LASPO Act 2012 Post-Implementation Review

Submission from the Law Centres Network

Note: The following submission will address aspects of the implementation of the Legal Aid Sentencing and Punishment of Offenders (LASPO) Act 2012 and their implications for legal aid, its intended beneficiaries and its providers. To date, the Law Centres Network has engaged with the Post-Implementation Review (PIR) in several ways, including face-to-face meetings, hosting a visit of officials at a Law Centre, taking part in the PIR consultative panels and contributing to the one-day review conference held in July 2018. This written submission will **not** seek to repeat our comments (or those of member Law Centres) on these occasions but rather to add to them.

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 (trading name of the Law Centres Federation, a registered charity) 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.

ASSESSING LASPO AGAINST ITS AIMS

The primary frame of reference for the PIR is LASPO's four policy aims – its intended consequences – which we will touch on first.

Discouraging unnecessary and adversarial litigation has always been a red herring. Civil litigation is adversarial because the English courts system is adversarial. The issue is, rather, that the Ministry of Justice (MoJ) has decided that some civil litigation is 'unnecessary' - or at least that it did not want to pay for it any longer. This applies primarily to private family cases, which were by far the largest category of civil legal aid spending before LASPO. In fact, by cutting early legal advice, as provided through Legal Help, MoJ has constructed a barrier to justice. It removed precisely the instance that could divert family cases to ADR: this became apparent in 2014-15 and prompted minister Simon Hughes to initiate the Litigants in Person (LiPs) Support Strategy to address this. Despite this, mediation volumes have remained low.

Legal Help also enabled providers to provide **early legal advice** and solve problems before they got to court, for example with a stern letter from a solicitor, or dissuading clients whose cases

lacked merit from taking them any further. This is certainly key to the work of Law Centres, and we have repeatedly argued that it was a lost opportunity for diverting people from litigation. Similarly, to then locate remediating action at courts, as in most of the LiPs Support Strategy, did little to address their legal need or relieve pressure on the running of the courts.

Targeting legal aid at those who need it most is a similarly misleading aim. Firstly, MoJ has stopped routinely gauging legal need, so cannot claim to know who needs it most but at most which groups are more likely to have legal problems. It can arbitrarily decide, as it did, that the most severe types of problems are the ones for which civil legal aid would be allotted. There are several problems with this. Firstly, it leaves problems to escalate needlessly, with a range of personal repercussions, up to the point in which they merit legal aid. Secondly, it leaves many with unmet legal need and, insofar as they still need to engage with the justice system, they are LiPs and burden the courts and tribunals which are still not sufficiently adapted to such volumes.

Table: populations in disadvantage and their relative uptake of civil legal aid in 2017/18[1]

Diversity Category	**Number in poverty**	**Rate of legal need likelihood**	**Estimated number of people in legal need**	**Category rate among legal aid cases**	**Legal aid case volume**	**Gap between need and uptake**
Children (under 18)	4.1m	32%	1,312,000	19.44%	46,070	1,265,930
Young adults (18-25)	3.118m	37%	1,153,643	13.68%	32,257	1,121,386
Aged 55-64	1.516m	31%	469,960	4.78%	11,113	458,847
Aged 65+	1.9m	14.5%	275,500	2.78%	6,437	269,063
Women	5.2m	32%	1,664,000	50.79%	120,194	1,543,806
People with disabilities	4.2m	33.5%	1,407,000	22.75%	53,810	1,353,190
BAME people	3.146m	38%	1,195,480	20.63%	48,311	1,147,169

Furthermore, the declining uptake of civil legal aid cannot be attributed to declining legal need. Even though MoJ has not conducted regular and consistent legal needs surveys since the Civil and Social Justice Panel Survey of 2012, other official statistics serve as proxy indicators of **persistent, sometimes increasing need** and its scale, as below:

[1] Legal aid uptake diversity rates are taken legal aid statistics, and rate of likelihood of legal need from the Legal Problem and Resolution Survey. Figures for populations in poverty derived from Joseph Rowntree Foundation analysis of national statistics. Diversity categories may, of course, overlap. This table is meant as an indicative approximation toward the *scale* of legal need last year that legal aid did not meet.

Housing

	Housing legal aid new cases				Proxy indicators of need		
Year	Legal Help matter starts	HPCDS new matters	Certs. granted	ECF granted	Rough sleepers	Homeless acceptances	Households in temp. accom.
2013-14	47,161	44,860	10,889	1	2,744	53,410	61,930
2014-15	42,879	46,745	10,297	3	3,569	56,500	69,140
2015-16	39,295	38,730	9,155	2	4,134	59,260	75,740
2016-17	35,445	39,028	7,947	7	4,751	57,890	78,930
2017-18	35,380	39,712	7,850	8			

Education

	Education new legal aid new cases			Proxy indicators of need	
Year	Legal Help matter starts	Certificates granted	ECF granted	School exclusions: fixed term + permanent	Pupils with SEN without statements (all schools)
2013-14	1,153	43	0	274,425	1,260,760
2014-15	1,752	25	0	308,770	1,065,280
2015-16	1,708	22	0	346,045	991,980
2016-17	1,608	33	0		1,002,070
2017-18	1,882	32	0		1,022,535

Discrimination

	Discrimination legal aid new cases			Proxy indicator of need
Year	Legal Help matter starts	Certificates granted	ECF granted	New single ET claims – all discrimination categories
2013-14	2,301	5	0	24,121
2014-15	1,602	11	0	11,050
2015-16	1,417	6	0	24,016
2016-17	1,184	11	0	23,084
2017-18	1,691	12	0	21,373

Making savings to the cost of the scheme is the only aim that has manifestly been met, as the overall expenditure on civil legal aid has reduced well beyond its target. However, it has been apparent from the outset that civil legal aid's unit cost - the average cost per case - which was the only indicator reported on civil legal aid in LASPO's first three years, has steadily increased from £900.20 in 2011-12 to £1,017.70 in 2012-13, then to £1,612 in 2013-14. The annual report for 2015-6 featured a revised set of indicators and stopped reporting average cost per case altogether, but the leap in the cost per case is telling. To some extent this was to be expected, as cuts focused on the much more economical Legal Help component.

Table: new civil legal aid cases since LASPO, annual volumes

Year	Legal Help matters started	Certificates granted	HPCDS new matters	ECF grants	Total
2012-13	573,737	150,538	33,575	n/a	757,850
2013-14	173,583	117,573	44,860	70	336,086
2014-15	171,586	107,909	46,745	229	326,469
2015-16	158, 095	111,312	38,730	668	308,805
2016-17	147,260	116,540	39,028	981	303,809
2017-18	140,091	116,601	39,712	1,419	297,823

Moreover, this increase in average case cost has appeared alongside an 11.4% decline in total acts of assistance since LASPO, which is currently a drop of 60.8% from the year before the cuts (see above table). Civil legal aid is thus helping fewer and fewer people but at greater cost apiece. This, then, raises valid questions about the overall value it delivers to the taxpayer.

Delivering better overall value to the taxpayer is a key aim for civil legal aid as it is for any public service, but there are considerable doubts whether it is met. Firstly, as noted above, civil legal aid now helps a smaller population, but at greater average expense per case. Secondly, as the scope of assistance is limited even where it is available, it is manifestly insufficient to resolve beneficiaries' legal problems in their entirety, in a way that would reduce the risk of their relapse or recurrence. Thirdly, the way that legal aid is structured is affecting people helped or not helped by it in ways that shift costs to other public provisions made by the taxpayer. The bias toward late intervention means that by the time legal aid is engaged, people and their families endure adversity which affects their health, work, accommodation and social relations, thereby driving up demand for support from NHS, benefits or local authority services. Worse can be said for people whom legal aid does not help, and who are then highly likely not to have their legal problem resolved at all, as successive legal needs surveys agree.

IMPACT ON INTENDED BENEFICIARIES

The current civil legal aid system is one that no-one would have designed; it is the product of a thousand cuts, of which certainly LASPO was made in haste, and an approach in which access to sufficient legal assistance has been of secondary importance. Overall, as a public provision, civil legal aid as currently delivered is almost aimless. LASPO has removed legal aid's statement of purpose from the legislation; thus, it can be difficult to understand what it is for, especially as no **basic standard of provision** is specified – something that both the Low Commission (2014) and the Bach Commission (2017) sought to address. Under the previous legal aid system, the Legal Services Commission was required by law to gauge legal need to commission legal aid to meet it. Since 2012 there have been no new legal needs surveys of scale, so there is **no definitive idea of whether legal aid is currently meeting need**.

In commissioning the service, the Legal Aid Agency (LAA) seems **primarily concerned with controlling spending**, and there seem to be no meaningful performance indicators relating to access to justice and how legal aid should facilitate it. Tellingly, the LAA annual report and audited accounts gauge performance against Key Performance Indicators for speed of processing of legal aid applications, but lack indicators relating to how many acts of assistance were achieved. If what does not get measured does not get done, there seems to be **no incentive for LAA to improve uptake of legal aid** or its reach among particularly vulnerable or hard-to-reach populations who need it.

LASPO has had a devastating effect on the ability to enforce people's rights, resulting in 848,000 fewer cases helped. The decline in legal aid uptake is not down to a decline in need. Proxy indicators bear this out, as above: soaring figures for homelessness acceptances, possession proceedings, insolvencies, benefits appeals and immigration appeals. **That legal aid uptake should decline as need for it grows is proof of how broken the current system is.** Where Law Centres and other agencies are otherwise resourced, some help is still available, no longer by right but contingent on charity and subject to 'post code lottery'.

Where even this in no longer available, **advice 'deserts'** have appeared, as the Law Society has shown in housing law and Refugee Action in immigration law; the latter report also demonstrates the knock-on effects of scope cuts on the availability of services still in scope. There is hardly any research on where people go for legal assistance whom Law Centres and others are unable to help, although the recent Equality and Human Rights Commission report captures some useful insights. What frontline agencies like Law Centres see is more people being turned away from more agencies. The real question here is at what point the public bodies responsible – MoJ and LAA – cannot help but notice this, too.

Apart from making a public provision such as legal aid available, there is an ongoing need to make the public aware of it and **how to access it**. Legal aid's contracted providers are forbidden from advertising the service, so the main platform on which it is publicised is the gov.uk website. We believe that this lack of active public engagement **erodes trust** in legal aid as a means of upholding rights: simply posting information online does not discharge government's duty to educate and inform the public about this vital provision, aimed primarily at disadvantaged and often vulnerable people. Meanwhile, legal aid's disappointing performance continues to deteriorate, short-changing the public and raising sustainability concerns.

As predicted in LASPO's equality impact assessments, it is adversely and disproportionately affecting disadvantaged groups and groups with protected characteristics. The direct and indirect effects of this are not sufficiently understood. People may be deterred from seeking help now, but their problems do not go away and are likely to escalate if not resolved.

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 human rights to private and family life. 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.[2] Thus, where the Housing Possession Court Duty Scheme (HPCDS) 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 whether the current scope definition allows for the best use of legal aid funds**, if problems are not fully resolved or are allowed to recur needlessly. 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.[3] 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.

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** 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 far too many."[4]

Lacking legal assistance, LiPs are likely to lack aspects of **legal capacity** like 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

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[2] 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.

[3] 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.

[4] 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.

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.[5] In extreme cases, prosecutions have been thrown out by the court because legal aid cuts have left defendants without advocates.[6] Government has presented various provisions as compensating for the loss of legal aid, including minor investments in Public Legal Education and information (PLE), which is needed; 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). These are worthwhile, but none of them satisfy people's ongoing unmet need for legal advice on their rights or the law, and for representation in court.

LASPO's impact has been bad enough in isolation but worse 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, and enables injustices to persist. Since the removal of legal aid for immigration cases, immigration rules were compounded by two Immigration Acts (2014 and 2016) with a third one expected soon.[7] Legal aid for help to challenge 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. Five years on, in 2017-18, there were 238,803 new benefits appeals, and legal aid helped in just 451 benefits cases. With over 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, where benefits are likely to be the claimant's only source of income and a key support in upholding their livelihood and dignity.

The **financial eligibility rules introduced in LASPO have neither simplified legal aid delivery nor made it more efficient**. In several practical respects they burden legal aid's target population and are inappropriate for their typical circumstances. Firstly, LASPO has restricted financial eligibility for legal aid. As most potential clients are supported by benefits, and as those benefits are more reactive to the ebb and flow of more precarious forms of low-paid work, financial eligibility becomes trickier to assess, and increases the risk to providers of using delegated authority. Secondly, the use of passporting has been significantly affected by welfare reform but regulations have not kept up with changes to the reality of social security. Thus, the alarming ease with which a claimant can lose all or most of their benefits, with Housing Benefit cut following a primary benefit sanction or recalculation, is not being addressed. Similarly, MoJ has yet to take a stance on passporting claimants on UC with permitted income, a year after consulting about this. A third and related problem with means eligibility rules is their lack of accessibility: they have become not just more complex to understand but also more onerous to evidence satisfactorily.

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[5] 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.

[6] Cf. https://www.lawgazette.co.uk/practice/fraud-trial-collapses-over-legal-aid-cuts/5041044.article.

[7] Indeed, UK immigration rules have more than doubled in length since 2010: https://www.theguardian.com/uk-news/2018/aug/27/revealed-immigration-rules-have-more-than-doubled-in-length-since-2010.

A fourth problem with means eligibility rules is the higher financial participation rates introduced in LASPO. Law Centres and other providers see time and again how clients in real need, who have cases of merit within scope, must give up legal aid because the statutory charge required of them is too dear. There were over 3,500 revoked applications in 2016-17 and around 3,000 in 2017-18, and more applications did not even get to the point of submission.[8] Professor Donald Hirsch's study for the Law Society robustly makes the unaffordability argument.[9] Against this background, there is a further risk that people feel they need to agree to a statutory charge they can ill afford simply to get legal assistance with a pressing problem. In so doing they can deepen their indebtedness (e.g. in rent arrears) by owing money to the LAA as well. Ealing Law Centre's submission expands on this issue.

IMPACT ON PROVIDERS AND SERVICES

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 dropped by 60% 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 uprated in over a decade and unilaterally cut by 10% in October 2011 – make legal aid barely viable to non-commercial providers.[10]

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, **Law Centres have experienced an overall drop of 40% in their income since LASPO**. 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 ourselves turning away increasing amounts of enquirers, which is particularly dispiriting because, but for the funding cuts, we would have been able to assist many more of them.

Our largest Law Centre illustrates the impact of legal aid cuts on the availability of legal assistance and on unmet need. Last year, the Law Centre received 80,000 telephone enquiries, over 200 a day. Full casework services are the ones were capacity is most limited, largely by funding: last year, of 1,100 referrals the Law Centre received, it could take up only 300, or just under one in four cases. Like other Law Centres, it augmented its reduced in-house capacity through pro bono services, which can provide one-off advice and allow the Law Centre to triage cases for a full casework service in house. Last year, it assisted 4,200 cases through pro bono clinics alone, at a

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8 LAA management information as disclosed to the Civil Contracts Consultative Group.

9 https://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/legal-aid-means-test-report.

10 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

cost to the Law Centre of approximately £10,000 for training, supervising, supporting and hosting pro bono volunteers. This is just one way in which the Law Centre effectively subsidises from its charitable resources the public service it delivers.

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 (including the Legal Services Commission training scheme) that would make up the next generations of social welfare lawyers. Law Centres are keen to maintain competencies that are vital for their mission regardless of the remaining scope of legal aid. Currently, 34 Law Centre offices continue to offer welfare benefits services, focused on challenging faulty decisions; 30 offices continue to provide employment law services and immigration services; and 10 Law Centres offer face-to-face discrimination law assistance. Last year, one Law Centre that has preserved employment law competency received just under 1200 related enquiries, of which it assisted 870 with legal advice but only a minority of those with full casework and representation. However, unlike with legal aid, grant funding for this service is not guaranteed beyond next year.

Legal aid for **discrimination** cases is only initially accessible through a **mandatory 'telephone gateway'**, which in theory should make it easier for some to access. However, only 2,306 new discrimination cases nationwide got helped through legal aid in LASPO's first year, and the number has only gone down since. Last year only 1,703 new discrimination cases got legal aid, 26% lower than the initial position.[11] 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**.[12] There have been no indications that MoJ sees this drop as problematic or seeks to address it.

Still, even regardless of the channel of delivery, cutting access to early legal advice, primarily through 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.[13] 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

[11] Figures include legal help and certificates granted, based on Legal Aid Agency official statistics, as above.

[12] 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.

[13] 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.

taken up these points and agreed that in **LASPO the government has 'hindered, not helped' disabled people in asserting their rights** in court.[14]

Accessing legal aid for discrimination cases remains fraught: at least one Law Centre reports that, over five years in, it has yet to successfully signpost people to the gateway. This is not unusual:

- 'Paul' (all client names below are changed) is a military veteran who suffers with Post-Traumatic Stress Disorder and is on medication for depression and anxiety. He is also a victim of domestic violence and has residence of his young daughter. He was facing eviction by his mortgage lender within less than a week. The Law Centre solicitor called the gateway while with him in order to ask for the entitlement number to be able to provide face-to-face advice, so she could make an application to prevent his eviction and represent him at court. This reasonable adjustment was repeatedly declined and only enabled by escalating the matter to the Legal Aid Agency contract manager. This enabled her to prevent Paul's eviction despite the bank's opposition, and help him apply for a relief grant to clear his debt arrears. A less experienced lawyer, or one less familiar with legal aid guidance, would have given up and Paul and his daughter would have been evicted.
- 'Gavin' had suffered employment-related disability discrimination. He found it hard to talk on the phone due to anxiety issues, so it was his mother who first approached the Law Centre, when in a face-to-face meeting the solicitor assessed is problem and gave initial advice. Gavin's mental health problems were manifest to the solicitor, who tried to get the telephone gateway to refer him to face-to-face advice. This was refused twice, by the initial operator and again by the helpline specialist. They wanted to assess the client's needs themselves on the phone, by email or face-to-face, which would have required Gavin to travel to another city to be seen. The Law Centre solicitor had to tell Gavin that, **despite already being in touch with a local provider, he would not be able to access legal aid through it**, instead needing to email helpline providers with his details.
- 'Shane' had a discrimination claim against his employer, but had to chase the legal aid telephone gateway providers as they would not return his calls, took a long time to confirm his eligibility, and then more time to assess the merits of his claim. A Law Centre assisted where possible, for example, in helping him draft key documents such as a schedule of loss. Eventually, several days before the final hearing, the gateway provider told Shane that his claim did not have sufficient benefit for them to help him. The Law Centre stepped in to advise him ahead of the hearing, where he was successful. Justice was served and Shane had a good outcome, but LAA did not pay the Law Centre for doing the right thing.
- Some clients have also reported that, when speaking to the helpline, they had been offered advice on the discrimination aspect of a claim only and **told to seek advice on related problems elsewhere**. 'Omar' had a discrimination claim against his former employer, as well as an unfair dismissal and unpaid wages claims. He had initial help from a Law Centre and was accepted onto the gateway and referred to a provider – only to

[14] 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/ldeqact/117/117.pdf.

return two months later, saying they could only assist with the discrimination part of his claim. Such arrangements undermine the efficacy of legal aid and poorly serve people whose rights have been breached.

The administration of **Exceptional Case Funding** (ECF) raises concerns about its practical effectiveness as a 'safety net'. By distinguishing between 'normal' scope and 'exceptional' cases, or between presumption to provide and presumption to deny, legal aid does not sufficiently protect human rights in practice. A combination of exclusive merits criteria (making it exceptional indeed), onerous application requirements and slow processing account for its very low uptake. Overall, only 1,420 people nationwide benefited from this so-called 'safety net' last year, paling in comparison with MoJ's original projections of 5,000-7,000 exceptional cases per year.[15] 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, and therefore count for about 60% of grants, in other areas of law, such as complex welfare benefits challenges, this remains problematic. If legal professionals find it challenging to draft successful ECF applications, one can only imagine how bewildering it 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 befits this provision.

Fundamentally, due to its exceptional nature, every ECF application is uncertain – enough to deter many providers from applying. This is compounded by practical issues as follows:

- It takes expertise and persistence to prevail over LAA and be granted ECF. 'Sue' had a complex welfare benefits Upper Tribunal case, which already had permission to appeal – meaning the judge had already acknowledged important points of law in the case – and was listed for a hearing. A Law Centre advised her, took on her case and applied for ECF last September. A barrister agreed to cover the hearing and undertake preliminary work. At first, LAA declined, claiming that Sue's case was within scope of normal legal aid. **The Law Centre solicitor had to remind them of their own rules**, whereby normal legal aid funding at this level was not applicable when representation is needed. The Agency then questioned the appeal's merits again and made several requests for document copies from Sue's file. After an 18 week wait, legal aid was finally granted in January, just a fortnight before hearing.
- 'Linda' is disabled. She was unlawfully evicted almost a year ago and has lost all of her possessions. A Law Centre solicitor was told that a damages-only claim was out of normal legal aid scope, so applied for ECF last July. This started a seven-month long correspondence with LAA, in which the Agency requested more information only to decline the application, the Law Centre appealed the decision and was declined again. In February, the Law Centre lodged a complaint as the ECF application was declined for allegedly not providing information that in fact had already been provided. It took the

[15] National Audit Office, *Op. Cit*, pp. 7, 27.

Agency a week simply to acknowledge receipt of the complaint. A person in outstanding need of legal assistance would have given up very early on.

- ‘Claudine’ is a French national who has been living in the UK since 1996. After working for 18 months, she fell severely ill and has been supported by welfare benefits since. Recently she moved to an area where Universal Credit is fully rolled out and was told that she does not have the right to reside, so fails the habitual residence test and cannot claim for assistance with her housing costs. Her rent arrears have triggered possession proceedings. The Law Centre appealed this decision but DWP have asked the tribunal to strike out the appeal, wrongly claiming that a post code mistake voided Claudine’s claim. The only benefit Claudine can claim is Universal Credit and without it she is destitute. The Law Centre wants to help her but, as first-tier benefits appeals are out of legal aid scope, the only way to fund the case would be through ECF. Given their frustrating experience with ECF, they are reluctant to invest the significant efforts in applying.

Judicial Review is a useful tool for challenging the decisions of public authorities. Often it is effective as a deterrent, too, prompting reconsideration merely by *threatening* to bring a Judicial Review. For Law Centres and other legal aid providers, half the deterrent effect lies in a public authority knowing that a Law Centre *can indeed* challenge it. However, since 2013, LAA has operated a ‘no permission, no payment’ rule, whereby a legal aid provider would not get paid for their work until the High Court grants permission for the Judicial Review. As pre-permission work can be considerable and the risk of not being paid for it is real, this had a chilling effect on legal aid providers. The problem here is twofold. Sometimes, cases do not get permission on the papers alone, but do so in a subsequent oral hearing, increasing the risk to legal aid providers. Oftentimes, cases with merit do not get to permission stage at all, because the public authority realises its error and withdraws its decision, or settles the case, before a hearing. In such cases, **a client may enjoy a favourable outcome, but their legal adviser is left in the lurch**:

- ‘Amina’ and ‘Femi’ and their six children, including an infant, became destitute but the council declined their application for support under s. 17 of the Children Act 1989 (entitling destitute migrant families with children to local authority support). Then, late last September, they were evicted from their private rented home and spent that night sheltering the A&E waiting area at King’s College Hospital in south London. Their Law Centre solicitor applied for urgent legal aid, and by the time it was approved has already instructed counsel, who applied for out-of-hours interim relief, so the court ordered the council to put the family in temporary accommodation pending a new assessment of their s.17 application. With permission for legal aid declined on the papers, a fresh application was made for permission at an oral hearing, but the day before the hearing the council saw sense and settled the matter. The family got their support and withdrew their application for Judicial Review. However, legal aid will not pay the Law Centre and Counsel, who have done so much work in urgency. As a system this is not sustainable.
- ‘Diego’s family is vulnerable: a migrant family in which his father has been violent toward his mother. He is working and supports his sister (as primary carer) and mother, and all still live with his father. The Home Office granted him limited leave instead of Indefinite

Leave to Remain, so the Law Centre challenged this by Judicial Review. The Legal Aid Agency repeatedly asked for more means evidence, much of which was already uploaded onto CCMS (online case management system) and receipt confirmed. Claiming they cannot see the evidence, the Agency revoked and reinstated Diego's legal aid certificate twice, seemingly unable to take an overall view of means in unusual circumstances. This case is sensitive, with a risk of further domestic violence against the mother, but the family and their Law Centre are still being sent hither and yon.

FUTURE PROVISION

As things stand, we believe that England and Wales' civil legal aid system falls well short of MoJ's intention, in objective 2.1 of its Single Departmental Plan, to provide "**simple, timely and reliable access to legal aid".** Examples cited above and by other reports also suggest that the current regime also falls short of MoJ's equality objective to provide "**fair and accessible services**". It is doubtful whether the service can guarantee equal access to service users when uptake through various channels varies significantly (lower by telephone than face-to-face) or when eligibility hinges on the *kind* of income a person has (low but stable earnings compared with precarious work topped up by fluctuating benefits). Many of these shortcomings are systemic and can be addressed through judicious policy decisions that bear out the values that MoJ's strategic plan claims to stand by: **humanity, openness, collaboration** and a sense of **purpose**. MoJ must approach this afresh rather than seeking to patch up a fundamentally flawed existing system.

Ultimately, legal aid is a partnership between a public core, which determines pay, scope, indemnity and other issues – and the additionality that providers, especially not-for-profits, bring with them: local presence, subject expertise, a network of local connections and outreach capacity to increase accessibility. When **government relies for the success of its public services on external stakeholders** on whom it has little control, it must have realistic expectations, understand their outlook and bring them onside. The National Audit Office made this point twice recently: once more broadly by the Auditor General, and again by the MoJ review team in their report on the courts modernisation programme. LASPO is no different: a prime example of a unilateral, top-down policy pursued despite objections from most stakeholders, expecting the wider advice sector to absorb its impact. Instead, the advice sector was decimated by sharp withdrawal of public funding, unviable terms have led to provider flight, and civil legal aid helps fewer and fewer people every year, often with piecemeal assistance that is not effective enough. We can do better than this.

Civil legal aid should be able to accommodate the full breadth of social welfare legal work while remaining at current spending levels. This would involve a widening of civil scope to include problems that both practice and scholarship know to cluster. Another needed change is to the commissioning outlook along these lines:

- **Independence** is the basis of clients' **trust**, as in social welfare law their disputes tend to be with public bodies. It must be preserved and emphasised at both provider and commissioning (LAA) levels

- **Person focus** is the key to designing a legal aid system that is truly effective. This would take into consideration all that we know about legal aid's target population and their circumstances and structure provision accordingly:
    - Prioritising **accessibility**
    - **Simplifying eligibility** to reduce red tape
    - **Early legal advice** so the 'stitch in time' lowers demand for costlier work
    - Seeking to minimise relapse or problem recurrence
- **Coherent scope** definitions would be required to provide an adequate service that would fully address legal **problem clusters**, thereby also achieving optimal value for public funds. This would suggest allocating funding by client rather than by problem
- **Integration** of legal aid services across providers and channels to minimise perverse incentives and increase efficiency of both services and their administration, thereby reducing overall spending. One key move would be to end the mandatory status of the **telephone gateway**, allowing clients to choose the channel they find most helpful
- **Viability** of legal aid is key for maintaining its provider base:
    - **Overhaul remuneration** to make legal aid financially sustainable to providers
    - Workforce development: preserving a critical mass of current and future practitioners by investing in a **training** scheme

Importantly, in making these suggestions we are **not proposing a return to pre-LASPO provision. This is not possible anyway**: public policies affecting this work, such as welfare and immigration, have changed considerably since 2013. Similarly, the landscape of legal advice provision has become much sparser, so for some time services would continue to be rationed primarily by availability. Moreover, there are new challenges for access to justice arising from the fact that **the courts modernisation programme does not address the legal needs of LiPs, already let down by LASPO**. Even if we assume that court processes would successfully be streamlined – and the NAO has voiced its doubts about this – people still need advice about their rights and options, and providing it at the court would come too late for many, whom early legal advice could divert from the courts altogether, when their cases are vexatious or lack merit, when they are better addressed through mediation, or when it is simply not in their best interest to go to court.

Even in a policy climate driven by budget cuts, we believe that MoJ can make better choices that would improve the impact of funded provisions. The degradation of access to justice, especially legal assistance, over the past six years makes such a change of direction imperative.

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Law Centres Network, September 2018