

Written evidence from Public Law Project ('PLP')

Introduction

PLP welcomes the Committee's inquiry. The provision of legal aid to individuals who seek redress is not simply a matter of compassion, but a key component in ensuring the constitutional right of access to justice, itself inherent in the rule of law¹.

Legal aid is an essential precondition of a fair and democratic society. Failure to provide it can amount to a breach of fundamental rights² under the common law and/or the ECHR. However, in the absence of urgent reform, the future of Legal Aid is one in which:

- A significant proportion of the population is assessed as ineligible due to their means, despite being unable to afford to pay privately.
- Legal aid is inaccessible to many individuals, Exceptional Case Funding ('ECF') is not an effective safety net, and fundamental rights are breached as a result.
- Legal aid is unavailable in whole geographic areas of the country, for entire categories of law.
- Legal aid is not economically viable for many providers and pressures on those who remain incentivise a reduction in quality.

Sadly, that future is already here.

Our submission to the LASPO PIR³ set out how the scheme is not accessible, effective or sustainable. The government's 'Action Plan'⁴ requires expansive re-imagining. The present timescale (beyond Spring 2021) will not assist those who cannot access justice *now*.

PLP's expertise

PLP is a national legal charity, established to help ensure that those marginalised through poverty, discrimination, or disadvantage have access to public law remedies. We undertake research, policy initiatives, casework and training. The contents of this submission are drawn from experience in all relevant aspects of our work, including:

- Our briefings, research, policy work and written evidence.
- Litigation we have been involved in concerning aspects of LASPO⁵.
- Our engagement with other stakeholders.

Evidence submitted to the inquiry

¹ per Lord Reed in [R\(Unison\) v Lord Chancellor \[2017\] UKSC 51](#) at §6 and §66.

² [R \(Gudanaviciene\) v Director of Legal Aid Casework \[2014\] EWCA Civ 1622](#), §56, per Lord Dyson MR.

³ <https://publiclawproject.org.uk/wp-content/uploads/2018/09/LASPO-PIR-SUBMISSION-PLP.pdf>

⁴ 'Legal Support: The Way Ahead', February 2019.

⁵ See, for example: [R \(Rights of Women\) v Lord Chancellor and Secretary of State for Justice \[2015\] EWHC 35](#) (domestic violence evidence requirements); [R \(Gudanaviciene\) v Director of Legal Aid Casework \[2014\] EWCA Civ 1622](#) (ECF); and [R \(Public Law Project\) v The Lord Chancellor \[2015\] EWCA Civ 1193](#) (the 'residence test').

1. How LASPO has impacted access to justice and views on the post-implementation review

Financial eligibility for civil legal aid

The income and capital eligibility thresholds pre-date LASPO and have not been increased since 2009, despite £1 that year being the equivalent of £1.35 in 2019⁶. The PIR considered⁷ evidence that those limits fail to reflect financial reality. The Action Plan commits to a review of the thresholds by Summer 2020 (delayed to Spring 2021⁸ due to COVID-19) followed by further consultation before implementation. The review is welcome, but the timescale is too slow. As set out in our 2018 briefing⁹, based upon research commissioned by the Law Society¹⁰ the thresholds continue to:

- Exclude people already unable to sustain an acceptable standard of living even without having to pay for legal advice and representation¹¹.
- Fail to realistically provide for housing costs¹², mortgage debt or equity in the home¹³.
- Disadvantage families with children¹⁴ and homeowners on low incomes¹⁵.
- Compound hardship through unaffordable contributions¹⁶.

PLP's recent casework focuses on individuals who are assessed as ineligible on capital grounds due to equity in their homes, in circumstances where it is not practicable for them to sell or raise money against their property¹⁷. This issue commonly affects victims of domestic violence who may be, for example, unable to sell against their abuser's wishes, treated as having a second home because they have fled to a women's refuge, unwilling to make themselves and their children homeless, unable to sell fast enough or unable to service a second mortgage because they are on means tested benefits.

⁶ <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator>.

⁷ §739 at p171 of the PIR, including PLP's briefing, below.

⁸ <https://www.lawgazette.co.uk/news/moj-to-consult-on-legal-aid-means-test-in-spring-2021/5105091.article>

⁹ 'The gap between the legal aid means regulations and financial reality', July 2018;

¹⁰ Hirsch, Donald (2018): [Priced out of justice? Means testing legal aid and making ends meet](#). Loughborough University. Report.

¹¹ Many households whose disposable income is just above the upper limit for eligibility will already be below the minimum income standard (Hirsch, p21).

¹² The monthly amount deductible from disposable income to account for housing costs for individuals without dependents has remained capped at £545 since December 2001.

¹³ The mortgage and equity 'disregards' have been capped at £100,000 since 1996, while house prices have increased by around 200% since then.

¹⁴ Deductions for dependents do not reflect the actual cost of supporting those people, and the gross income limit remains £2,657.00 per month for all applicants, unless they have more than four dependent children.

¹⁵ The capital thresholds and the mortgage and equity disregards mean that anyone who owns a home worth over £214,450.00 will be financially ineligible for legal aid, including people with income below the income threshold and (since April 2013) recipients of passporting benefits.

¹⁶ All households that are financially eligible, but required to pay contributions towards their legal aid will already be in poverty and will not be able to afford to pay contributions without experiencing greater financial hardship (Hirsch, p27).

¹⁷ For a detailed consideration of common obstacles see Whitehouse, Lisa (2018): 'Report on the affordability of legal proceedings for those who are ineligible for legal aid by reason of exceeding the capital threshold'

Recommendation 1

Assessment of income should take into account the levels of spending needed to maintain an acceptable standard of living¹⁸ and be reviewed on an annual basis.

Recommendation 2

Assessment of capital should take into account the circumstances of the applicant and the LAA should exercise discretion to value capital assets at nil where it would be fair to do so.

Exceptional Case Funding

ECF is intended to provide an essential safeguard: each grant represents an individual whose human rights would have been breached without legal aid. It is concerning that the number of ECF applications each year remain significantly lower¹⁹ than the 5,000 to 7,000 anticipated when LASPO was introduced²⁰. There is evidence that legal aid providers are deterred from making ECF applications.

In January 2020, PLP published survey results based on responses from 80 legal aid providers. 38.75% of respondents reported that they do not make ECF applications, with 22.5% reporting that they had never made an application to the ECF scheme²¹. Providers cited off-putting factors such as the risk of not being paid, stretched resources and a time consuming applications process, applications not being cost effective and previous applications being refused²².

While individuals can apply directly to the Legal Aid Agency, they face additional practical barriers, including the complexity of the forms themselves. The PIR displayed limited understanding of these practical hurdles.²³

The Action Plan committed to simplification of the ECF process, improvements in timeliness and to consider an emergency procedure before the end of 2019. Eighteen months later, it is unclear whether minor changes so far are the extent of the improvements to be made. Greater

¹⁸ see Hirsch (n 14) for a detailed comparison of the present legal aid means test with research on a [Minimum Income Standard](#) by the Joseph Rowntree Foundation (p 23 & 24 on the impact of allowing households to fall below that standard).

¹⁹ There were 2,601 applications in 2017-2018: <https://www.gov.uk/government/collections/legal-aid-statistics>

²⁰ Ministry of Justice: Legal Aid Reform: Excluded Cases Funding Process Equality Impact Assessment; March 2012, page 9.

²¹ [Improving Exceptional Case Funding: Providers' Perspectives](#) January 2020, p13.

²² *Ibid*, p15.

²³ Suggesting, for example, that forms can be entered for early investigations to explore the possibility of a subsequent more substantive application, which would not be of assistance to a direct applicant (588 of the [LASPO PIR](#)).

transparency and public information on the progress of consultation and implementation is required.

Although PLP welcomes the changes implemented, such as the updated Provider Pack, we note that the changes to date are not sufficient to ensure that legal aid providers are able to use the ECF scheme. Protracted processes of consultation are of no practical use to the people who are presently unable to access legal aid and face breaches of their human rights.

PLP further notes that in some areas grant rates for ECF are very high, for example, applications for ECF for Immigration under Article 8 ECHR²⁴. The same was formerly true of applications for legal aid for unaccompanied and separated children, which have subsequently been brought within scope. The existence of common types of case that are outside of the scope of legal aid, but extremely likely to be granted ECF, results in the inefficient allocation of resources to the processing of applications that could otherwise form part of the Legal Aid budget.

Recommendation 3

There should be no further delay in wholesale improvement to the ECF scheme. The process should be accessible to direct applicants; the evidence required should be simplified; contactable caseworkers should be assigned; the scheme should be financially viable for providers and providers should have increased powers to determine eligible cases. Where grant rates are high in a particular area of law, that should trigger a review of whether to bring the matter within the scope of Legal Aid.

2. The role of the Legal Aid Agency; the impact of Covid-19 on legal aid services and clients; and recruitment and retention problems among legal aid professionals.

Fostering a culture of risk taking by providers and clients

The way in which Legal Aid is administered by the LAA creates inefficiencies that compel clients and providers to accept financial risk or go without legal aid. For example:

- The ability to backdate grants of ECF by up to two months has been used to mitigate the absence of an effective urgent procedure, but providers work at risk that the application may eventually be unsuccessful.
- Providers are required to seek permission to incur costs at a number of stages²⁵ and lengthy delays can occur that compel a provider to work at risk, seek adjournment or fall short of best practice or their responsibility to their client.

²⁴ [The latest statistics quarterly release](#) reports a grant rate of around 80%, the vast majority for immigration.

- Providers who undertake judicial review work are expected to work at risk up to the permission stage²⁶.

Providers are disincentivised from taking on meritorious but complex or urgent cases. This increases the financial pressures upon those that do. It can also put clients in an invidious position when their matter is urgent, compelling them to proceed before their eligibility or level of contribution is certain, or placing them at a costs risk²⁷.

Inability to address advice deserts

There are vast areas of the country with insufficient providers to meet demand for entire categories of law that remain in scope, such as housing²⁸ or immigration and asylum²⁹. The underlying causes are linked to the sustainability of legal aid practice and inextricably linked to problems with recruitment and retention of practitioners.

In the PIR, the LAA is said to have a role in ensuring there are sufficient providers to ensure access to justice³⁰, however it is only the Lord Chancellor who is subject to a statutory duty to make legal aid available³¹. Meanwhile, the LAA lacks a mandate and resources to properly assess need. While the LAA keeps information on contracts held and matter starts available, this provides information on the work done by providers, but not the unmet need.

Where requests are made by providers for additional support, or concern drawn to areas where there are not enough (or any) providers to meet demand, powers to address these issues lie with the Lord Chancellor, yet they have never been exercised³². The pandemic created significant cash flow issues for providers³³, but the relief offered by the LAA was limited, technical and did not constitute additional financial assistance to providers³⁴.

Impact of COVID-19 on ECF

The number of applications for ECF has dropped by nearly a quarter during COVID.³⁵ Research by PLP indicates this is attributable to the pandemic³⁶, with providers citing high

²⁵ In controlled work, this would include prior authority to exceed the disbursement limit (i.e. for an expert report) or profit costs (in hourly rates cases). In certificated work, this would include scope and costs limitations, applications for prior authority to instruct an expert/leading counsel and approval of Very High Costs Case plans.

²⁶ [Civil Legal Aid \(Remuneration\) \(Amendment\) Regulations 2015](#).

²⁷ Costs protection provided by s. 26(1) and (2) of LASPO is lost if a certificate is revoked.

²⁸ see [Law Society briefing](#) (April 2019) and map, showing that in more than half of all local authority areas (an area encompassing more than 22 million people) there is not a single housing provider.

²⁹ see [Dr Jo Wilding: 'Droughts and Deserts'](#) (2019) on reasons for the market failure in immigration and asylum legal aid and map (p 9) identifying local authority areas with no immigration and asylum providers.

³⁰ 1129 of PIR

³¹ s. 1 of LASPO

³² [FOIA request, June 2020](#).

³³ <https://www.lawsociety.org.uk/en/topics/legal-aid/cuts-to-standard-monthly-payments-guidance-to-firms>

³⁴ <https://www.gov.uk/guidance/financial-relief-for-legal-aid-practitioners>

³⁵ [Ministry of Justice statistics report a 23% decrease in the number of applications for ECF received by the LAA between April to June 2020](#), as compared to the same quarter of the previous year.

³⁶ [Improving Exceptional Case Funding: Responding to COVID-19](#), October 2020. 60% of providers stated that the pandemic had a direct impact on their capacity or ability to make ECF applications.

workload and practical difficulties. Most providers felt more should be done to increase accessibility of the scheme during the pandemic³⁷ and were unaware of steps already taken by the LAA³⁸.

Recommendation 4

The LAA should be given a mandate and resources to monitor the level of unmet legal need. Where there is a risk of market failure (whether due to issues around sustainability or the impact of COVID-19) the Lord Chancellor should exercise his powers under s.2 of LASPO to remedy that failure.

Recommendation 5

The LAA should review its process and procedures with the aim of reducing the financial risks to which providers are subjected. Future changes to the scheme should improve sustainability and reduce such risks.

3. The impact of the court reform programme and the increasing use of technology on legal aid services and clients.

Digital working in the First-tier Tribunal (Immigration and Asylum Chamber) ('FtTIAC')

PLP conducted empirical research into the introduction of a reformed online appeal process in the FtTIAC³⁹ and its expansion as a response to the pandemic.

As a result of the reform measures, the work legal representatives undertake in immigration appeals became considerably more frontloaded and inadequate fixed fees for cases subject to the new process were introduced⁴⁰. Many interviewees felt they were being asked to undertake significant extra work at minimal or no pay; some barristers refused to draft Appeal Skeleton Arguments as a result.

The new regulations were implemented without sufficient consultation, there was a lack of foresight in how the reformed process would interact with the sector, and the fee structure undermined the goals of the reform. Interviewees repeatedly felt the commercial viability of their practices had been undermined, impacting their willingness to engage with the frontloaded process and possibly incentivising poorer quality representation. The fee structure was subsequently replaced⁴¹, following a legal challenge based on the inadequacy of the consultation and inquiry undertaken.

³⁷ 80% of legal aid providers were unaware of the steps that the Legal Aid Agency implemented to ensure the accessibility of the ECF scheme in response to the pandemic.

³⁸ Nearly three quarters of legal aid providers (73%) thought that more should be done to improve the accessibility of the ECF scheme during the pandemic.

³⁹ 'Online Immigration Appeals: A Case Study of the First-tier Tribunal', August 2020.

⁴⁰ With a transitional arrangement providing for payment on the basis of hourly rates, by way of the [Civil Legal Aid \(Remuneration\) \(Amendment\) \(Coronavirus\) Regulations 2020](#)

The Community Legal Advice Gateway

Evidence shows that remote advice services such as the mandatory telephone gateway can operate as a barrier to access to advice⁴². The PIR and Action Plan acknowledge that remote advice services do not provide adequate provision for all social groups and types of legal issue. PLP notes that due to the pandemic there has been a necessity for some services to cease and/or limit face-to-face advice. We urge attention be paid to the shortcomings of the mandatory telephone gateway and the recent report by the Good Things Foundation⁴³ on the limitations for vulnerable clients of the HMCTS Assisted Digital Service.

Recommendation 6

HMCTS should ensure that the LAA and legal aid practitioners are integral to the court reform programme; consulting these stakeholders late (or not at all) risks undermining possible benefits of the reform programme.

Recommendation 7

Any changes made to facilitate the remote provision of services must consider the potential impact on vulnerable groups, and mitigate the potential risks of a reduction in the quality of services wherever possible.

4. What the challenges are for legal aid over the next decade, what reforms are needed and what can be learnt from elsewhere.

Legal Aid must become accessible, effective and sustainable to ensure access to justice in England and Wales. The need for reform is urgent. A protracted process of consultation, resulting in limited reform at a distant point in the future, is wholly inadequate to remedy the outstanding defects in the LASPO scheme which are inhibiting access to justice *now*.

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⁴¹ [Civil Legal Aid \(Remuneration\) \(Amendment\) \(No. 2\) \(Coronavirus\) Regulations 2020](#)

⁴² [Keys to the Gateway: An Independent Review of the Mandatory Civil Legal Advice Gateway](#), March 2015.

⁴³ [Evaluation by Good Things Foundation](#), September 2020.