

## Written evidence from the Ministry of Justice

### Call for Evidence – The Future of Legal Aid

1. First and foremost, I would like to extend my heartfelt gratitude to those particularly those working hard to provide essential legal aid services. As a former criminal barrister, I care deeply about the legal aid profession, who are an essential part of providing access to justice now and in the future. Criminal defence practitioners play a crucial role in upholding the rule of law. We greatly value the huge contribution the criminal defence profession makes to our society.
2. The Lord Chancellor has a statutory duty to secure the availability of Legal Aid. We are committed to supporting the legal aid profession to ensure we put legal aid on a sustainable footing both now and in the future.
3. Access to justice is a fundamental right and last year we spent £1.7bn on legal aid to support the most vulnerable. However, legal aid is only one part of the picture. We are making changes to enhance the breadth of legal support available that will benefit everyone in society, focusing on what works.

### **How LASPO has impacted access to justice and for views on the post-implementation review and the criminal legal aid review;**

#### **LASPO**

4. The ability of individuals to resolve their legal issues is vital for a just society, and everyone must have the ability to access the justice system when they require it. It is crucial that people should be supported through this process. A core element of this support is, and will remain, access to publicly funded legal advice and representation where it is necessary. Government provides legal aid in England and Wales to ensure those who need it can access legal advice and representation.
  - a. The changes introduced by LASPO were intended to deliver an effective, efficient and sustainable legal aid system and was based on several key objectives, namely: Making significant savings to the cost of the scheme;
  - b. Discouraging unnecessary litigation at public expense;
  - c. Targeting legal aid at those who need it most; and,
  - d. Delivering better value for money for the taxpayer.
5. The Post-Implementation Review (PIR) of LASPO began in April 2018 and was an open, collaborative and objective review, examining the extent to which LASPO met the objectives above. To complement our own data, the MoJ undertook a range of engagement to understand the impact of LASPO, including three rounds of consultative group meetings with a range of interested parties. The MoJ received evidence submissions from over 80 organisations which were carefully considered as part of the review.

6. Whilst the reforms to legal aid were very broad and varied in their nature and intent, the assessment of the PIR was that collectively, as a package, the changes made to legal aid by, and under, LASPO have been partially successful in meeting these objectives. More detail on this assessment is available in the full PIR, published on 7 February 2019.<sup>1</sup> Since the publication of the PIR, much of our work across legal aid and legal support has focused on developing our evidence base and better understanding our users, in particular the most appropriate support to ensure individuals can resolve their legal problems as swiftly as possible.
7. Alongside the PIR, the Ministry of Justice also published a Legal Support Action Plan, which outlined the changes the government intended to make and the future direction for legal aid and support. The policies within this Action Plan built on the breadth of research and expertise submitted to the review including end users, academics, practitioners, representative bodies, advice providers, charities, regional interest groups, judges, and other interested parties.
8. The Action Plan set out a vision against which a number of deliverables were committed to, which when taken together, ensured that:
  - 1) The legal aid system will continue to be accessible and efficient into the future – helping the most vulnerable;
  - 2) A complementary range of legal support will be investigated to help people resolve their problems – we will explore what works, testing pilots and evaluating through both face-to-face advice as well as innovative methods of delivery;
  - 3) The Ministry of Justice will work proactively across Government to improve decision making and processes to reduce unnecessary litigation where appropriate;
  - 4) The Government will work proactively with the market to help foster and champion a culture of innovation in the provision of legal aid and wider legal support services; and,
  - 5) The Ministry of Justice will continue its collaborative work with the professions to ensure that we can continue to attract and retain the best legal talent in the publicly funded professions into the future.
9. We have already delivered a series of measures outlined in the Action Plan to improve the legal aid system and legal support offer.

### *The Legal Support Action Plan*

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)

10. The Action Plan outlined our vision for resolving legal problems earlier by ensuring people have access to the right legal support services, at the right time, and in the right way for them. The Action Plan recognised that legal aid is only part of the picture for ensuring access to justice and outlined a number of initiatives to deliver wider support. These include improving coordination and signposting for people to find legal support and expanding the role technology can play in helping people identify their legal issues.
11. These initiatives intend to explore the role technology can play in helping people identify and resolve their legal issues. We will review what delivery options remain worth pursuing after our recovery from Covid-19, but our ambition is to be much more ambitious in this space and to further consider the availability of early support.
12. As part of the Action Plan, we announced a review of the means test for legal aid. The review is assessing the effectiveness with which the means test protects access to justice, particularly for those who are vulnerable. In doing so, we are considering the full range of means-testing criteria bringing together data, evidence and expertise from government, legal practitioners, representative organisations and third sector bodies. We originally planned to complete the review by Summer 2020, but at the point the Covid-19 pandemic hit, we agreed with practitioner representative bodies that we should pause the review whilst we managed the immediate crisis and we are now working towards Spring 2021.

#### *The Criminal Legal Aid Review*

13. In December 2018, the department announced the start of the Criminal Legal Aid Review (CLAR). This was set up in response to concerns raised by criminal defence professions, and in light of the wider reforms that are already beginning to transform how our criminal justice system operates.
14. CLAR was set up to achieve two main outcomes:
  - 6) To reform the criminal legal aid fee schemes so that they:
    - fairly reflect, and pay for, work done
    - support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce
    - support just, efficient, and effective case progression, limit perverse incentives, and ensure value for money for the taxpayer
    - are consistent with and, where appropriate enable, wider reforms
    - are simple and place proportionate administrative burdens on providers, the Legal Aid Agency (LAA), and other government departments and agencies
    - ensure cases are dealt with by practitioners with the right skills and experience
  - 7) To reform the wider criminal legal aid market to ensure that the provider market:

- responds flexibly to changes in the wider system, pursues working practices and structures that drive efficient and effective case progression, and delivers value for money for the taxpayer
- operates to ensure that legal aid services are delivered by practitioners with the right skills and experience
- operates to ensure the right level of legal aid provision and to encourage a diverse workforce

15. In June 2019, in collaboration with professional representative bodies including the Law Society, the Bar Council, the Young Barristers' Committee and the Criminal Bar Association, we agreed to bring forward consideration of the following areas:

- how litigators and advocates are paid for work on unused material
- how advocates are paid for work on paper-heavy cases
- how advocates are paid for cracked trials in the Crown Court
- how litigators are paid for work on sending cases to the Crown Court
- (how litigators are paid for pre-charge engagement. This was not included in the initial proposals or consultation due to its dependence on the Attorney General's Office review of disclosure; it will be consulted on later this year.)

On 21 August 2020, the department published its response to the consultation. Further details of the policies can be found in this document; the policies represent an additional £35-51 million for criminal legal aid per annum. This is in addition to the c.£20m we injected into the Advocates' Graduated Fee Scheme last year and the c.£30m injected into CPS prosecution fees.

16. In the consultation response, it was set out that the next phase of CLAR will involve an independently-led review, ambitious and far reaching in scope, that assesses the criminal legal aid system in its entirety. It will aim to improve transparency, efficiency, sustainability and outcomes in the legal aid market. It will consider working practices and how these can drive efficient and effective case progression and deliver value for money for the taxpayer.

17. Alongside the independent review, the Department will also work to ensure that the fee schemes are consistent with, and enable, wider reforms that seek to modernise the criminal justice system, in line with our original aims for the review. The internal review will aim to identify straightforward changes which could be made more quickly ahead of the independent review and address some of the most pressing issues regarding the provision of legal advice and assistance, particularly in the police station and magistrates' court (including the Youth Court).

### **The role of the Legal Aid Agency**

As part of the Legal Aid Reform programme, in April 2013, the Legal Services Commission (LSC) was replaced by the Legal Aid Agency (LAA).

18. LASPO also provided for the creation of a new statutory office holder, the Director of Legal Aid Casework (DLAC). The DLAC is a civil servant designated by the Lord Chancellor. The DLAC has responsible for making determinations on legal aid in individual cases. Case decisions and some of the functions of the DLAC are delegated to LAA caseworkers, providers and/or the courts (for some criminal legal aid matters).
19. An annual report has been published each year since the LAA's inception, to explain how the DLAC has carried out the functions assigned under LASPO over the last financial year. The four main areas covered are:
- 1) The role of the DLAC;
  - 2) Decision making process and structure;
  - 3) Accountability;
  - 4) Statistics.
20. The LAA Annual Report for 2019-20 was published 21 July 2020. It assessed the LAA's performance against its four strategic objectives:
- 1) Provide simple, timely and reliable access to legal aid;
  - 2) Build strong relationships across Government and the justice system;
  - 3) Secure value for money for the taxpayer in all that we do;
  - 4) Achieve our full potential through being fair, proud and supportive.
21. In 2019-20 the LAA maintained and improved delivery and service quality – 91% of civil applications received were processed within 20 days, 100% of crime applications within two days, and 99% of criminal and civil claims within 20 days.

#### *LAA Business Transformation*

22. In 2017, the LAA began work to simplify the delivery of legal aid through business transformation. To date the agency has:
- 1) Developed a new online tool for legal aid applications called Apply, and started using it for some passported domestic violence applications;
  - 2) Improved how they process some types of cases, so that decisions and payment are made more quickly;
  - 3) Put user feedback and ideas from LAA staff at the heart of change;
  - 4) Worked across Government to find ways to better share data rather than asking for it again from legal aid clients;
  - 5) Reviewed the organisation structure and implemented changes to ensure the Agency is fit for the future;
  - 6) In response to Covid-19, implemented a secure file exchange so that providers can share files with the LAA, which were previously sent on paper or disks.
23. The LAA continues to embed transformation in the work it does. This includes continuing to support the roll-out of the new Apply service and seeking further

opportunities to improve the experience for the people who apply for legal aid, the providers who deliver the services and those in the LAA who administer the scheme.

### **Recruitment and retention problems among legal aid professionals;**

24. We recognise that there has been a decline in recent years in the number of criminal duty solicitors who provide a critical service in the police station and magistrates' court. Having listened carefully to the legal profession's concerns regarding the ageing profile of duty solicitors and difficulty attracting new entrants, the next phase of the Criminal Legal Aid Review will consider how the criminal legal aid market can meet demand now and into the future, provide an effective and efficient service that ensures value for money for the taxpayer, and provide defendants with high-quality advice from a diverse range of practitioners.
25. The Independent Review will specifically consider recruitment and retention problems among legal aid professionals and what the best way to meet potential practitioners career expectations might be. Throughout the first phase of CLAR we have engaged with a wide range of practitioners to get their views on why they feel a career in the profession is no longer attractive. This feedback will also be considered by the Independent Review. The review will also consider barriers to recruitment, retention and career advancement within the criminal legal aid profession for individuals with protected characteristics and what the government might do to address them.
26. We understand the concern of legal aid practitioners that entry into the civil legal aid profession is no longer attractive and we are considering this issue carefully. The department's ongoing work on the sustainability of the civil legal aid system is specifically considering recruitment and retention among legal aid professionals through the lens of looking at the pipeline into the profession. We have already held a series of roundtables, including one specifically with young lawyers to understand the barriers they have faced in entering the profession – both financial and structural – and to consider what intervention, as government, we could make to support this.
27. The Lord Chancellor has a duty to uphold access to justice and all work on the sustainability of both Criminal and Civil and Family Legal Aid is intended to ensure that there are a body of providers (and a pipeline supplying this body) that ensures access to justice is maintained. The LAA regularly monitors capacity and the available access to services and takes action where it identifies gaps in services or where demand is greater than the available supply

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

28. The court reform programme is using technology to bring our justice system into the 21st Century, improving the experience of all our users when they need to access the justice system. Easy to use online services have replaced lengthy processes and reduced the time it takes for people to resolve their case. Slow, paper-based processes dependent on face-to-face interactions are being replaced with more streamlined activity that can deliver quicker and better services to all who use and need them.

29. We are monitoring the ongoing equalities impacts of the increasing use of technology and paying due regard against the nine protected characteristics outlined in the Equality Act 2010. We support vulnerable users and those who are digitally excluded through:

- a. Digital support – providing help to those people who are less confident using online systems to navigate our online services;
- b. Reasonable adjustments to help individual disabled users access services on a more equal basis
- c. Continued availability of traditional methods such as paper forms, which are being continuously improved and made more accessible.

The new easy-to-use, online services introduced over the last two years mean the public are no longer required to fill out long paper forms or appear in person unnecessarily, often at very difficult or stressful points in their lives.

30. We have invested £1.1bn in modernising our court system, to make sure that it is accessible to everyone in society. In collaborating with the senior judiciary, we are focused on increasing the use of technology with a goal of modernising our ways of working and the way justice is administered.

31. In March, due to Covid-19, almost half of all courts were closed and jury trials were paused. Since then, the increasing use of technology has been central to the work of court staff, legal professionals and the judiciary who have collaborated in prioritising the running of our justice system. Up to 90% of hearings in this period involved remote access and without technology recovery would have been significantly hampered.

### **The impact of Covid-19 on legal aid services and clients;**

32. We are aware that the COVID-19 outbreak has created a range of challenges for the legal profession and we are working closely with legal practitioners and other providers of legal support across the justice system, to understand and respond to their concerns. We know the most important thing for legal aid practitioners is to get courts up and running again to get work going through the system. To support court recovery and increase the opportunities for legal aid work to be undertaken, we are investing £80m in courts, recruiting 1,600 new staff, opening more Nightingale Courts, and will shortly have even more rooms available for jury trials. Magistrates' courts are seeing the number of outstanding cases drop – dealing with over 21,000 cases a week. This has contributed to the increased cases in our Crown Courts, which are currently clearing over 1,800 cases and listing over 100 trials each week.

33. Further to this, we recognise the impact that Covid-19 has had on legally aided clients and the difficulties that they have faced. We addressed these issues in more detail in the Department's response to the committee's inquiry into the impact of COVID-19 on the legal sector and refer the committee to this document. We and the LAA are continuing to closely monitor the impact of this ongoing situation as we move through court recovery for both practitioners and legal aid clients.

34. Legal support stakeholders have informed us that the pandemic has impacted the key drivers of civil legal need such as financial volatility, job security and family stability. There has been patchy evidence of increasing legal need across many different jurisdictions; nonetheless there is clear consensus among the advice sector that demand has increased for debt, employment and welfare advice. Citizens Advice, National Debt Helpline and other providers have reported significant increases compared to the same periods last year.

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

*Criminal Legal Aid*

35. The fundamental aim of the Independent Review into Criminal Legal Aid is to ensure that we have a diverse and sustainable legal aid market, that meets demand now and, in the future, provides value for taxpayer funds, and ensures access to justice.
36. The criminal justice system is at a time of rapid change. HMCTS Reform, technological advancement and demographic changes are all affecting how Criminal Legal Aid is provided and how we can best structure Legal Aid to support those most in need. Covid-19 has only accelerated the pace of change. The Independent Review into criminal legal aid will consider and align its recommendations with reforms being made across the Criminal Justice System, contributing to wider efforts to enhance efficiency and effectiveness, considering reforms in other jurisdictions where they provide a useful indication of how reforms might affect the provision of Criminal Legal Aid in England and Wales. The review will seek to ensure the system is sustainable so that it can overcome any challenges in its future. The review will consider whether new methods of service provision may be appropriate and, if so, how these may be procured and provided. The review will consider how the government can incentivise providers to make the most of modern technology; the impact on those with protective characteristics; how it can encourage them to innovate; and how it can place a proportionate administrative burden on providers so that the administration of the system does not stand in the way of access to justice.
37. We are working at pace to be able to launch the next phase of CLAR – the independent review, working closely with practitioner representative bodies and will be able to confirm the Terms of Reference and who will lead the review in due course.

**Civil Legal Aid**

38. We have begun work to consider the issues relating to the longer-term sustainability of the civil and family legal aid system more widely – this is something which we understand has been a concern for some time but has been made more acute by recent events.
39. As part of this work, the MoJ are looking at a number of areas:
- The level of fees and structure of the fee schemes;
  - The scope of civil legal aid, particularly the availability of early legal advice;

- The pipe line into the profession, particularly training opportunities for prospective lawyers;
- The delivery model for civil legal aid; and,
- The administrative burden placed on providers.

Once we have scoped the work and identified options we will publish a timetable.

### *Means Test Review*

40. LASPO made minor changes to the eligibility regime for legal aid, such as the removal of capital passporting, and therefore the PIR didn't consider the financial thresholds for accessing legal aid, various respondents to the review submitted evidence on legal aid eligibility and thresholds.
41. Following the engagement undertaken throughout the PIR we decided that the time was right to take a fresh look at the means test, and therefore, in February 2019, we announced the launch of the Legal Aid Means Test Review. This review is considering the means tests in the round, including:
- the income and capital thresholds for civil and criminal legal aid entitlement
  - benefits passporting
  - non-means tested areas of legal aid
  - types of income and capital that are disregarded when assessing financial eligibility
  - the contributions system.
42. Alongside these areas, the review is assessing how well the means test protects access to justice, particularly for those who are vulnerable, including reviewing capital thresholds for victims of domestic abuse. We are working closely with legal aid practitioners, representative organisations and third sector bodies to explore these issues, while bringing together data, evidence and expertise from across government and beyond.
43. We will publish a consultation which sets out our findings and our proposed changes to the means test in Spring 2021. Following this, we will bring forward any legislative and administrative changes as soon as practicable.