



**Joint Committee on Human Rights Inquiry:**

**'Human Rights: Attitudes to Enforcement'**

**Written Evidence Submitted by the Law Centres Network, February 2018**

**Summary**

- As provisions to help people uphold their human rights, equitable access to legal assistance is as fundamental to access to justice as equal access to the courts.
- Access to justice was significantly curtailed by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO). As anticipated, this has disproportionately affected disadvantaged people and those with characteristics protected by Equality Act 2010.
- Civil legal aid cuts substantially weaken the enforcement of the rights to effective remedy and to a fair trial. Other human rights affected are the rights to private and family life and to be protected from discrimination, as well as social, economic and cultural rights.
- The LASPO cuts affect not only legal aid services but also their provider base and the viability of practicing social welfare law for the benefit of disadvantaged people. To date, government mitigating action has not markedly reduced unmet need for legal assistance.
- LASPO's impact on enforcing human rights is apparent in the Exceptional Case Funding scheme; providing discrimination legal aid via a 'telephone gateway'; the proliferation of litigants in person; and scope definitions impeding the ability to challenge public bodies.
- Recent progress was attained in the Supreme Court's UNISON judgment, which reasserts affordability as a practical test of access to justice. Further progress could be made by bolstering protections of social, economic and cultural rights in domestic law.
- We remain concerned that, if the gap between formal human rights protections and the effective legal assistance to enforce them remains, then this would not only undermine the rule of law but also public support for human rights, which could be cast as irrelevant.

**About us**

The Law Centres Network (LCN) is the membership body for Law Centres, each of which is an independent not-for-profit legal practice specialising in social welfare law. Law Centres aim to widen access to justice, in order to make the UK more equal and strengthen the rule of law. They target their free core services at the poorest, most disadvantaged people in their communities.

The first Law Centres in the UK were set up in 1970 and, despite recent funding cuts, are still a strong movement of 45 members. Established in 1978, the Law Centres Network helps Law Centres to remain sustainable and develop their services, as well as serving as a vehicle for their collective action and as their national policy and advocacy voice.

### Enforcing human rights in practice

1. The primary business of Law Centres is to widen access to justice by offering civil legal assistance to those least able to pay for it, be it through legal advice and casework, or through representation at court or tribunal. The distinction between legal assistance and access to the courts is important because the former is normally required for people to understand whether their problem is legal and justiciable – in this case, whether it engages their human rights; whether its resolution is likely to require access to court or tribunal, for example to appeal a benefits decision or defend a possession proceeding and prevent eviction; whether in their specific case such a course has legal merit and therefore a chance to succeed at court; and, just as importantly, whether pursuing their case in court would be in their best interest. Equitable access to legal assistance, therefore, is as fundamental to access to justice as access to the courts.
2. Access to justice is insufficient for human rights to be effectively enforced, and this is especially the case for disadvantaged people. The most significant detrimental driver in the decline of access to justice in recent years has been the implementation of the **Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)**. The Act has significantly curtailed the scope of assistance funded through legal aid and, by extension, has made it much harder for people of modest means to access the courts in order to enforce their human rights. LASPO has been exceedingly successful in cutting legal aid expenditure, at the expense of also cutting legal assistance. Its original impact assessment had predicted cuts to lead to 605,000 fewer cases;<sup>1</sup> after only four years, it has in fact led to over 848,000 fewer cases, with the civil case load continuing to shrink year by year. The cuts have been so disastrous that they have led not only to an initial drop in new cases (in areas no longer in scope), but to an ongoing decline in caseload since then: from 724,279 new cases in 2012-13 down to 282,196 the following year (a 61% drop), to just 254,264 new cases last year (2016-17), another 10% drop.<sup>2</sup> Along with scope cuts, the means test for legal aid was also tightened and, just as importantly, its income cap has not been adjusted to take account of inflation, which in 2017 alone rose by 2.6%. This amounts to an effective further cut to the number of people eligible for legal aid. LASPO, then, is best understood not as a one-time cut in April 2013 but as a provision that continues to be eroded by its structural deficiencies.

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<sup>1</sup> Ministry of Justice Impact Assessment no. MoJ090, 21 June 2011, p.10. Archived online at <http://webarchive.nationalarchives.gov.uk/20111013060743/http://www.justice.gov.uk/downloads/consultations/cumulative-consulation-response-ia.pdf>.

<sup>2</sup> Figures aggregated from official Legal Aid Agency statistics at <https://www.gov.uk/government/collections/legal-aid-statistics>.

3. The impact of such sharp withdrawal of funding has been devastating for agencies such as **Law Centres** which provide legal assistance to people who would otherwise be unable to afford it. The number of not-for-profit legal aid providers has halved since LASPO, compared to a 20% in commercial providers. In the 18 months following LASPO's implementation, 11 Law Centres have had to close, being one in six of our members. Across Law Centres, legal aid income has dropped by 60%. Even where legal aid is still available, stagnating civil fees – not updated in over a decade and unilaterally cut by 10% in October 2011 – make legal aid barely viable to non-commercial providers.<sup>3</sup> For their part, charitable funders remain reluctant to step in and replace lost public funding, and focus on funding themed fixed-term projects rather than ongoing provision. Together with cuts to other public funding, such as local authority support or dedicated casework grants from EHRC, between 2013 and 2015 Law Centres have experienced a drop of 40% to their income. All this has driven consolidation and considerable efficiencies in all remaining Law Centres, unavoidably also leading them to restrict or ration some services and to discontinue others entirely. These constraints to Law Centres' capacity to assist have come at a time when demand for Law Centres services has been rising, by as much as 400% in some. We find turning away increasing amounts of enquirers particularly dispiriting because, but for the funding cuts, we would have been able to assist many more of them. In the longer term, LASPO cuts threaten the viability of a range of social welfare law specialisms by causing not just the loss of valuable experts but also the loss of many training and junior positions that would make up the next generations of social welfare lawyers.
4. **The severity of LASPO's impact** has struck several prominent observers. Commenting in October 2016, an Amnesty International UK report saw the legal aid cuts as a retrogressive measure damaging human rights, and has blamed LASPO for creating a two-tier justice system, "increasingly closed to the poorest, most vulnerable and most in need for its protection."<sup>4</sup> The Law Society's 2017 review of LASPO concludes that not only is legal aid no longer available to many of those who need it but even those eligible for it find it difficult to access, both procedurally (e.g. satisfying stringent means tests) and practically (e.g. no local access point or difficulties interacting with telephone gateway).<sup>5</sup> This, concludes Lord Bach in the Bach Commission final report, endangers the rule of law in the UK, because "unless everybody can get some access to the legal system at the time in their lives when they needs it, trust in our institutions and in the rule of law breaks down."<sup>6</sup> It is worth noting that some of the most adverse effects of LASPO were not related to scope cuts, which are easier to pinpoint, but to technical aspects of its delivery.

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<sup>3</sup> In 2014 the National Audit Office assessed this to be a reduction in real terms of 34% to civil legal aid fees. See National Audit Office, *Implementing Reforms to Civil Legal Aid*, November 2014, p. 33, available at: <https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>

<sup>4</sup> Amnesty International UK, *Cuts That Hurt: the Impact of Legal Aid Cuts in England on Access to Justice*, p.3. Available at: [https://www.amnesty.org.uk/files/aiuk\\_legal\\_aid\\_report.pdf](https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf).

<sup>5</sup> *Access Denied? LASPO Four Years On: A Law Society Review*. The Law Society of England and Wales, June 2017. Available at <http://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/>.

<sup>6</sup> Lord Bach, 'Foreword', in *The Right to Justice: the Final Report of the Bach Commission*, p.5. Fabian Society, September 2017. Available at <http://www.fabians.org.uk/the-final-report-of-the-bach-commission/>.

As described above, not updating the means threshold to reflect inflation amounts to an effective eligibility cut. Poor commissioning on the part of the Legal Aid Agency has led to ‘legal aid deserts’ – areas of the country where there is only one local legal aid provider or none.<sup>7</sup> The choice to deliver some areas of law through a ‘telephone gateway’ has separated them artificially from the bulk of legal aid, delivered face-to-face, resulting in accessibility issues and low and declining uptake (see below). Several aspects in particular bear out LASPO’s devastating effect.

5. **Discrimination** in goods, services or employment was not a discrete area of legal aid until after LASPO, when it was made accessible only through a ‘telephone gateway’ first, which in theory should have made it easier to access. Only 2,306 new discrimination cases nationwide got helped through legal aid that year, and the number has only gone down since. Last year only 1,195 new discrimination cases got legal aid, just over half (-48%) of the opening figure.<sup>8</sup> This corresponds to similar drops in new education and debt cases, suggesting that rather than a gateway, the telephone channel serves as a gatekeeper, restricting access to the service by the way that it is delivered. Proportionally, new cases through the telephone gateway have declined even more sharply than new face-to-face legal aid cases, suggesting that the problem is in the channel itself.<sup>9</sup> There are no indications that the Ministry of Justice sees this drop as problematic or seeks to address it. Furthermore, as these lines are written, the Legal Aid Agency has cancelled the tender for new discrimination gateway contracts, due to ‘insufficient compliant tenders’.<sup>10</sup> This suggests that not only has this service under-performed, but that current providers are not interested in continuing to deliver it, suggesting viability concerns. A solution beyond September 2018 has yet to be announced, giving rise to grave concerns. Still, even regardless of the channel of delivery, cutting access to early legal advice – a primary conduit of which is legal aid – was key to the underuse of the Equality Act to challenge discrimination in practice. This was one of our main arguments in our 2015/16 evidence to the House of Lords Committee on the Equality Act 2010 and Disability.<sup>11</sup> We submitted that the lack of access to advice left people all at sea with regards to a fast-developing area of law; they were more likely to go ahead with a discrimination claim that in fact had no merit; more likely to miss out on vital guidance on possibly settling their case without going to court; or burden court resources by not presenting their evidence as required if they were litigants in person. The Select Committee has taken up these points and agreed

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<sup>7</sup> The Law Society has campaigned to highlight this problem in 2016. See: <https://www.lawsociety.org.uk/news/press-releases/lack-of-housing-legal-aid-services-is-leading-to-nationwide-advice-deserts/>.

<sup>8</sup> Figures include legal help and certificates granted, based on Legal Aid Agency official statistics, as above.

<sup>9</sup> In 2015, a year after the telephone gateway’s introduction, the Public Law Project has assessed its systemic problems in its report *Keys to the Gateway: An Independent Review of the Mandatory Civil Legal Advice Gateway*, available at <http://www.publiclawproject.org.uk/data/resources/199/Keys-to-the-Gateway-An-Independent-Review-of-the-Mandatory-CLA-Gateway.pdf>.

<sup>10</sup> <https://www.gov.uk/government/news/civil-news-cancellation-of-civil-legal-advice-procurement>.

<sup>11</sup> Written evidence at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/equality-act-2010-and-disability-committee/equality-act-2010-and-disability/written/20891.html>; oral evidence at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/equality-act-2010-and-disability-committee/equality-act-2010-and-disability/oral/21466.html>.

that in LASPO the government has ‘hindered, not helped’ disabled people in asserting their rights in court.<sup>12</sup>

6. Three areas of law that have suffered extensive scope cuts in LASPO were **housing, welfare benefits and immigration**, in ways that could restrict access to justice to uphold people’s rights to **private and family life**. These cuts preserve legal aid only for the most severe or egregious cases, relating to asylum, imminent or actual homelessness and Upper Tribunal benefits appeals on points of law. The kind of issues no longer eligible for legal aid therefore include housing disrepair, overcrowding or inadequate housing, challenging housing benefits decisions or indeed all first-tier benefits appeals, private family cases, migrant family reunification, most non-asylum immigration cases, or cases involving the self-sufficiency (through benefits income or social housing) of people with learning disabilities or mental health problems. The structure of legal aid also hinders complete resolution of legal problems that are still in scope, because in social welfare law problems routinely cluster and need to be resolved in the round.<sup>13</sup> Thus, where the Housing Possession Court Duty Scheme can help prevent a family’s eviction, legal aid no longer helps resolve the underlying problem that has led to the arrears and possession proceeding, such a relationship breakdown, or delays, miscalculations or sanctions relating to benefits. This raises doubts about whether the current scope definition allows for the best use of legal aid funds, if problems are not fully resolved or are allowed to needlessly recur. Where early-stage problems are no longer covered by legal aid they are also left to escalate in order to qualify for assistance, causing avoidable hardship, blighting people’s lives with stress and other related health problems and becoming costlier, more complex and more contentious to resolve.<sup>14</sup> Vulnerable people in particular find recourse to court or tribunal especially unsettling, and would benefit from the less contentious resolution of their legal problems at earlier stages, where the stakes are lower.
7. In a largely adversarial legal system that was designed by lawyers for lawyers, the removal of legal aid for one party raises questions about their ability to get **a fair trial as Litigants in Person** (LiPs) due to the resulting inequality of arms in court. Cutting legal aid for those who are simply unable to pay lawyers’ fees has a discriminatory effect on them compared with the general population seeking resolution in formal justice. Litigants in Person are not a new phenomenon but legal aid cuts have made them much more common, and therefore much more challenging to handle: as Lord Thomas, the Lord Chief Justice, admitted in 2016, “it is a problem across the entire system... the problem is we have now

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<sup>12</sup> House of Lords, *The Equality Act 2010: the Impact on Disabled People*, HL Paper 117, 24 March 2016, p.6: <https://publications.parliament.uk/pa/ld201516/ldselect/lddeqact/117/117.pdf>.

<sup>13</sup> See passim in the Low Commission report *Tackling the Advice Deficit: A Strategy of Access to Advice and Legal Support On Social Welfare Law in England and Wales*, January 2014, at: <https://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>. Problem clustering is well established in the scholarship on the issue, for example Pleasence, Balmer, Buck, O’Grady and Genn, ‘Multiple justiciable problems: common clusters and their social and demographic indicators’, *Journal of Empirical Legal Studies*, July 2004.

<sup>14</sup> See comments from Law Centres and scholars in “One in Three People with Legal Problems in UK Develop Health Issues – Report,” *The Guardian*, 29 January 2018, <https://www.theguardian.com/inequality/2018/jan/29/one-in-three-people-with-legal-problems-in-uk-develop-health-issues-report>.

far too many.”<sup>15</sup> Lacking legal assistance as outlined in para. 1 above, Litigants in Person are likely to lack knowledge about their rights and the law required to effectively manage their case; to lack the legal skills to argue it in writing and in person; and to lack a sound understanding of their case merits and prospects, leading them to make choices that are not in their best interest, such as not settling the case when this would be advisable or pursuing it doggedly, however hopeless. The lack of legal advice or representation has left some domestic violence victims needing to manage their case and question their attackers in court.<sup>16</sup> In extreme cases, prosecutions have been thrown out by the court because legal aid cuts have left defendants without advocates.<sup>17</sup> Government has presented various provisions as compensating for the loss of legal aid, including minor investments in Public Legal Education and information (PLE), which admittedly needs it; rapid expansion of Personal Support Unit services, which help people navigate the courts but do not advise; other resources in the Litigants in Person Support Strategy (LIPSS); and most recently the £1bn courts and tribunals reform and digitisation programme. These are worthwhile endeavours, but none of them satisfy people’s ongoing unmet need for legal advice on their rights or the law, and for representation at court.

8. The administration of legal aid’s ‘safety net’ scheme, **Exceptional Case Funding (ECF)**, raises concerns about its practical effectiveness in enforcing human rights. The scheme, set out in section 10 of LASPO, is meant to provide legal aid for out of scope cases where not providing legal aid would lead to a breach of human rights as protected by HRA. A combination of exclusive merits criteria (making it exceptional indeed), onerous application requirements and slow processing account for its very low uptake. Overall, only 954 people nationwide benefited from this so-called ‘safety net’ last year, paling in comparison with the government’s original projections of 5,000-7,000 exceptional cases per year.<sup>18</sup> The application and grant rates were both lower in the first two years of the LASPO regime – just 16 grants in the first year, being under 1% of applications – recovering after the application form was halved in length, from 14 to 7 pages. Still, Law Centres report that, while in areas of law such as immigration ECF applications seem more straightforward to argue, in other areas of law (e.g. complex welfare benefits challenges) this is still far from straightforward and cases that they deem as deserving of ECF are refused. If legal professionals find it challenging to draft a successful ECF application, one can only imagine how bewildering this might be to people attempting to apply on their own when unable to access legal assistance – especially when they are in particularly delicate or vulnerable circumstances as would befit this exceptional provision.

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<sup>15</sup> Lord Thomas of Cwmgiedd, speaking at his Lord Chief Justice’s annual press conference on 30 November 2016: <https://www.judiciary.gov.uk/wp-content/uploads/2016/11/lcj-annual-press-conference-2016-transcript-1.pdfpdf-1.pdf>, p. 5.

<sup>16</sup> See the case of ‘Caroline’ reported in “Legal Aid Cuts: ‘The Forgotten Pillar of the Welfare State’ – A Special Report,” *The Guardian*, 25 September 2014: <https://www.theguardian.com/law/2014/sep/25/-sp-legal-aid-forgotten-pillar-welfare-state-special-report-impact-cuts>.

<sup>17</sup> See “Fraud Trial Collapses Over Legal Aid Cuts,” *Law Society Gazette*, 1 May 2014: <https://www.lawgazette.co.uk/practice/fraud-trial-collapses-over-legal-aid-cuts/5041044.article>.

<sup>18</sup> National Audit Office, *Op. Cit.*, pp. 7, 27.

9. The impact of LASPO cuts has been detrimental in isolation, but is **aggravated in wider context**. Removing legal aid for seeking redress in areas of public policy where major changes affect large populations of disadvantaged people looks like a pincer movement on the poor: not just destabilising them but making it very much harder for them to challenge erroneous or sometimes unlawful practices. Since the removal of legal aid for non-asylum immigration matters, immigration rules were further restricted and compounded by two Immigration Acts (2014 and 2016) with a third one expected later this year. Legal aid for disadvantaged people to challenge bad benefits decisions was all but entirely removed just at the time of comprehensive welfare reform, which introduced Universal Credit (UC), the benefit cap, Mandatory Reconsideration (MR) and Personal Independence Payments (PIP) among others. In the last year before the legal aid cuts (2012-13), there were 507,131 new benefits appeals, and legal aid helped 275,724 benefits cases. Four years on, in 2016-17, there were 228,604 new benefits appeals, and legal aid helped in just 451 benefits cases. With two-thirds of benefits decisions currently being overturned on appeal, there is clearly a problem with initial decision making and a pressing need to assist people before and at tribunal. 4 in 5 appeals concern PIP and ESA – sickness or disability benefits – where benefits are likely to be the claimant’s only source of income and a key support in upholding their livelihood and dignity.
10. Curtailing access to other elements of **administrative justice**, through which decisions and actions of public bodies can be challenged, also reflects a wilfully restrictive view of the rule of law. Making prohibitive fee rises at Employment Tribunal is but one aspect of this. Another is the decline in Judicial Review legal aid work following LASPO, which was halved from 6,294 grants in the year before the cuts (2012-13) to 3,018 grants in the last full year (2016-17). A similar restriction of organisations’ access to Judicial Review has proven detrimental to the ability of charities, operating in the public benefit, to challenge decisions and policies of public bodies. This curtailment was made not through higher fees but by increasing the risk to charities of taking a Judicial Review. Part 4 of the Criminal Justice and Courts Act 2015 removed organisations’ ability to seek costs protection for the legal work done prior to getting permission for Judicial Review from the High Court. Our own experience of this has been bruising. In the autumn of 2016, the Law Centres Network challenged the way in which the contract to provide the public human rights helpline EASS came to be awarded to outsourcing firm G4S. As pre-permission work was considerable, and permission was ultimately withheld, LCN was liable for costs which would have hit our limited finances hard, were it not for public crowdfunding support.<sup>19</sup>
11. **Social economic and cultural rights** are clearly not held up to similar regard as ‘primary’ human rights explicitly incorporated into HRA. This imbalance can make it harder to hold government to account for failing to make progress on realising people’s fundamental rights to food and water, health, housing, work, social security or an adequate standard of living – or worse, for allowing backsliding on progress already made. We would therefore strongly recommend that the International Covenant on Economic Social and

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<sup>19</sup> See also Nimrod Ben-Cnaan, “Access to Justice: Harder Than It Looks!”, *Legal Voice*, 12 October 2016, available at <http://www.legalvoice.org.uk/access-justice-harder-looks/>.

Cultural Rights, to which the UK is already a party, be formally incorporated into UK domestic law through primary legislation. Before this, though, an important step in the right direction would be for government to bring into force section 1 of the Equality Act 2010, being the socio-economic duty. We commend the efforts of MPs endorsing Early Day Motion 591 to this effect, as well as the Scottish Government's initiative to commence the duty in Scotland.

12. The recent **Supreme Court UNISON judgement** on fees in Employment Tribunal (ET) has cast in sharp relief the importance of the practicalities of upholding rights. As Lord Reed reasoned, the introduction of higher ET fees was achieved through government's disregard of access to justice as a public good. Instead, access to the courts was portrayed as just another public service, whose users were expected to pay as they were the only ones to benefit from it. The UNISON judgment removed a material hurdle to access to justice for employees, by ordering the cancellation of the fee rise. However, it is also important in asserting that access to justice can be practically tested based on affordability. This is a particular, systemic sticking point because, as Lord Thomas of Cwmgiedd lamented in 2016, "our system of justice has become unaffordable to most," and the situation has not materially changed since.<sup>20</sup> The Supreme Court also reminded that effective recourse to channels of redress is what gives rights their effect and inspires respect for them – a principle at least as old as Roman law (*ubi ius ibi remedium*). This is the nub of the current state of affairs: while HRA and other provisions secure human rights, these rights are meaningless without reasonable access to remedies.
13. Over the past seven years, a climate of conditionality, uncertainty and indeed threat to human rights has taken hold in the UK. Many provisions enabling the securing and strengthening of human rights were weakened through austerity cuts. The cuts, including LASPO's cuts to civil legal aid, were presented as driven by the need to reduce public expenditure, with familiar refrains such as 'needing to do more with less' or 'better focussing public services'.<sup>21</sup> LASPO's case was firmly that of 'doing much less with less'; other reforms, such as Universal Credit, cannot even be credited with saving the public purse nearly as much as projected.<sup>22</sup> Beyond the fiscal, LASPO has done something even more pernicious: widening the gap between universal human rights, to which government is formally committed – and their effective protection and remedies afforded to the public, especially disadvantaged groups. What LASPO has achieved and continues to achieve is a dismantling of supports for disadvantaged people; an erosion of the UK social contract by alienating people from a justice system that does not work for them; and a weakening of human rights, which risk being perceived as an irrelevance.

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<sup>20</sup> The Judiciary of England and Wales, *The Lord Chief Justice's Report 2015*, p.3: [https://www.judiciary.gov.uk/wp-content/uploads/2016/01/lcj\\_report\\_2015-final.pdf](https://www.judiciary.gov.uk/wp-content/uploads/2016/01/lcj_report_2015-final.pdf).

<sup>21</sup> In a strikingly frank statement, Ursula Brennan, then Permanent Secretary at the Ministry of Justice, admitted to the Public Accounts Committee in December 2014: "The piece of evidence that was overwhelming was the level of spending. The evidence required was that government said we wish to cut the legal aid bill." See: <https://www.lawgazette.co.uk/law/moj-chief-admits-cuts-rushed-through-without-research/5045500.article>.

<sup>22</sup> See <https://www.theguardian.com/society/2018/jan/25/universal-credit-taxpayers-benefits-cuts>.