



Evidence to the Bach Commission on Access to Justice

Presented by the Law Centres Network

“Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.” [Thucydides, History of the Peloponnesian War, 5.89]

The current state of access to justice

1. *Please provide us with your name, contact details, and the name of your organisation and your role in it (if applicable).*

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2. *In a sentence, what are your biggest concerns about the state of access to justice? Please provide up to three answers.*

- The most vulnerable people are not being adequately helped to access legal assistance to help them, and the system was so badly cut that it is crumbling from within.
- Access to appeal and redress is restricted, meaning that public authorities, landlords and employers can act with impunity while people in poverty are disadvantaged further by lack of access to justice.
- With no agreement on a basic standard of access to justice – nor a commitment to provision at least parts of it from the public purse – the current predicament is set to deteriorate further.

3. *Please outline in more detail the way in which your/your organisation’s work intersects with the question of access to justice, and the way in which current policy enables and undermines access to justice.*

Law Centres are a network of 44 not-for-profit legal practices across the UK. They employ salaried lawyers who are experts in social welfare law, including the areas of debt, housing, employment, social security entitlements, immigration and discrimination. Their legal services are primarily at the specialist end of the early problem resolution spectrum – which also includes legal education and capacity building, non-legal support, and assisted information (also known as ‘generalist’ advice). Being legal practices, Law Centres’ services also encompass the formal justice system with casework, case preparation and representation at court and through the courts – in ways that many other advice agencies cannot. Along with

legal assistance to individuals and groups, Law Centres aim to affect policy and law reform, in order to improve faulty systems rather than simply helping people cope with their adverse effects.

We find that current government policy acts in effect as a hindrance to access to justice. The policy is inconsistent and changes repeatedly, and the effect of changes is little understood and even less remediated. It is ill-informed, now even more so than three years ago, being the product of tendentious use of evidence that is often patchy and out of date.¹ Access to justice policy lacks a clear statement of its purpose, a coherent, systemic vision, or a firm commitment to a basic standard of provision and its resourcing. Correspondingly, the system of access to justice reflects a jaundiced view of people and citizens – especially those in disadvantage – and the idea of their equal standing before the law. Even within the confines of current fiscal restraint, the civil legal aid budget is miserly and is meted out reluctantly to prop up an inefficient system that can be fiendishly difficult to access. Complementary services to legal aid are still a patchwork and insufficient for meeting widespread need.

In detail:

The biggest impact of LASPO has been the devastation of local legal and advice ecologies through the removal of funding for their essential services in social welfare law. Particularly hard hit was the early and preventative work used to nip problems in the bud. Since LASPO civil legal aid now backloads legal assistance to later stages when problems have already escalated, causing avoidable suffering for clients and greater expense to the state. As evidence, the only indicator that the Ministry of Justice reports on for civil legal aid in its annual report – average cost per case – has gone up.²

Law Centres have seen increasing *difficulties in enforcing the legal rights of their clients*, caused by civil legal aid changes compounding with other policy changes across government. In welfare benefits, comprehensive welfare reforms and a punitive approach from DWP have led to a sharp rise in sanctions and numerous questionable benefits decisions. However, Law Centres must find other resources to keep up much needed help to clients in challenging sanctions and appealing decisions, and some have turned to dedicated pro bono projects to meet that need, and their great success reflects remaining need for help.³

¹ The then-permanent secretary at the Ministry of Justice, Ursula Brennan, admitted as much to the Public Accounts Committee during its inquiry into the delivery of civil legal aid reform: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-accounts-committee/reducing-the-cost-of-civil-legal-aid/oral/16101.pdf>.

² See the Ministry of Justice's Annual Report and Accounts for 2014-15, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434016/moj-annual-report-and-accounts-2014-15.pdf, p. 5.

³ Avon and Bristol Law Centre has done just that, and very successfully. Still, they admit that they are an exception that proves a rule: the service is only available locally, where they are resourced to provide it, whereas it should be equally available across the country and based on right. See <http://www.lawcentres.org.uk/policy/news/news/law-centre-project-success-in-challenging-fit-for-work-decisions>.

Lack of leadership on the implementation of the Equality Act 2010, especially as applied to people with disabilities, has been among factors driving need for legal advice on matters of discrimination.⁴ To meet it there is an assisted information helpline in Equality Advisory and Support Service (EASS), funded by the Cabinet Office; and legally-aided specialist advice, only available through the telephone gateway, Community Legal Advice (CLA). The number of new legal aid discrimination cases has declined sharply, due in part to telephone's limitations as a delivery channel and the complexity of this developing area of law.⁵

In housing law, where remaining legal aid is largely focused on homelessness prevention, much of the work involving tenant rights, for example addressing disrepairs, must now be funded from alternative sources, if it can be funded at all. This means that landlords can ignore disrepair in their properties with impunity, because they know that tenants no longer have recourse to legal aid to fight their corner. Thus an already skewed relationship becomes even more imbalanced, further disadvantaging tenants as the weaker party.⁶

One area of law in which the compound effect of legal aid cuts with other policies has been apparent is employment, where tribunal fees, increased significantly shortly after the LASPO cuts, are in effect a significant hurdle to our clients' ability to uphold their rights. With no legal aid remaining for challenging wrongful dismissal and other workplace problems, and with steep new fees, the Employment Tribunal has seen a precipitous drop in new cases.⁷ Law Centres are seeing employers increasingly refusing to engage with their clients until they have 'proven their seriousness' by paying the new fees. The latest report from the Senior President of Tribunals also suggests that, despite the drop in new cases, persistent litigants without merit are not discouraged by the new fees, suggesting an adverse outcome for tribunals and for access to justice.⁸

Pending proposals of similar fee increases for immigration appeals raise concerns for additional hurdles before clients with immigration and asylum problems. The removal of legal aid from most of non-asylum immigration cases, coupled with ineffective regulation, have seen a veritable free-for-all of rogue immigration advisers (despite

⁴ See the recent critical report from the House of Lords Select Committee on the Equality Act 2010 and Disability: <http://www.publications.parliament.uk/pa/ld201516/ldselect/lddeqact/117/117.pdf>.

⁵ The Public Law Project has expanded on the concerning shortcomings of the CLA telephone gateway in its report 'Keys to the Gateway': <http://www.publiclawproject.org.uk/data/resources/199/Keys-to-the-Gateway-An-Independent-Review-of-the-Mandatory-CLA-Gateway.pdf>. The report assessed the Ministry of Justice's own review: <https://www.gov.uk/government/publications/civil-legal-advice-mandatory-gateway-research-findings>.

⁶ We have reported this in our evidence to House of Commons Justice Committee inquiry into LASPO: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/8956.html>.

⁷ See TUC report: https://www.tuc.org.uk/sites/default/files/TUC_Report_At_what_price_justice.pdf; later comment from the Law Society: <http://www.lawsociety.org.uk/news/press-releases/two-year-anniversary-of-employment-tribunal-fees-shows-scheme-undermined-access-to-justice-july-2015/>; and comment from expert Richard Dunstan <https://labourpainsblog.com/2016/03/10/etstats/>.

⁸ We have reported this in our evidence to the Justice Committee; see note 4 above. Mr Justice Langstaff, the departing EAT president, suggested that fees had not deterred vexatious litigants <https://www.judiciary.gov.uk/wp-content/uploads/2016/02/The-Senior-President-of-Tribunals-Annual-Report-2016-final-1.pdf>, pp. 90-94.

the best efforts of regulator the Office of the Immigration Services Commissioner) providing shoddy services or part-services or defrauding people, putting their very status in the UK at risk. Law Centres are seeing more such victims who come to us for help: in one case, an EU national had gone through four immigration advisers over three years, simply trying to settle his permanent residence, only finally succeeding in doing so when he came to one of our London Law Centres.

Law Centres' biggest frustration with LASPO and related reforms is that, in part because they were so ill-informed (see note 1 above), they have created a service not designed with its target audience in mind. Legal services for people in poverty and disadvantage, many of them vulnerable, ill or otherwise functionally impaired – need to be designed and delivered so as to take account of the circumstances and needs of their client groups, as we highlight below.

Transforming our justice system

4. *In a sentence, what practical steps could be taken to ensure access to justice for all was a reality? Please provide up to three answers.*
 - Declaring the purpose of civil legal aid, establishing a common standard for adequate/minimal provision, and commissioning to best meet these.
 - Significant ramping up of public legal education and information, with independent evaluation and quality assurance of public guidance on rights and procedures.
 - Restructuring legal aid provision to focus on early action, joined-up problem resolution and systems improvement, driven by specialists.
5. *Please outline in more detail ideas for practical solutions to the crisis in access to justice. These could range from minor alterations to a radical overhauling in our justice system.*

The challenge before us now is to design *an access to justice system*, not simply a legal aid system. At the moment, legal aid comprises the vast majority of the Ministry of Justice's approach to access to justice, with public legal education and information (PLEI), pro bono legal work, and non-legal support services featuring as freestanding afterthoughts not cohering into one meaningful whole but to a wasteful and incongruous patchwork. A new access to justice system will cover all elements of informing people of their rights, helping them understand them and their options, helping them get formal redress and resolve disputes, including through legal assistance. The model for such a system and its constituent parts is set out clearly in the Canadian Forum on Civil Justice's 'Roadmap for Change' report.⁹

Clarity on the *principles of access to justice* and legal aid is absolutely essential to this: stating what legal aid is meant to provide was an important part of the Access to Justice Act and its absence is at the core of the shortcomings of the LASPO Act that replaced it, enabling some counter-productive scope cuts. An important point of

⁹ See http://www.cfcj-fcj.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf, pp. 11-13.

reference should be the United Nation’s Sustainable Development Goal 16 – to which the UK has committed – promoting inclusive societies with access to justice for all.¹⁰

The system for access to justice would benefit from a *comprehensive strategy* as recommended by the Low Commission, which would add much-needed policy stability.¹¹ It is important that this strategy be co-produced by all relevant stakeholders, from the government, the judiciary, frontline advisers, researchers and others, as exemplified in the Canadian Action Committee on Access to Justice in Civil and Family Matters, chaired by the Chief Justice of Canada.¹² Government’s input into the strategy should reflect a joined-up view of legal aid and access to justice beyond the remit of the Ministry of Justice alone. A good working model for this would be the American Legal Aid Interagency Roundtable, established by President Obama.¹³

The commissioning of legal aid and other access to justice services should be based on current *research and evidence* and their delivery should be reassessed in this light as well. This would mean the re-establishment of some routine legal needs assessment, which would inform benchmarking, planning and service evaluation.¹⁴ It should also entail a commitment to seek to learn from other parts of the justice system, such as tribunals, so as to improve public decision making and reduce future need.¹⁵

The LASPO Act has cut the *scope of civil legal aid* to focus it on cases that are most severe or protected by human rights provisions. While those are important to maintain, the most effective access to justice system would focus its efforts on prevention and early intervention, which should also drive down its cost.¹⁶ We propose to broaden the scope of civil legal aid to its pre-LASPO definition and to achieve cost reduction through a mix of early work, when problems are less costly to resolve – and a more effective collaboration among providers, arising from a mixed model of commissioning akin to the one used by the Scottish Legal Aid Board (SLAB).¹⁷

The access to justice system as we propose it would include the following elements:

1. Public legal education and information:
 - a. A single online portal, not necessarily as part of the Gov.uk portal, for all public legal information for and about England and Wales. Content

¹⁰ See <https://sustainabledevelopment.un.org/sdg16>.

¹¹ See pp. 46-50 in <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>.

¹² See <http://www.cfcj-fcjc.org/action-committee>.

¹³ See <https://www.justice.gov/lair>.

¹⁴ Such a duty had been stipulated in the Access to Justice Act 1999 (part 1, section 4). Civil and Social Justice Surveys were an integral part of legal aid commissioning before being discontinued in 2012.

¹⁵ See Professor Robert Thomas’ suggestions at <https://ukaji.org/2014/09/10/analysis-robert-thomas-administrative-justice-better-decisions-and-organisational-learning/>.

¹⁶ The only indicator for civil legal aid in the Ministry of Justice annual report is the average cost per case. The 58% jump from pre-LASPO to LASPO terms shows how much costlier more severe cases are: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434016/moj-annual-report-and-accounts-2014-15.pdf, p. 5.

¹⁷ On the SLAB programme, ‘Enabling Access to Justice’, and its formation see <http://www.slab.org.uk/providers/reforms/civil/>. The programme bears out recommendations from the Christie Commission on delivery of public services in Scotland, which directs attention to causes not consequences of problems, to economic sustainability and to making best use of technology: <http://www.gov.scot/Publications/2011/06/27154527/0>.

would be in accessible language and structured intuitively by problem type (not, for example, by area of law), connecting people to resources relevant to their circumstances and to sources of further help.

- b. A system of acknowledgement by kite marks of online sources of information that is accurate and up to date, to counter the great deal of irrelevant or obsolete information to be found online.
 - c. A strategy for informing people about their rights and the justice system, not just at schools but later on as well, around life events: births, deaths, marriages, separations, major purchases, home rental, job start, job loss and so on.
 - d. Building people's legal capability through engagement locally, online and through the media, segmented and targeted by group, e.g. new parents, people with disability or migrants.
2. Non-legal support:
- a. Personal support at court, not providing advice but guiding Litigants in Person through processes and procedures to minimise delay and stress.
 - b. Personal assistance to access available technologically-enabled resources, locally (e.g. CourtNav) or online (e.g. Universal Credit), acknowledging that some people are unable to use them unaided.
 - c. Triage and referral capacity through a variety of factors, from local advice agencies or those accessed by phone or online; public services; or non-advice practitioners who are 'trusted intermediaries' (e.g. district nurses, community leaders).
 - d. Assisted information (also called 'generalist advice') and one-off or summary advice, provided through advice organisations locally or remotely, or through pro bono advice clinics that do not take on cases.
3. Legal assistance – Judicare model:
- a. Community-based legal advice and advocacy, and representation of clients at court or tribunal, provided by a mix of not-for-profit organisations, contracted law firms or packaged pro bono services. Technologically assisted where possible, but offering face-to-face help where needed.
 - b. Where applicable, provision on alternative dispute resolution (ADR) mechanisms such as mediation, connected to a judge where their validation is required.
 - c. Judicare as a model reflects a view of access to justice akin to primary healthcare: a universal 'legal insurance' targeted at people unable to pay for legal services and providing them with a basic level of service.
 - d. Transformational, not just transactional: beyond helping more people in need, Judicare providers would be tasked with proposing ways of simplifying and modernising the justice system as well as other public provisions (e.g. housing, benefits) with a view to making them more sustainable. To that end, the system's public commissioners would seek to capture and evaluate not only legal outcomes but also outcomes for the client (in wellbeing or relapse minimisation) and for the justice system in general (such as trust in its fairness, especially among minority groups).

The above separation of the various functions is artificial, as many can be and are undertaken by the one agency. Indeed, across our network, various Law Centres offer several such services and see the benefit of doing so. Our suggestion is to work with the diversity and integration of remaining services, rather than to ignore it.

Commissioning this system of access to justice would involve a combination of contracts and grants, each with its own Key Performance Indicators contributing toward the delivery of the national strategy. Current certificated work could continue to be provided through contracts; however, for integrated local delivery we propose grant-based commissioning that would package PLE, legal assistance (including pro bono tie-ins) and policy work aimed at systems change.¹⁸ It would allow Law Centres and similar organisations to sustainably continue to focus on avoiding litigation where possible. This place-based approach would also serve to integrate legal assistance with other public provision strategies, such as public health or reducing reoffending, improving shared outcomes. It would also encourage providers to forge closer ties with partners outside of the advice sector – an approach that is necessary in these straitened times.

Another stone that must not be left unturned is the *use of technology* to facilitate and sometimes deliver public services, including in the access to justice system. Technology can help ease people’s problem resolution journeys. They can look up their circumstances and applicable considerations online, as well as find relevant sources of assistance. Those who are unsure or unable to act on the online content on their own could be spared being passed from pillar to post by entering a local network of support only once and being seamlessly referred to the most appropriate agency. Their need to repeatedly provide their information could be reduced by making the initial enquiry digitally. Follow-up on the initial encounter could be facilitated by automatic reminders to attend meetings, to bring certain documents or any additional instructions. We were heartened to see the breadth of possibilities in legal technology at a recent legal ‘hackathon’ (IT problem-solving intensive event) held by Hackney Community Law Centre, and are following up on some of the appropriate solutions.

We regard digital delivery of legal advice as a promising prospect, provided that it is used *alongside face-to-face provision and not instead of it*. Telephone or online delivery of legal advice is not suitable for many people in legal aid’s current target population for a variety of reasons, including impairments and vulnerabilities. Still, in vast and sparsely populated areas or in serving clients who are housebound (due to illness or disability), technologically-enabled services come into their own. Technologically-enabled remote services can also widen the range of legal assistance that can be offered to clients, by connecting more pro bono assistance to those in need or to their local advisers, using appropriate connection facilities available where they are. We are curious about the potential of such systems to widen reach, and so several Law Centres have been experimenting with video chat platforms.

The move towards *digitisation of civil courts and online sessions* is a bold one and should be pursued prudently. This move may lessen litigants’ need for help before and

¹⁸ This packaged grant-based commissioning is already in place in Australia, and a recent comprehensive review by the Australian Productivity Commission has suggested its expansion. See <http://www.pc.gov.au/inquiries/completed/access-justice/report>.

during accessing it, but it is unlikely to affect their need for assisted information and legal advice, to help them understand their situation and options and to pursue them. It may directly reduce the costs of court use, but it is also likely to create (the need for) a host of quasi-legal and assisting capacity, at courts or in other places through which people access their services.¹⁹ This assistance is likely to be needed for some years to come and, therefore, must be designed into a future access to justice system rather than be added on later as an 'adjustment' to benefit those who cannot navigate the new platforms entirely independently.

For its many virtues, technology is a means to an end. Utilising it should be integral to an access to justice system – it is the only way it can avoid being an expensive afterthought – but it must serve the needs of its target population: people living in poverty and disadvantage, many of them vulnerable. The ongoing scarcity in which they live narrows these people's mental 'bandwidth', making it difficult for them to recognise and take advantage of opportunities. The ways in which public services extend assistance to people in poverty should acknowledge and address this 'scarcity mindset', acknowledged by social science. The World Bank's World Development Report 2015 suggests three primary ways of doing so: shaping services to fit places, times and ways where people could make best use of them; measures to improve their stability and social infrastructure and to reduce their income volatility; and simplifying processes and procedures.²⁰

An appropriate system of access to justice does not merely provide a public service: it is at the core of the English and Welsh social contract, establishing the practical as well as formal equality of all people before the law by targeting assistance at those of least means. It is only through equal access to justice that we can hope to redress power imbalances in society and, following Thucydides' Melian dialogue, to meaningfully uphold right.

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¹⁹ This is one aspect worth bearing in mind from the experience related by Bonnie Hough, Managing Attorney with the California Administrative Office of the Court's (AOC) Center for Families, Children and the Courts. The new helper roles are but one aspect of the Californian courts' admirable experimentation with instructors, facilitators, assisted or virtual self-help centres, multilingual services and other initiatives. Sir Michael Briggs has admitted taking especial note of this model.

²⁰ Scarcity research, as exemplified by Harvard economist Sendhil Mullainathan, builds on insights from behavioural economics: see <http://www.harvardmagazine.com/2015/05/the-science-of-scarcity>. The World Bank annual development report dedicates a chapter to poverty's challenges as well as to successful experiments in addressing them, also referencing Mullainathan's work: <http://www.worldbank.org/content/dam/Worldbank/Publications/WDR/WDR%202015/Chapter-4.pdf>.