



December 2018

**POST-IMPLEMENTATION REVIEW OF PART 1 OF THE  
LEGAL AID, SENTENCING & PUNISHMENT OF OFFENDERS (LASPO) ACT 2012**

**Introductory Remarks**

Part 1 of the LASPO Act 2012 introduced a series of reforms to the civil justice system that were prompted by economic considerations, and it is unsurprising that they have had a major adverse impact on access to justice.

The Civil Justice Council (CJC) understands the context for this review is a financial outlook on public expenditure on the justice system which is at least as unpromising as applied at the time of the LASPO reforms. The CJC has always sought to respond pragmatically, and in particular to concentrate on improving resources and services for litigants in person in the post-LASPO landscape. This submission is in that same constructive spirit. Whilst financial pressures are understood, access to justice is of course a constitutional right. There are access to justice needs that have to be met somehow, and this post-implementation review offers an opportunity for some amendment or modification of the reforms.

This submission is deliberately high level and in summary form – this is a vast topic on which submissions and evidence-based analysis will be provided by expert practitioners in greater detail than the CJC could provide. CJC representatives have met with Ministry of Justice officials to make points based on this submission, and will continue to encourage and promote services and resources for unrepresented parties in civil disputes.

The remainder of the submission follows the Ministry's headings for its review.

**1. Scope on people, providers and the justice system**

In terms of particular areas of law, the Low Commission report<sup>1</sup> 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 and costs to the taxpayer.

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 the 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.

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<sup>1</sup> <http://www.lowcommission.org.uk/>

*Housing* cases are theoretically still in scope, although only where accommodation is at risk. This can mean that funding is only available for that part of a case (applying for injunctive relief) and not the damages part – clients would need mixed funding, meaning far fewer disrepair cases are pursued. As so many disrepair cases were successful claims pre-LASPO they cost the legal aid budget little.

Housing benefit issues are now specifically out of scope which complicates rent arrears cases. With debt advice also out of scope, critical early advice is lost. With mandatory grounds for possession (for private and housing association tenants) if rent arrears are two months/8 weeks it can mean that it is too late to defend a claim and homes are lost. Housing practitioners therefore find it challenging to assist with housing benefit or debt problems not only at an early stage, but also after when claims for possession have been issued. Where housing benefit problems are central to the existence of rent arrears, legal aid does not cover any work done to resolve the housing benefit issues - even if the work would remove or reduce the arrears to provide a defence to the claim. Work done under a legal aid certificate granted to defend a claim for possession relating to housing benefits, would be “marked down” (i.e. no payment would be made for the work). Many providers therefore either undertake the work for no payment or not at all. This prevents them from giving the assistance needed to avoid a person losing their home.

The problems are compounded in all areas by the LASPO’s 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.

Practitioners also cite the Legal Aid Agency’s decision-making as a factor in reducing scope. The latest LAA statistics<sup>2</sup> show that over half (53%) of civil representation funding decisions are successfully appealed.

The CJC thinks there is an economic case, in overall public expenditure terms, for increased public funding for early legal advice. There are interesting case studies that would bear further examination, such as the UCL legal advice clinic established at a GP surgery in Newham.

There is also value in considering legal aid in the wider context of understanding the drivers of demand for legal advice, especially where these are the result of preventable errors elsewhere in the system – from benefits administration to systemic issues with public body decision making.

## **2. The exceptional funding scheme**

The Government’s expectations pre-LASPO were that around 6,500 cases would be funded annually by the Exceptional Case Funding (ECF) scheme. In the first year of its operation 70 cases were funded (4.6% of applications). Following a review of the scheme (in response to a Court of Appeal judgment) the numbers of cases funded has increased – in 2017/18 1,420 grants were made, 54% of applicants<sup>3</sup>.

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<sup>2</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/720647/legal-aid-statistics-bulletin-jan-mar-2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720647/legal-aid-statistics-bulletin-jan-mar-2018.pdf)

<sup>3</sup> *Ibid.*

The Public Law Project has undertaken extensive work and research on the ECF and its briefing paper<sup>4</sup> offers a detailed analysis of the operation of the scheme and ways in which it could be reformed to improve accessibility.

The CJC believes that such reforms would help to alleviate some of the most acute cases involving those who the LASPO reforms left out of scope or eligibility, and would enable the ECF to play the larger role that Parliament would have envisaged for it.

The CJC believes a more creative use of the fund would benefit the system enormously – for example to include new scope for the fund to be used to finance test cases that affect many claimants/defendants, or in response to supporting families affected by major public incidents. This would require a reconfiguring of the existing scheme, but the post-implementation review offers a perfect opportunity for that fresh analysis and approach.

### **3. Eligibility of individuals**

In addition to the reduction in scope introduced by LASPO, the legislation reduced eligibility for those seeking legal aid in terms of merit and means testing. The Government consulted last year on amending aspects of the eligibility for legal aid, and the outcome is awaited. The opportunity was missed to review the current financial thresholds, which were set in 2012 and should, at a minimum, be revised to take account of inflation.

A recent report by the Joint Committee on Human Rights reported<sup>5</sup> that in 2015 the proportion of the population eligible to receive legal aid was 25%, compared to 70% in Scotland. Further, a recent report commissioned by the Law Society finds that even where individuals are de facto eligible, contribution levels are in many cases practically unaffordable to people on low incomes.<sup>6</sup>

The remarks we make in relation to scope and exceptional funding apply under this heading too, in terms of the value and importance of finding ways for more people to access early legal advice and in important cases representation.

Some of the changes in regulations - such as introducing a capital test for those on means tested benefits – have created more work for providers and the LAA (and thus more cost) when most of the clients on passporting benefits are eligible. The level of evidence needed for vulnerable clients, including e.g. children in care, involves a lot of evidence gathering and checking for people who are almost certainly eligible and could be passported, thereby saving the cost of gathering and checking the evidence of means.

### **4. Remuneration of recipients and providers of legal aid**

The LASPO reforms have had a huge wider effect in terms of the reductions in funding for legal aid providers and experts, 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, leading to reductions

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<sup>4</sup> <https://publiclawproject.org.uk/wp-content/uploads/2018/05/Exceptional-Case-Funding-Briefing.pdf>

<sup>5</sup> [https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/66906.htm#\\_idTextAnchor008](https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/66906.htm#_idTextAnchor008).

<sup>6</sup> “Priced out of Justice: Means testing legal aid and making ends meet” Donald Hirsch March 2018

in levels of services and also closures of Law Centres and advice agencies resulting in increasingly well documented advice deserts.<sup>7</sup>

These sustainability challenges for the provider base matter, especially at a time when citizen demand for support is increasing, and when ensuring that social welfare legal needs can be identified and resolved at the earliest opportunity makes such a significant contribution to achieving wider public policy goals. The provider base is still shrinking; numbers of providers and matter starts are still reducing year-on-year.

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. The sector has responded with innovation and increased effort, but is in danger of being overwhelmed. Those in the frontline report turning away the majority of those seeking help, which begs the question of what is happening to these people, and illustrates how difficult it is to capture meaningful data for this review.

Many providers have simply walked away from legal aid services due to low rates and onerous contract requirements. As noted above, the Law Society’s review of ‘advice deserts’ found that for housing cases nearly a third of areas in England and Wales had one or no legal aid providers with Shropshire and Suffolk having none. A major concern is not just the capacity of providers, but also the demographics – many of the experts in this field will be retiring in the next 5 years, and while the Legal Education Foundation’s Justice First Fellowship has funded 68 young lawyer training contracts in social welfare law this needs a more sustained approach from Government. There is a real risk of advice deserts expanding rapidly outside all but the largest conurbations.

Providers also cite the heavy burden of bureaucracy imposed in legal aid funding systems. Clearly processes are required for the use of public funds, but the sense is that the balance is not right, particularly for cases requiring urgent legal intervention.

Experience in the period since LASPO was implemented shows that a relatively small resource invested to support the advice and pro bono sectors can go a very long way in terms of preserving or creating services. Greater investment in early legal advice would help make legal aid provision more viable for practitioners.

## **5. Encouraging the use of ADR and accessing alternative advice**

The LASPO reforms have had a dramatically adverse effect on the use of mediation in family cases, and it follows that the absence of early legal advice means that parties in civil disputes are less likely to have the option and benefits of ADR explained to them. This means they may be fighting a case they should be seeking to settle, or equally some unrepresented parties may be settling for low sums when damages via ADR or trial may have been much higher.

However, the small claims mediation service has provided – for those able to access it in time – an excellent way of resolving disputes in a timely and economic manner. The Civil Money Claims Online service has enormous potential for online dispute resolution (ODR), but will require investment and commitment. The CJC recommended the widespread use of ODR in its major report<sup>8</sup> on the topic, and awaits details of the proposals with interest.

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<sup>7</sup> <http://www.lawsociety.org.uk/Policy-campaigns/Campaigns/Access-to-justice/end-legal-aid-deserts/> AND <https://www.refugee-action.org.uk/wp-content/uploads/2018/07/Access-to-Justice-July-18-1.pdf>

<sup>8</sup> <https://www.judiciary.uk/reviews/online-dispute-resolution/>

The CJC is about to publish a comprehensive report on the future use of ADR in civil justice which will be of interest to the review team.

In terms of accessing alternative advice, we have addressed this issue above.

#### **6. Remuneration of expert witnesses**

The CJC lacks statistical evidence on the impact of the legislation. Clearly, reductions in experts' rates (and in the scope of civil legal aid) will logically mean that courts will have access to less evidence from leading experts to the detriment of the interests of justice.