm data and statistics on legal aid and the numbers of litigants in person pursuing claims since April 2013 makes it hard to pinpoint with accuracy the exact extent of the deleterious effect of the reforms.

The CJC has sought to improve services and resources for litigants in person in the new landscape. This has been done in recognition of the wider economic imperative to reduce public spending, but the Committee’s inquiry will help to measure whether the reforms have gone too far, as presently drawn, so as to affect the interests of justice and costs efficiency.

¹ Civil Procedure Act 1997 Section 6 (3)(b)

Question 1. What have been the overall effects of the LASPO changes on access to justice? Are there any particular areas of law or categories of potential litigants which have seen particularly pronounced effects?

This depends on the definition of access to justice, as the reforms mean that while there is theoretical access to justice in that those who can afford it are free to go to court, it is increasingly difficult for those without substantial means to get the legal advice and representation that enables them to pursue or defend claims.

Clearly this applies directly in relation to the areas of civil legal aid which LASPO took out of funding scope, such as clinical negligence, most housing cases, most debt matters and many welfare benefits cases.

However, there has been a huge wider effect in terms of the reductions in funding for legal aid providers and experts, further reductions in individual eligibility and the availability of alternative resources. Demand for the advice and pro bono sectors has increased dramatically, but it has come at a time when funding for the advice sector is being squeezed from all directions – local authority grants as well as legal aid, resulting in Law Centre closures. The pro bono sector is also hard pressed – the very practitioners who have seen their rates and work reduced are the ones with the expertise for whom demand is strongest. Many providers have simply walked away from legal aid services due to low rates and onerous contract requirements.

A concern is that in some cases legal aid will not be provided until proceedings have got to court stage (and are more cost effective for providers) with higher costs - including for opposing parties who can often be public bodies - when funded early advice may have prevented the need.

In terms of particular areas of law, the Low Commission report² has covered the field of *social welfare* extensively, and we simply note that a lack of legal aid in such benefits cases can store up further problems e.g. homelessness, debt which the state has to address and fund at a later stage.

On *clinical negligence* cases the CJC has concerns as many cases take time and expense to prepare and assess – there is not the same culture of pro bono among clinical experts as lawyers, and the number of cases in this field should be monitored.

The impact on *immigration* (non-asylum) cases has been to see advice offered reduce dramatically. The 50% increase in requests for assistance to the Bar pro Bono Unit across all legal areas is illustrative; the increase is greater in the areas of immigration, housing, employment and family law.

Housing cases are theoretically still in scope, although only where accommodation is at risk. Health and safety concerns arise where advice on disrepair cases are not being funded, and housing benefit issues are now specifically out of scope which complicates rent arrears cases – practitioners see work done on issues intertwined with housing benefit marked down as it is out of scope, hampering their incentive or ability to do the work.

The problems are compounded in all areas by the change of policy on borderline cases (those assessed as having a reasonable but not likely prospect of being successful) across all areas – these are no longer getting legal aid despite having some recognised merit.

² <http://www.lowcommission.org.uk/>

The position is such that the default assumption of many is that they think they would not qualify for legal aid, so do not bother applying or are put off by the high barriers. Some are helped later, but unknown numbers are simply falling out of the system.

Concerns have also been expressed about the new Legal Aid Agency, and the tougher approach it is adopting in relation to processing claims from providers. Any delay in payments creates particular problems for providers having to manage their cash flow within already very tight margins. It is understood that diligence is required with public money, but processes on establishing means and contract monitoring risk those needing emergency aid e.g. housing repossession may not be helped in time.

Question 2 – What are the identifiable trends in overall numbers of legally-aided civil law cases being brought since April 2013 in comparison with previous periods, and what are the reasons for those trends?

It is quite difficult to access post-April figures from publicly accessible sources– there are no quarterly legal aid figures on the Government website, only annual figures for 2012/13, immediately prior to LASPO taking effect. The last quarterly figures available for court cases generally (as checked at 1 April 2014) end in December 2012 ahead of the LASPO's introduction.

In the absence of official data, the Committee may wish to contact academics who have sought to research this area, such as this study from a Warwick University doctoral thesis academic: <http://downloads.illegal.org.uk/2013/SOSReport.pdf>.

Clearly the trends when published will show dramatic changes in those areas no longer in scope – clinical negligence, most debt and housing cases, immigration etc. For example, 72,000 people received welfare benefits advice and 62,000 debt assistance in 2012/13 which will undoubtedly see dramatic falls. Our understanding from anecdotal sources is that mental health cases are likely to be the only category showing an increase in 2013/14.

As well as some legal providers walking away from the scheme, we understand some of those with contracts are not using these to the full, as the contract is hard to run, and time spent interviewing potential clients who turn out not to be in scope is not funded.

Question 3 – Have the LASPO changes led to the predicted reductions in the legal aid budget? Has any evidence come to light of cost-shifting or cost escalation as a result of the changes?

Clearly major savings will have resulted, although there are also certain to have been costs to the state arising from the non-availability of professional legal advice.

The Law Society commissioned report by Graham Cookson of Kings College London is a detailed analysis of the consequences of successive legal aid reforms: www.lawsociety.org.uk/representation/research-trends/research-publications/documents/unintended-consequence-of-legal-aid-reforms.

The Government estimated savings of £240million arising from these reforms – the KCL study estimated costs of implementing the reforms or to other Government departments at £139million, almost 60% of the total. The Committee may wish to

establish the point in the implementation process at which the government plans to assess and make a judgement on the degree to which those estimated savings have been achieved - and, if not, to consider bringing some areas of law back into the scope of legal aid under the powers granted to the Lord Chancellor by section 9(2) of the Act.

Question 4 – What effects have the LASPO changes had on (a) legal practitioners and (b) not-for-profit providers of legal advice and assistance?

The reforms have had a significant impact on both sectors. For some practitioners it has been the impetus to move away from legal aid work altogether, and for some practices the effects will have been to jeopardize their business. The Solicitors Regulation Authority has identified reliance on legal aid funding as a risk factor. The effect of the reforms may be to reduce those specializing in certain areas of law, to the detriment of the system generally, and to future judicial recruitment – an example on this in civil is social welfare law, but the effects are likely to be more acute in family.

The effects of LASPO have been significant on the not-for-profit sector – agencies are reporting large rises in demand for their services (we know they will be submitting their own responses, so statistics not supplied here) as people are turned away from public funded resources, or because of the prevailing climate where people assume they will not qualify for legal aid. However, some Citizen's advice Bureaux report reduced demand from the duty schemes for housing possession cases as people struggle to get to court to attend hearings.

The increased demand is coming at a time when there is great pressure on funding for the not-for-profit sector, as local authorities seek to reduce their own budgets.

The CJC is aware of initiatives going on across the advice sector to address these substantial challenges. Health budgets have been a source of funding for advice services in the past with excellent examples of partnerships such as the Sheffield Mental Health CAB. The Centre for Mental Health recently published a report on the business case for mental health funding for welfare advice - see www.centreformentalhealth.org.uk/pdfs/Welfare_advice_MH_services.pdf Government can usefully help the advice sector to be more systematically included in health spending. Schemes supporting people with complex problems also need to include a legal advice component. Coventry Law Centre has developed an effective role within the Troubled Families programme in that city. Evaluation of the impact of this work, being carried out by the University of Warwick, will be published shortly. Rochdale Law Centre, Islington Law Centre, Community Advice Law Service in Leicester and others have established fee charging entities for the first time, particularly in the categories of immigration and employment. Harrow Law Centre and Law Centres Network are working on how to attract more EU funds for legal support. This will not replace funding for face-to-face advice, but can help with supporting complementary services such as public legal education. Interesting work is underway to help advice agencies and their partners to intervene earlier when legal issues are simpler and cheaper to resolve. In one example, Law for Life is working with Community Links to train local residents in becoming advice champions. AdviceUK has pioneered a systems thinking approach to understanding and addressing the demand for legal advice. This uncovers just how much need for legal advice is caused by issues such as poor decision making in public agencies in the DWP. In Portsmouth, AdviceUK has helped the council and local advice agencies to reorganise advice services to try and address this. The challenge is to get other

areas to adopt this approach. The organisation Legal Voice organises regular conferences to share lessons from these, and other, experiments.

The government deserves recognition for the support provided to the advice sector through the Advice Services Transition Fund being administered (and matched) by the Big Lottery Fund. This £67 million programme, funding work in over 200 local areas, is enabling some excellent work with a close focus on successful 'transition'; however there are concerns that much of the funding inevitably is propping up existing services and so the funding cliff edge that local advice services face has just been postponed to 2015. It is highly likely that the sector will need more time, support and knowledge about what works at that stage, otherwise there will be further closures of services and the expansion of advice deserts. The Law Commission brought together good thinking and practical ideas which the CJC urges government at national and local level to heed.

Question 5 – What effects have the LASPO changes had on the number of cases involving litigants-in-person, and therefore on the operation of the courts? What steps have been taken by the judiciary, the legal profession, courts administration and others to mitigate any adverse effects and how effective have those steps been?

No hard statistical data on the number of litigants-in-persons (LiPs) prior to April 2013 is available, but with the reduction in legal aid it seems a safe assumption that numbers have risen, even if some people have dropped cases. Reductions in court resources and reduced opening times for court counters also mean that there is less opportunity for seeking advice on non-legal aspects, such as how to fill in court forms, have a face-to-face explanation of the process, costs etc.

The effects on the courts have been to increase the numbers without representation, with a presumed larger increase in higher value and more complex cases. Judges have to 'step into the arena' to help cases along, but not to the extent of showing bias to represented parties. The CJC feels that there are two outcomes to this; firstly many cases are taking longer as everything has to be explained, or some cases will be over more quickly, as LiPs have not brought the right papers or prepared the correct court bundle and lose their case by omission or cannot cope with the process, or do not bring or defend the case at all.

The judiciary, legal profession and courts staff have risen to this challenge well. Each will want to set out their initiatives themselves, this response will concentrate on the CJC's own activities. It is worth noting, however, that while the legal professions have striven to increase the pro bono services they provide, they will not be able to fill the shortfall in free legal advice, meaning there are no readily apparent places for those without representation to turn.

A working group was set up under the Chairmanship of Robin Knowles QC in advance of the reforms and in anticipation of the LASPO reforms. The group published a comprehensive report ([http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fCJC+papers%2fCivil+Justice+Council+-+Report+on+Access+to+Justice+for+Litigants+in+Person+\(or+self-represented+lit\)](http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fCJC+papers%2fCivil+Justice+Council+-+Report+on+Access+to+Justice+for+Litigants+in+Person+(or+self-represented+lit))) in November 2011, which set out a series of short, medium and long term recommendations to improve support and resources for LiPs given reductions in public funding for advice and representation. A number of draft guidance notes were

included, and the CJC has striven to help with the co-ordination of public and voluntary sector efforts to improve services and resource material.

Regular implementation updates have been prepared (see **link to most recent update here**)– good progress and practice have occurred in some areas, in many others there remains a great deal to do.

Two national forums have been held – in November 2012 and 2013, with a third planned for November 2014, to review progress, compare experience and share good practice, as well as consider priorities for action. Regional forums have been held in a number of locations, with more to come and the CJC is working with the judiciary to encourage judges to take a lead on setting up local groups to address the needs of LiPs and how they are being met.

The CJC has also produced its own guide to small claims for LiPs (<http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fOther+papers%2fSmall+Claims+Guide+for+web+FINAL.pdf>) which is available online and printed copies have been distributed to courts and advice agencies throughout England and Wales. The CJC has worked constructively with the Government and courts administration to improve funding for information resources. Following a CJC recommendation, the legal professional bodies are working together to frame guidance for lawyers on their conduct and duties to the court when their opponent is a litigant in person.

It is difficult to assess how effective this work has been, and certainly there is a need for the Government to promote and lead on public legal education, as it does on health education.

Question 6 – What effects have the LASPO changes had on the take-up of mediation services and other alternative dispute resolution services, and what are the reasons for those effects?

Our understanding is that the take-up of mediation in family cases has dropped sharply, but that is not the CJC's focus, but on the civil side the same principle – that without legal advice, mediation may not be considered as an option to resolve disputes – applies. The exception is the small claims mediation service, which is publicly funded and offers an excellent service for disputes below £10,000 in value.

One fear in the post-LASPO world relates to mediation, and is two-fold – first, that unrepresented people are agreeing to settle when they could have won greater damages via mediation or arbitration services e.g. clinical negligence claims and second that they find themselves in an unequal position during mediation, again as the result of a lack of legal advice, and settle for less than they might – or that the mediation fails as a result.

The CJC is about to commence some exploratory work on opportunities offered by Online Dispute Resolution (ODR) to resolve low value cases, led by Professor Richard Susskind.

Question 7 – What is your view on the quality and usefulness of the available information and advice from all sources to potential litigants on civil legal aid? Do you have any comments on the operation of the mandatory telephone gateway service for people accessing advice on certain matters?

The CJC working group's 2011 report set out in Chapter 12 an assessment of the level of provision on information for LiPs and made a number of recommendations. Since this time a number of improvements have been made with some excellent material put online by (amongst many others) AdviceNow, the Royal Courts of Justice Advice Bureau and the Bar Council. There has also been positive engagement with the Government and HM Courts Service regarding information resources, and it is hoped that funding will be provided to make good on this. There is also a need for funding to enable voluntary bodies to keep their advice material up-to-date. There is much to do in terms of providing people with accessible advice on how to proceed with claims, what alternatives to going to court can be considered, the costs risks, the court process, ADR, fees involved etc,

While the CJC supports material being accessible online it needs to be recognised that for some of those most in need of assistance such resources are not available, and face-to-face advice and support will always play an important role. Online resources supplement such efforts rather than acting as a substitute.

In relation to the telephone gateway service we are not aware of statistics on the take-up and client feedback for the service, which we suggest ought to be published as a key performance indicator. The lack of data makes it difficult to comment, although the Committee can usefully talk to other help-lines that calls will be referred on to by the gateway, such as the Public Law Project (<http://www.publiclawproject.org.uk/civil-legal-aid-advice-line>). An article in the Law Society Gazette in September 2013 (<http://www.lawgazette.co.uk/practice/keeping-gateway-to-debt-advice-open/5037675.article>) by a Law Works caseworker raised concerns about the way the service operates from a consumers' perspective – although it should be noted that for a variety of reasons Law Works has since taken the decision to close its helpline.

Another point to make is the experience of advice agencies that telephone services are not suitable to some people who need advice who want more personal contact.

Professor Roger Smith undertook a survey of telephone hotlines, which reached some broad conclusions that may assist the Committee (<http://www.rogersmith.info/telephone-legal-advice-hotlines-nine-tentative-conclusions/>). These included that such helplines are mainly used by the better educated with fairly straightforward problems, they are less suited to complex issues.

Question 8 – To what extent are victims of domestic violence able to satisfy the eligibility and evidential requirements for a successful legal aid application?

This question primarily concerns family justice and we have not addressed it.

Question 9 – Is the exceptional cases funding operating effectively?

The CJC will be discussing the operation of the Code at its meeting on 1st May, as a result of concerns expressed by members.

The understanding has been that the scheme was designed to be a safeguard for people without means and meritorious cases to secure public funding to ensure that In fact, the scheme was described as 'safety net' during the LASPO debates, for

example at Lords Committee stage (see www.theyworkforyou.com/lords/?id=2011-12-20a.1687.7#g1734.0), again at third reading (www.theyworkforyou.com/lords/?id=2012-03-27a.1252.9#g1302.3) and later (just a week before the Bill got Royal Assent) (see www.theyworkforyou.com/lords/?id=2012-03-27a.1252.9#g1302.3)

the UK complies with the European Convention on Human rights and EU law.

However, concerns have arisen as to whether the operation of the scheme in practice is fulfilling the original aims and complying with section 10 of LASPO.

Applications have to be made in writing to the Legal Aid Agency (LAA) within the constraints of Section 10 (3) of LASPO, and the Government has published guidance on its operation. For legal representatives preparation of the application (and merit/means documentation) is at risk in the sense that if the application is unsuccessful they receive no payment for it or for any urgent work done on the case pending the outcome of the application. The process is regarded as onerous by lawyers who have completed it, sourcing evidence (e.g. from human rights and European case law) and almost inaccessible for applicants in person, whose applications are filtered through an LAA 'preliminary view'. This has undoubtedly had the effect of deterring many solicitors from undertaking the onerous task of making an exceptional funding application, regardless of the strength of the case or the vulnerability of the applicant.

The LAA published statistics on 13 March 2014 on applications in the first nine months of the scheme (to 31 December 2013). 1012 applications for non-inquest cases were made, only 14 grants have resulted, meaning the success rate is only 1.3%, which itself suggests the scheme is very tightly drawn. The Public Law Project which has experienced lawyers advising on the process has submitted 97 applications only two of which have succeeded. The Ministry of Justice told stakeholders at a meeting in February 2013 that it expected 5-7000 applications to be made per annum, another suggestion the process is overly burdensome and forbidding.

Another problem with the scheme is that there is no procedure catering for urgent cases – the scheme's own guidance says that there is no guarantee applications will be determined before a hearing day, and the aim is for cases to be determined within 20 working days from the receipt of a fully completed application, with 10 working days for internal reviews of refused applications. For some cases therefore e.g. deportation appeals the scheme is of no practical use.

A further concern is that - despite their vulnerability and inability to conduct litigation on their own - there is no exemption from the need to apply for exceptional funding or from the rule that unsuccessful exceptional funding applications will not be paid, for children or people who have been assessed as lacking the capacity.

Finally, to the extent that funding reserved for exceptional funding is not used, there is real force in the suggestion that it might be reinvested to address some of the problems being encountered in accessing justice, for example by making a contribution to some of the recommendations made by the Low Commission Report.