
AN ANALYSIS OF THE EVIDENCE

By Sir Henry Brooke

This paper sets out an analysis of the evidence received on some (but not all) of the main issues the Commission had to consider when writing its report.

Please note: This appendix was written by Sir Henry Brooke and considered by the Bach Commission. It should not be read as the collective work of the commission.

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CHAPTER 1: Legal Aid Expenditure Overview

The pre-LASPO Impact Assessment

The pre-LASPO impact assessment of the cumulative legal aid reforms dated 13 July 2012¹ stated that in aggregate the package of measures would save the legal aid fund an estimated £410m per year once full steady-state savings had been realised.

In today's prices, that would be an estimated annual saving of £445m.

Savings in real terms

Overall Annual Legal Aid Expenditure for the base year 2010-11 and the four post-LASPO years (2013-2014 to 2016-2017) (£'000s), budgeting measure of expenditure in real terms²

The figures in the next Table were taken from the June 2017 edition of the Legal Aid Agency's Legal Aid statistics, updated on 22 August 2017. They adopt 2010-11 (the last full year before LASPO received the Royal Assent) as the base year and show real terms expenditure on legal aid in each of the years recorded. All the other statistics in this Appendix are taken from the original June 2017 edition (unless otherwise indicated) and show expenditure in cash terms.

Looking backwards from today, the real terms expenditure on legal aid in 2010-11 was almost £2.5bn (£1.3bn on criminal legal aid, and £1.1bn on civil). As stated above, the impact assessment of the cumulative legal aid reforms at Royal Assent stage estimated that LASPO and the associated fee reforms would effect £410m worth of savings per annum once full steady-state savings had been realised.³ As the table below shows, in reality they have saved more like £950m.

	Criminal Legal Aid	Civil Legal Aid	Central Funds ⁴	Total legal aid
2010-11	1,289	1,125	86	2,499
2013-14	1,007	859	85	1,951
2014-15	913	703	65	1,681
2015-16	878	612	50	1,541
2016-17	863	646	45	1,554

¹ Ministry of Justice. (2012) *Cumulative legal aid reforms: impact assessment* (Royal Assent stage). Accessed September 2017: <https://www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information>

² Legal Aid Agency. (2017) *Legal aid statistics: January to March 2017*, Table 1.0. Accessed September 2017: <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2017>

This table reflects the total value of payments made to legal aid providers in the years in question.

³ See fn 1 above.

⁴ Expenditure from Central Funds was not included in the pre-LASPO Impact Assessment.

Relevant statistics in cash terms

Overall Annual Savings (in cash terms) since 2009-2010 base year

Crime

Crime lower workload ⁵

Value of cases (£'000s)

	Pre-charge suspects	Charged defendants	Representation at MC	Prison Law	Virtual court	Total
2009-10	187,248	8,013	255,531	24,889	45	475,726
2010-11	179,375	7,427	226,374	25,381	249	438,806
2013-14	160,587	5,079	191,067	19,920	394	377,047
2014-15	145,368	4,026	167,001	15,842	456	332,692
2015-16	128,543	2,500	139,433	14,875	495	285,845
2016-17	129,439	2,214	136,209	14,650	597	283,108
Change since 2009-10	-57,809	-5,799	-119,322	-10,239	552	-192,618

Crime higher workload⁶

Value of Cases (£'000s)

	Litigators LGFS	Litigators Discret'ry	Advocates AGFS	Advocates Discret'ry	VHCC	Higher Courts	Total
2009-10	261,290	64,196	278,336	13,704	95,309	11,416	724,251
2010-11	302,963	20,524	266,123	4,079	93,087	9,792	696,568
2013-14	292,362	14,922	226,901	2,260	56,776	7,491	600,712
2014-15	311,417	11,405	213,024	3,314	36,179	8,245	583,643
2015-16	336,513	10,426	226,612	1,685	26,789	7,235	609,260
2016-17	319,245	10,438	223,942	1,486	31,685	6,685	593,480
Change since 2009-10	+57,955	-53,758	-54,394	-12,218	-63,624	-4,721	-131,271

Overall saving in crime (in cash terms) since 2009-10: £192.618 million + £131.271 million = **£324m**

⁵ Crime Lower covers representation to those accused of criminal offences at police stations and in Magistrates' Courts.

⁶ Crime Higher covers legal representation in Crown Courts, Court of Appeal and the UK Supreme Court.

Civil

Legal help and controlled representation: Value of cases (£'000s)⁸:

	2009-10	2010-11	2016-2017	Reduction since 2009-10
Community care	2,808	2,509	1,705	1103
Debt	23,927	25,650	75	23,852
Discrimination	-	-	352	+352
Education	1,240	1,725	1,457	217
Employment	4,784	6,996	2	4,782
Family	61,088	58,201	10,825	50,263
Housing	22,593	22,564	9,247	13,346
Immigration	78,985	74,304	37,401	41,584
Mental Health	33,556	36,281	32,911	645
Other	4,659	4,752	2,178	2,481
Welfare Benefits	22,179	22,599	2,226	19,953
Totals	255,820	255,581	98,379	157,804

Civil Representation:⁹ Value of cases (£'000s)

	2009-10	2010-11	2016-17	Reduction since 2009-10
Community Care	2,442	3,000	1,945	497
Debt	1,595	946	229	1,366
Discrimination	-	-	10	+10
Education	1,405	871	155	1,250
Employment	360	488	7	353
Family	558,114	565,875	517,971	40,143
Housing	26,679	24,956	19,314	7,365
Immigration	4,291	5,129	3,680	611
Mental Health	1,339	2,592	9,925	+8,586
Other	37,476	49,397	18,453	19,023
Welfare Benefits	238	97	14	224
Totals	634,240	653,351	571,702	62,538

Overall saving in civil since 2009-10: £157,450 million + £62,236 million = **£220 million**

⁸ This Table shows the value of claims paid during the year: a case may well have started in earlier years.

⁹ Civil Representation relates to legal aid that covers representation by barristers and solicitors in civil cases that go to court.

Exceptional case funding (2013-2014 to 2016-2017)

Number of applications granted

Non-Inquests	2013-14	2014-15	2015-16	2016-17	Expected outturn
Debt	0	0	0	0	Negligible
Discrimination	0	0	0	0	
Education	0	0	0	0	Up to 5% for some proceedings
Employment	0	0	0	0	Up to 5% for some proceedings
Family	9	48	156	96	Up to 5% for some proceedings ¹⁰
Housing	1	3	2	7	Up to 25% for some proceedings
Immigration	4	57	326	668	Negligible
Other	2	8	17	7	Up to 5% for some proceedings
Welfare Benefits	0	3	2	8	Negligible
Total	7	119	503	786	
Inquests	54	110	163	145	

Even after the decision of the Court of Appeal in *Gudanaviciene*,¹¹ these figures remained very much lower than was originally expected.

Number of legal aid providers

Legal Help & Controlled Legal Representation	2012-13	2016-17	Reduction
Community Care	166	118	48
Debt	466	29	437
Education	33	4	29
Employment	223	3	220
Family	2,383	1,399	994
Housing	646	427	219
Immigration	240	237	3
Mental Health	203	178	25
Other	659	212	447
Welfare Benefits	436	60	376
Totals	5,455	2,667	2,798
Civil Representation	2011-12	2016-17	Reduction
Community Care	104	89	15
Debt	125	40	85
Discrimination	0	2	+2
Education	28	13	15
Employment	27	1	26
Family	2,816	2,026	790
Housing	681	449	232
Immigration	167	93	74
Mental Health	105	108	+3
Other	1,033	658	375
Welfare Benefits	19	2	17
Totals	5105	3481	1634

¹⁰ "Other private law family": Up to 5% for most proceedings.

¹¹ *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622. Accessed September 2017: <http://www.bailii.org/ew/cases/EWCA/Civ/2014/1622.html>

In September 2017 the Ministry of Justice published statistics that showed a decline in legal providers across all regions of the country – with Wales showing the largest drop of 29%. The figures were also high in the south-west (28%), the north-west (27%) and Merseyside (24%).

The smallest fall was 13%, in London.¹²

¹² Accessed September 2017: <https://www.theguardian.com/law/2017/sep/19/number-of-legal-aid-providers-falls-20-in-five-years-figures-show>

CHAPTER 2: Family Law

Introduction

The greatest changes in the civil legal aid regime occurred in the field of family law. Legal aid was withdrawn in all private law family cases unless the applicant qualified for admission through what was called the domestic violence gateway.

Subject to this exception, legal aid was no longer to be available in “financial relief” cases¹³ or “children and family” cases.¹⁴

The following categories of case remained in scope:

- Domestic violence and forced marriage cases;
- International child abduction;
- International family maintenance;
- Representation of children if a judge made them a party to the proceedings under Rule 9.5 of the Family Proceedings Rules 1991.

Legal aid would only be available for appeals in higher courts in the categories of case for which it remained in scope.

The scale of these changes is reflected in some of the recent statistics published by the Legal Aid Agency (LAA):¹⁵ those that cover the baseline year (2009-10), the last pre-LASPO year (2012-13), and the first four years of the LASPO regime.

The first two Tables show that nearly a quarter of a million fewer people now receive legal help in family cases (when compared with the baseline year), and that annual savings of £52 million were achieved. The numbers who receive help with family mediation (an important feature of the government’s pre-LASPO plans) are trivial.

Volume of cases

Legal Help & Controlled Legal Representation	Private law family	Help with family mediation
2009-10	250,568	
2012-13	181,475	
2013-14	98,236	61
2014-15	30,584	306
2015-16	16,992	325
2016-17	13,922	279

¹³ i.e. disputes about the division of financial assets; applications for a lump sum payment or maintenance; transfer of tenancy; and divorce following relationship breakdown.

¹⁴ i.e. disputes about contact and residence of children; injunctions against ex-partners; and Prohibited Steps Orders and divorce following relationship breakdown.

¹⁵ Legal Aid Agency. (2017) *Legal Aid Statistics January to March 2017*. See fn 2 above. Extracts from Tables 5.2, 5.3, 6.2, 6.3 and 8.2 are reproduced here.

Value of cases (£s)

Legal Help & Controlled Legal Representation	Private law family	Help with family mediation
2009-10	55,781	
2012-13	34,823	
2013-14	20,076	15
2014-15	7,084	66
2015-16	3,309	73
2016-17	2,211	64

The next two tables show that the number of grants of civil representation in domestic violence cases (which were not removed from scope) have been reduced since the baseline year, and that savings approaching £160 million have been achieved in the cost of representation at court.

Volume of cases

Civil Representation ¹⁶	Domestic Violence	Financial Provision	Other family proceedings	Private law Children Act proceedings
2009-10	19,111	17,843	1,039	46,684
2012-13	15,173	7,533	1,117	44,874
2013-14	14,262	6,852	1,197	44,221
2014-15	14,839	4,784	767	25,392
2015-16	12,709	2,395	365	13,253
2016-17	12,693	1,446	226	10,035

Value of cases (£s)¹⁷

Civil Representation ¹⁸	Domestic Violence	Financial Provision	Other family proceedings	Private law Children Act proceedings	Totals
2009-10	50,610	43,523	3,551	161,996	259,680
2012-13	47,147	29,983	4,335	174,945	256,410
2013-14	42,240	25,019	6,022	157,838	231,119
2014-15	41,118	18,223	4,038	124,465	187,844
2015-16	36,957	12,018	2,428	80,218	131,621
2016-17	35,832	7,690	1,727	58,082	103,331

¹⁶ The very small figures for “Combined family proceedings” and “Help with mediation” are omitted from this table. In 2016-17 nobody was assisted under either of these heads.

¹⁷ The Table shows the value of the claims paid during the year: a case may well have started in earlier years.

¹⁸ The very small figures for “Combined family proceedings” and “Help with mediation” are omitted from this table. In 2016-17 there was no expenditure under either of these heads.

Exceptional Case Funding (family cases)

A final table shows that the number of Exceptional Case Funding (ECF) grants in family cases remains miniscule, despite the liberalisation of the ECF regime two years ago, and the initial forecast that up to 5% of most proceedings in “other” private law family cases would be readmitted to scope with ECF funding.

	Applications	Grants	Success Rate
2013-14	819	9	1%
2014-15	464	48	10%
2015-16	394	156	40%
2016-17	303	98	32%

The Court of Appeal has explained the principles on which ECF must be granted:¹⁹

- The Convention guarantees rights that are practical and effective, not theoretical and illusory in relation to the right of access to the courts;
- The question is whether the applicant’s appearance before the court or tribunal in question without the assistance of a lawyer was effective in the sense of whether he or she was able to present the case properly and satisfactorily;
- It is relevant whether the proceedings, taken as a whole were fair;
- The importance of the appearance of fairness is also relevant: simply because an applicant can struggle through “in the teeth of all the difficulties” does not necessarily mean that the procedure was fair;
- Equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent.

Given that these criteria are certainly satisfied in many private law family cases in which unrepresented litigants are currently being left to struggle on their own without lawyers,²⁰ the vanishingly small number of grants of ECF in family cases since these principles were explained appears to show that specialist providers have given up considering it as a practical way in which their clients can be helped.

The Domestic Violence Gateway

The Commission received a huge volume of evidence that contained criticisms of what was regarded as the capricious regime that controlled admission to the domestic violence gateway.²¹ Since LASPO,

¹⁹ In *R (Gunanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622. Accessed September 2017: <http://www.bailii.org/ew/cases/EWCA/Civ/2014/1622.html>

²⁰ A deep sense of injustice is notably felt by those who face domestic violence and sexual abuse allegations without legal representation when the party making the allegations is in receipt of legal aid. Sometimes this experience leads to further violence and/or aggression on their part, or they simply walk away from their responsibilities because the proceedings have been so unfair.

²¹ Research conducted by *Rights of Women* in 2015 showed that 37% of women who had experienced or were experiencing domestic violence could not produce any of the forms of evidence that were at that time prescribed. Rights of Women. (2015) *Evidencing domestic violence nearly 3 years on*. Accessed September 2017: <http://rightsofwomen.org.uk/wp-content/uploads/2014/09/Evidencing-domestic-violence-V.pdf>

however, this regime has been significantly relaxed in many important respects,²² and before the June 2017 General Election the Ministry of Justice was involved in constructive discussions over ways in which the regime might be further liberalised. Evidence of domestic violence that occurred up to five years earlier is now admissible, the range of acceptable supporting evidence has been greatly extended, and evidence of financial abuse may now be accepted as constituting domestic violence.

Rights of Women complained, however, about the fact that only the survivors of domestic violence were deemed to need legal advice and representation. Other vulnerabilities were not taken into account. Women with disabilities, mental or physical illness, language, educational, financial and social barriers were not deemed to require legal advice or representation in order to conduct litigation. They said that it was unconscionable that a destitute woman who did not understand English should be required to draft her own evidence or be expected to understand and comply with orders of the court.²³

The effect of LASPO and of the fees charged in family law cases

The Consortium of Expert Witnesses in Family Courts told the Commission that their biggest current concerns post-LASPO came were that:

- Increasing numbers of parents in private law cases are litigants in person²⁴ and have no access to representation or to expert reports, so that they and their children are denied justice in serious matters concerning sexual, physical, and emotional abuse, and neglect.
- When expert witnesses are instructed in private and public law cases, the scope of their reports is driven by financial cuts, so that they often have only a limited number of documents made available to them, and they are only allowed limited interviews with family members; when they request more time for complex cases, determinations are made by non-clinical Legal Aid Agency staff, who routinely over-ride the decisions of the Judge who knows the case first-hand.
- Many highly-experienced medico-legal experts from all disciplines have abandoned or restricted their Family Court work because of the rate cuts, the insufficient hours that are allowed to properly undertake an assessment properly, and the difficulty in collecting

Accessed September 2017. The *Welsh branch of Families Need Fathers* reported that in a sample survey of 226 male victims that used the same question framework 69.8% of respondents were shown to lack the necessary qualifying evidence.

²² Amendments to the relevant provisions in the Civil Legal Aid (Procedure) Regulations 2012 were effected by the following statutory instruments: SIs 2014/814; 2015/1416; and 2016/516. All accessed In September 2017: <http://www.legislation.gov.uk/ukxi/2014/814/part/1/made> http://www.legislation.gov.uk/ukxi/2015/1416/pdfs/ukxi_20151416_en.pdf http://www.legislation.gov.uk/ukxi/2016/516/pdfs/ukxi_20160516_en.pdf The last of these changes was made shortly after the Court of Appeal had quashed the earlier references to the requirement that evidence in support of an application for civil legal aid services must be no more than 24 months old and also ruled that financial abuse might amount to domestic violence: see *R (Rights of Women) v Lord Chancellor* [2016] EWCA Civ 91. Accessed September 2017: <http://www.bailii.org/ew/cases/EWCA/Civ/2016/91.html> .

²³ A very experienced district judge has told me: “Every day in the family court with so many unrepresented litigants is a living nightmare. So very many have mental health problems, drug, language, learning difficulties. I can no longer do justice or protect the vulnerable child or adult – I am in despair.”

²⁴ In 2014 the National Audit Office reported that in 80% of family court cases starting in the last quarter of 2013-14 at least one of the parties did not have legal representation. National Audit Office. (2014) *Implementing Reforms to Civil Legal Aid*, HC 784 2014-15, p. 15. Accessed September 2017: <https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>

payment from multiple parties responsible for paying bills; as a result experience built up over years in the Family Courts has been lost.

In its powerful evidence the Consortium also said:

“Access to Justice is limited not only for families who cannot obtain representation, but also for families who are publicly funded, but suffer from the cuts now imposed to our work with them.

LASPO has undermined and in some areas destroyed the innovations brought in by the Children Act 1989 to promote multi-disciplinary work towards protecting, understanding, and helping children and their families. Multi-disciplinary teams, which were once heralded as the way forward, are now restricted to just a few organisations; even most NHS services have shut down their teams for lack of adequate legal aid funding. Professional and expert meetings used to provide opportunities for social workers, Children's Guardians, lawyers, and clinicians to consider together and plan assessments that led to promoting the welfare of children and their families. Cost-cutting for all professionals has led to these meetings disappearing almost entirely. Instead, we now are asked to undertake assessments of complex family matters with little discussion in advance, late instruction, inadequate documentary evidence, and often restrictions on the number of family members we are allowed to see for our investigations.”

The Commission received many complaints about the level of fees litigants now have to pay in order to access justice, quite apart from the fees levied by HM Courts and Tribunals Service for initiating or continuing with court proceedings. Examples included a fee of £215 for enforcing a court order, a fee of £160 for obtaining a court order evidencing earlier incidents of domestic violence, and a fee ranging between £50 and £175 for evidence from a GP (which may be rejected if it does not follow the LAA's template for such evidence).

Concern was also expressed about the diminishing number of law centres and solicitors' firms who hold legal aid contracts for family work, as the following table shows:

Firms with family law legal aid contracts	Legal help	Civil representation: Domestic violence	Civil representation: Financial Provision
2012-13	2,383	1,883	1,961
2016-17	1,399	1,188	790

In a survey conducted by *Rights of Women* in 2015 71% of respondents said it was difficult, or very difficult, to find a legal aid solicitor in their area, and 53% said that they took no action in relation to their family law problem as a result of not being able to apply for legal aid.

In addition to these problems, *Southall Black Sisters* wrote of difficulties now confronting black and minority ethnic (BME) women when they seek to access specialist and statutory services. They said that the “justice gap” was increasingly being filled by discriminatory and unaccountable community-based or religious based forums and ‘tribunals’ which seek to arbitrate using religious laws that have a profoundly negative human rights and equality impact on the most vulnerable in our society, especially BME women.

Resolution summarised the present situation in these terms:

“Many family clients have multiple and not only family law problems. It is extremely challenging to signpost to meet other needs and for family law clients to

get advice in related areas of law, including out of scope housing issues and welfare benefits, as it is now almost impossible to get specialist advice on first-tier benefit appeals.

There is an inevitable but unfortunate evidence gap around the volume and experience of those who, for example, may remain in conflicted and damaging relationships, delay resolving matters, or not resolve children and finance matters at all. We are particularly concerned about parents who may decide not to pursue contact issues or are unable to try everything to maintain contact for the child's benefit.

...

In terms of the impact on the family court and their client, when they act for a party and one or more of the other parties is a Litigant in Person (LIP), our members consistently report that there is less constructive dialogue between and outside court hearings, and this works against constructive negotiation and settlement before the final hearing. In a Resolution survey, almost 95% of members who responded said that the case takes longer than it could do, almost 70% said that final decisions have to be made by the court without the necessary expert evidence, and 80% that the legal or legal aid costs of the represented party increase.

This all adds further costs to the family law system, largely due to the extra court time which cases involving a LIP often require. Anecdotally, our members report more children being separately represented in private children cases. This means that, whilst money is being saved at one end (in terms of cuts through LASPO), additional money is being required at the other stages of the process (in order to deal with the consequence of more LIPs)".

The effect of the LASPO changes on the practice of family law was usefully summarised in the evidence the Commission received from Jenny Beck, who is co-chair of the Legal Aid Practitioners' Group. When she started practising family law 25 years ago, legal aid funding was available for virtually all family law issues.²⁵ The changes introduced by LASPO in 2013 fundamentally impacted the provision of family law services, which in turn fundamentally impacted families.

She said that people usually see family lawyers when they are in distress. The absence of any ability to give early advice on the governing principles has meant that a great many people have been unable to look after themselves and their family at all adequately. In the old days, a mother might permit contact if she could obtain a Prohibited Steps Order to prevent the father from keeping the child after the contact was over. Now mothers were deciding not to permit contact at all, because it was altogether too risky given that she could not now obtain legal aid to get the children back if they were not returned to her.

She will receive no "upfront" legal advice about the child's best interests being paramount, or how the courts view family law cases. As a result, children lose out. They will not receive public funding themselves. As a result, she believes, LASPO has not only eroded access to justice by downgrading the

²⁵ Indeed, from the very start family law and personal injury law took up the lion's share of Government expenditure on civil legal aid, and this state of affairs lasted until the incoming Labour government removed most personal injury claims from scope in the reforms it introduced in the Access to Justice Act 1999.

rights of individuals (especially children), but it will also change the fabric of society as a whole as things go on.

Instead of increasing in popularity, as the Government expected, she said that publicly funded family mediation has fallen off a cliff, as the following table shows:

Family Mediations	Mediation Assessment Meetings	Mediation starts	Expenditure on Mediations (£,000s) ²⁶
2012-13	30,665	13,609	6,268
2016-17	11,927	7,668	2,934

A party is stuck if the other side refuses to mediate, and people are now lacking the initial advice they used to receive from their solicitors about the merits of mediation.

Ms Beck said that there was now evidence of the increased length of time that is taken up by family cases, with an increased tendency of one or both the parties to be unrepresented.²⁷ The rules of family procedure, she added, are almost impossible for a layperson to follow.

The restoration of legal help in private family law cases

After describing the concessions that had been made in relation to the domestic violence gateway, and the conversations that were continuing up to the announcement of the recent General Election, she said that the cost of restoring upfront legal help in family cases (which she put at £14 million²⁸) could be met from the savings in the money the Government had expected to spend on family mediation. Early advice would not only save money by directing more people into mediation (thereby not clogging up the courts) but it would also make savings in court time.

In this context Colin Stutt, who had immense experience of these matters when he was employed by the Legal Services Commission, told the Commission:

“Family legal aid – a little early help goes a long way. For me, the most worrying impact of LASPO is not that clients are often left unrepresented in ongoing court proceedings, it is that clients may have access to no advice and assistance early on, and so may even end up pursuing unnecessary proceedings. If, as I fear, it is not going to be economic to reinstate family legal aid in its entirety, I would argue for reintroducing a limited form of fixed fee legal aid which could be used either to help negotiate a settlement, assist in an ongoing mediation or advise and steer a client to help them proceed unrepresented. This involves seeing legal aid as a means for

²⁶ In its pre-LASPO Impact Assessment the government had allowed additional expenditure of £10 million in anticipation of a greatly increased number of family mediations. It took no, or no sufficient notice of the likelihood that when initial legal help and advice was withdrawn, couples would no longer be advised by their solicitors to submit their differences to mediation.

²⁷ The Society of Labour Lawyers told the Commission that if litigants in person are involved, there is less likelihood that they will narrow the issues, and their submissions are less likely to be succinct. There is therefore an increase in lengthy contested cases at a time when cuts in court resources are already taking place.

²⁸ Legal Help for an initial consultation with a lawyer is currently available at a fixed fee of £86. For Level 2 (Family Help (Lower) – Finance), which covers advice and assistance (including negotiation with the other party) but falls short of representation, a fixed fee of £208 is payable (£241 in London), and a settlement fee of £125 (£145 in London). Slightly lower fees are payable in children cases.

resolving disputes rather than as a process for the funding of representation in court.”

Resolution wrote to similar effect:

Resolution proposes a form of ‘family law credit’—where anyone who meets the criteria for legal aid for family mediation is able to have an initial meeting with or online access to a family lawyer to help them gather evidence they need in order to access legal aid, or to discuss their options.

It may be a combination of services, so that people are able to receive help from a legal professional at the points in the process where they need it most—so even if they end up representing themselves, they have an initial discussion about what they need or want to do. This would help moderate peoples’ understanding of their legal position, avoiding the need for some to enter the court system at all.

Jenny Beck said that although an attempt was being made to compute the knock-on costs of withdrawing early advice, this was very difficult since it involved estimating the greater expenditure that had to be borne by GPs or the mental health services or the police or the prisons and so on if sensible advice was not available early on. It was quite impossible to add this all up in respect of all the people who had lost touch with their families after they had been unable to receive early legal help.

She emphasised the importance of using trained lawyers in family cases. When she is training staff, she sees how trainees often miss out another possible angle to a case because they need more experience to work out how things are likely to pan out.

When asked about fees, she said that the Transforming Legal Aid strategy had imposed a cut of 10% on all fixed fees. The vast majority of care cases cost between £3,000 and £4,000, and are concluded within a 46-week period, with the cost of advocacy (if used) on top.²⁹ These cases include many child abuse cases.

The Society of Labour Lawyers, for its part, said that family cases are very personal and particularly emotive. They may involve people who are vulnerable, learning disabled people, people for whom English is not their first language, or people with low intelligence or addiction issues.

In some cases legal aid might be available for one area of a case but not for others, which makes it difficult for a litigant to access any effective representation. A recent case had involved an application for an interim care order. It was alleged that the father had strangled the child and committed domestic violence against the mother. Legal aid only covered the application for an interim care order, but not for the application for a non—molestation order which was dealt with at the same hearing. The father brought to court a report by a psychologist which stated that he had a very low IQ. However, he was unable to convey his evidence effectively to the court or indeed to understand what he had to convey.

²⁹ There are a tiny number of family cases that are more expensive. In child murder cases or other cases of the utmost seriousness authority may be granted by the LAA for a QC and a high-cost care plan, and it is these cases that account for a much higher overall spend on legal representation. Jenny Beck herself has not seen one of these cases in the last two years.

Problems with cross-examination in family cases

Many respondents drew the attention of the Commission to the harm that is created when an applicant in a domestic violence case is cross-examined by the alleged perpetrator.³⁰ Public and political disquiet about this practice has now led to the Government deciding to introduce procedures similar to those that are already in use in the criminal courts, although the legislation effecting this change fell at the recent dissolution of Parliament, and will be introduced again in the current session of Parliament.³¹

Suggestions for the reform of LASPO in family cases

In addition to advocating the re-introduction of early legal help in family cases, the Society of Labour Lawyers³² said that the Government should also reinstate legal aid for representation in particularly sensitive areas of private family law, such as:

- Cases in which the primary care of a child is in issue and care may be transferred;
- Cases where there is local authority involvement in private law children proceedings;
- Cases where representation of both parties is necessary for a just resolution: cases involving particularly vulnerable people, for instance;³³
- Cases involving an application to remove a child from the jurisdiction.

They said that legal aid was not needed in contact disputes if the dispute was about the quantum of contact, or whether contact should take place on a Saturday or a Sunday, but it was certainly needed if there was resistance to the idea that there should be any contact at all.

They also recommended a general catch-all test:

Is an allegation so serious that it would be unjust not to provide legal representation to defend it?

Jenny Beck agreed with this approach. She said that a catch-all provision was sensible for cases where it would be inequitable to consider that people had to represent themselves. She also said that the criteria for ECF support in family cases should be relaxed because there were a myriad different smaller issues for which justice demanded representation. She instanced grandparents, who currently do not qualify for legal aid when they apply for a care order to be made in their favour; or a parent when he/she seeks to recover care from a third party (such as a grandparent).

³⁰ Jenny Beck said that she had had a very recent case in which her client simply refused to give evidence because she was so alarmed at the prospect of being exposed to such cross-examination.

³¹ This legislation (Clause 47 of the Prisons and Courts Bill 2017) was introduced in the light of the observations of Lord Dyson MR in *Re K & H (Children)* [2015] EWCA Civ 543. Accessed September 2017: <http://www.bailii.org/ew/cases/EWCA/Civ/2015/543.html>, in which the Court of Appeal overruled a judgment by the President of the Family Division to the effect that the court itself had the power to direct HM Courts & Tribunals Service to fund the necessary representation. The new government has said that it will include the provision again in the Courts Bill it will present in the current session of Parliament.

³² The Society's evidence in family law cases was presented by Naomi Angell, a former chair of The Law Society's Family Committee, now a consultant at Osbornes LLP, who through a long professional career combined her casework as a family law solicitor with national family policy work.

³³ At present vulnerable people receive legal aid on an application for interim care, but not on a later application for the revocation of a care order.

The Law Society also addressed these questions, first in the evidence it submitted to the Commission in January-February 2016, and more recently in its publication *Access Denied: LASPO four years on – a Law Society review*.³⁴

It recommended a streamlining of the domestic violence gateway by suggesting that solicitors and other advisers approved under the legal aid contract should be given delegated powers to confirm that a client is a victim of domestic violence.³⁵ It was in any event keen that the new government should implement two changes already proposed by its predecessor: that frontline domestic violence support organisations should be able to confirm that an applicant is victim of domestic violence; and the removal of all time limits in relation to the evidence of the last incident of violence sought to be relied upon.

- The Law Society, too, recommended that funding should be restored for private family law cases related to the removal of children from their parents. It said that this would address the problem of the unnecessary removal of children from family members. It could be achieved in three ways:
- The reinstatement of funding for private family law applications for extended family members (for example, grandparents) seeking to care for children where their parents are not able to do so;³⁶
- The reinstatement of legal aid in private law applications for special guardianship;
- The reinstatement of funding for legal advice, assistance and representations for parents who are respondents or prospective respondents to proceedings for special guardianship orders or child arrangements orders which seek to formalise the position of children living with the applicant where a local authority had/has child protection concerns and had considered starting care proceedings but did not do so because the friends and family carer had agreed to apply or consider to apply for the relevant private family law order.³⁷

³⁴ The Law Society. (2017). *Access Denied? LASPO four years on – a Law Society review*. Accessed September 2017: <https://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/>

³⁵ The logic is that such solicitors can in any event be subjected to disciplinary sanctions and the loss of their legal aid contract if it is shown that they have abused this power.

³⁶ It suggested that a letter of recommendation from children's services should satisfy the LAA that legal aid should be granted for this type of application. At least one local authority is currently paying for grandparents and family members to make private law applications in order to protect children. This is said to be far less expensive than to incur the cost of initiating public law care proceedings itself.

³⁷ The Commission was told by one experienced family law firm that in their experience due to budgetary consideration many Local Authorities were not issuing Care Proceedings in circumstances they previously would have in the past where children have been placed with the wider family. *"Instead they are telling the wider family - who are often grandparents - to make an application to the Court for a Special Guardianship Order or a Child Arrangements Order. These are Private Family Law applications and so no longer in scope for legal aid. In these 'edge of care cases' the grandparents will often be of limited financial means and would have previously been eligible for legal aid pre-LASPO but find that is no longer available to them. In many instances the Local Authority is then refusing to meet their legal fees – even at legal aid rates - to enable them to obtain legal advice and representation to obtain the necessary Orders."*

CHAPTER 3: Housing Law

Expected reductions from baseline year and actual outturns

Volume of cases

	2009-10	2016-17	Reduction	Expected Reduction
Legal Help & Controlled Legal Representation	132,137	36,960	-95,177	-52,000
Civil Representation	10,432	7,216	-3,216	-1,200

Value of cases (£s)

	2009-10	2016-17	Reduction	Expected Reduction
Legal Help & Controlled Legal Representation	22,593	9,247	-13,346	-10
Civil Representation	26,979	19,314	-7,665	-3

Introduction

Housing law is a very technical and complicated area of law. The Encyclopaedia of Housing Law print version runs to over five loose-leaf volumes. There are numerous different types of tenancies (assured shorthold, assured, secure, introductory, flexible, demoted, non-secure) and each is governed by a different legal regime. Social landlords are always represented in court by lawyers, or by experienced housing officers. Private landlords may not always be represented, but as a rule they can afford legal representation. If a tenant is working, then he or she is unlikely to be eligible for legal aid, which is in any event now “out of scope” for most housing disputes. This heightens the inequality in what is already not a level playing-field in court.

Before LASPO

Before LASPO housing lawyers could give initial advice in a disrepair case and send an early letter of claim to a landlord for a small fixed fee. The threat of legal proceedings would usually persuade the landlord to carry out repairs, thus resolving the issue with very little public expenditure.

Assistance with welfare benefits could also be provided to clients at a very low cost fixed fee. This preventative advice enabled welfare benefits issues to be dealt with swiftly, avoiding the need to put a vulnerable tenant through the stress of legal proceedings for rent arrears, and avoiding unnecessary costs for the landlord (in both legal costs and lost rental income) and the unnecessary use of court time.

Cost benefit analysis of the value of early interventions in the housing field

In 2009 the Law Centres Network (LCN) published a report by *nef consulting* into the socio-economic value of law centres, using the traditional methods of measuring such impacts.³⁸ In this report the authors analysed two activities.

The first was an intervention by a law centre which saved a 16-year-old girl from being categorised as “intentionally homeless”, and restored her to being a confident teenager who learned how to manage her finances and eventually took up a full-time college course. They found that for an expenditure of about £1,700 the combined socio-economic benefit to identified stakeholders in central and local government was £20,000: a “benefit to cost ratio” of more than ten-to-one.

The second was a study of the value of the training element of a three-year project conducted by the Southwark Law Centre and Blackfriars Advice Centre called “Preventing Possessions” between 2004 and 2007. Training was provided to over 140 representatives from 39 organisations at a cost of about £122,000. The annual value to stakeholders (including the evictee) of a single avoided eviction was calculated at £56,000, and the “socio-economic cost to benefit ratio” of the training element of the project was assessed as six to one: a benefit of £6 for every single pound invested.

The situation post-LASPO – an overview

Shelter, the national housing charity, told the Commission last year that in 2014-15 there were 112,340 applications for statutory homelessness assistance and 546,500 households accepted for statutory homelessness assistance: an increase of 33% in five years. Shelter research showed that over six in ten renters had experienced at least one of the following problems in their homes in a 12-month period: damp, mould, leaking roofs or windows, electrical hazards, animal infestations and gas leaks.

The Government’s own homelessness statistics showed a steady growth between 2010 and 2015 in the number of cases of people being at risk of being made homeless due to problems relating to their housing benefit. In 2014-15, local authorities in England prevented 25,900 cases from becoming homeless by resolving housing benefit problems, a figure that had increased by almost 400% since 2009-10. Problems relating to a housing benefit claim were the most common reason for households requiring homelessness prevention services from local authorities in 2014-15, accounting for 24% of all prevention cases. Fewer people would need to seek homelessness assistance if they had much earlier advice to resolve their housing benefit problem.

During the same period 4.5 million people came to Shelter for advice - online, in person and over the phone. There was an increase of 12% increase in demand to the Shelter helpline and an increase of 8.6% in the number of people who accessed their ‘Get Advice’ pages.

Shelter told the Commission that the availability of Legal Aid provided a crucial means of preventing and resolving housing issues; of helping people to enforce their rights to housing, housing benefits and a decent service from landlords; and of providing support to them at times of crisis so that the crisis does not become a disaster.

The cuts to legal aid in the housing field (including the non-availability of legal aid for advice about housing benefit) which were introduced by LASPO have meant that fewer households can get the

³⁸ Accessed September 2017: <http://lawforlife.org.uk/wp-content/uploads/2013/05/nef-socio-economic-benefits-of-law-centres-129.pdf>

timely advice they need before they hit crisis point, by which time it may be too late to avoid homelessness.

Z2K sent the Commission this case study which illustrates the difficulties created by the unavailability of legal aid advice at a much earlier stage of a tenant's difficulties with rent arrears:

A client came to see us 2 days before he was due to be evicted from his council tenancy. He was a bus driver. He had had an accident at work following which he had lost his full time job. When he recovered he was only able to find part time employment which did not produce enough income to pay his rent. He did not know that he was entitled to housing benefit and was unable to access any advice that would have told him that. Eventually, in despair, he went to his MP who referred him to us. We helped him apply for housing benefit and persuaded the court to adjourn the hearing. We then obtained a back dated housing benefit payment which together with an arrears payment plan for the balance persuaded the landlord to withdraw the eviction, thus saving for the client the very valuable asset of a council tenancy.

If we had not been able to help him there is no one else to whom we could have referred him. The local Citizens Advice office could have dealt with the housing benefit issue but not the eviction proceedings. A housing solicitor could have dealt with the eviction in theory but not in practice because it could only be resolved by dealing with the housing benefit issue which is not covered by legal aid.

In the opinion of Shelter and of many others with great experience in the housing field, if free legal advice and advocacy were available at a much earlier stage, it would be easier to negotiate a mutually-acceptable outcome to housing problems. Many of the knock-on costs, to the court system, to local councils, to the NHS and, most importantly, to families and individuals themselves, could be avoided.

Lack of legal aid for damages claim for breach of repairing covenants

Legal aid is now only available for a claim brought by a tenant against his or her landlord for breach of repairing covenant (or for other causes of action related to disrepair of the tenant's home) where there is "serious risk of harm to the health or safety of the individual or a relevant member of the individual's family".

In practice, this means that the disrepair must still be in existence when the tenant brings a claim, so that the tenant is claiming an order for specific performance or an injunction requiring the landlord to remedy the disrepair.

The following types of claims are therefore excluded from legal aid availability:

1. A claim for damages where the disrepair is either no longer present or where the tenant has moved; and
2. A claim for damages and for injunction where there is some interference with health or safety, but the interference is not "serious".

If the tenant has lived, perhaps for a very long time, with the distress and inconvenience of serious dampness or other defects in his or her home, legal aid is not available to prosecute a claim for damages so long as any risk to his/her health or safety cannot be categorised as "serious". Alternative funding, such as a Conditional Fee Agreement (CFA), will therefore have to be arranged for the damages element of the claim. This could mean that any recovery of damages would not only be

subject to the statutory charge (whereby the Legal Aid Agency (LAA) has a first charge for its expenditure over any compensation awarded) but would also fall to be reduced by the deduction of the success fee under the CFA and any “after the event” insurance premium taken out by the client. The Law Centres Network told the Commission that in practice this means that unscrupulous landlords can usually ignore disrepair in their properties with impunity, because they know that tenants no longer have any recourse to legal aid to fight their corner.

Claims brought under section 11 of the Landlord and Tenant Act 1985 and/or section 4 of the Defective Premises Act 1972 can be very complicated. The availability of legal aid would provide a more level playing field in court and ensure that tenants only bring claims that have some basis in law and in fact, and that they are not disadvantaged when complex legal and factual issues (such as those concerned with the provenance of damp) are raised by their landlords.

Legal Action for Women told the Commission that in practice women in unsafe or unsuitable accommodation could not take court action against their landlords to obtain a remedy unless eviction proceedings were threatened. They said that in their experience Council housing departments were notoriously intransigent, and that it was practically impossible to get any help for women without the threat of legal action.

The Commission understands that most claims for damages for breach of a repairing covenant result in a successful outcome for the tenant, so that costs are recoverable against the landlord so long as the claim is not allocated to the small claims track. This means that legal aid for disrepair claims has not traditionally constituted a significant part of government expenditure on legal aid.

The reduction in the number of legal advice providers in the housing field

As a consequence of LASPO there has been a substantial reduction in the number of housing providers and the number of legal aid housing cases being undertaken. Figures produced by the LAA have shown a reduction in housing cases of over 50% since LASPO came into force, in a period in which rough sleeping, statutory homelessness and evictions from rented accommodation are all on the rise.

According to *Legal Action for Women* LASPO has made it nearly impossible to get advice and representation for benefits cases. The remaining agencies, e.g. Citizens’ Advice Bureaux, are inundated and have massive waiting lists. They cite an organisation called WinVisible (WV) as saying:

Vulnerable people with disabilities can’t get the help they need and are crushed by the process of being refused help as they go round three, four or more organisations. Faced with the loss of crucial benefits upon which their lives depend, people suffer horrible anguish and some become suicidal. We are in no doubt that lives have been lost as a result.

The Mary Ward Legal Centre received funding from the local council which enabled it to offer welfare benefits advice to people who lived, worked or studied in the London Borough of Camden. If they saw a client on a housing matter who was facing eviction and needed urgent advice about his or her benefits, whenever such advice as was available was too limited to resolve the issues properly they were forced to send the client elsewhere to try to get that advice if he or she did not qualify under Camden’s funding arrangements.

In Brighton the Brighton Housing Trust is now the only specialist provider of specialist housing advice. This means that clients have no choice, and there is also no other local provider to whom they can refer people when they do not have the capacity to accept them as clients or where a conflict of interest would arise. Because so many housing matters have been taken out of scope for legal aid

purposes they have to rely on non-specialist services to provide advice. As the Commission has already observed, early intervention can be hampered where there is no specialist advice available.

Z2K said that they frequently had to turn away clients in need of advice because they did not have sufficient resources to deal with the need, and there was often nowhere else to whom they could send them. They were also frustrated by the difficulty of finding competent housing lawyers who had the capacity to take on cases:

The good ones are often overburdened and there are some with legal aid contracts who are hopeless.

Almost a third of the legal aid areas in England and Wales have one or no local legal aid housing provider. There are currently no specialist legal aid housing law providers in Shropshire and Suffolk. Other providers, including Kingston upon Hull and Surrey, had no provider for a number of months, until the LAA took remedial action.

The Legal Aid Agency: the consequences of its bureaucracy in housing cases

The LAA's increased bureaucracy, particularly in respect of means testing, is of particular concern to housing law practitioners. The nature of the work they undertake is often very urgent. A client who is unlawfully evicted or made street homeless will often need very urgent assistance to ensure that he or she have a roof over their head that night. Such clients are very unlikely to have access to sufficient proof of their means (including income and capital) in order to satisfy the evidential requirements to prove financial eligibility. Even if they can produce sufficient evidence, the forms are now so long that legal aid providers have to spend a considerable amount of time completing them. This burdensome exercise is therefore acting as a disincentive for providers to undertake legal aid work.

Shelter spoke of having to navigate the layers of bureaucracy required to obtain Legal Aid, while worrying that payment will be denied or, worse, that they would be out of pocket after having to pay for Counsel's advice, and/or for surveyors, doctors or other experts. They have to make these payments upfront because any delay in preparation of their client's case could prejudice that case or indeed, where time is of the essence, defeat it altogether. They said:

If the bureaucracy surrounding Legal Aid were reduced, providers might be encouraged to stay in, or come back in to, Legal Aid work. We would be able to take on additional cases – because we could devote the time saved to actual legal work rather than the business of form filling and financial data collection; and the next generation of housing lawyers would not be deterred from wanting to use their skills to the benefit of disadvantaged people by all the obstacles that the Legal Aid system places in their way.

CHAPTER 4: Immigration Law

The accreditation scheme

The Commission received evidence from Jawaid Luqmani, an experienced immigration lawyer who acted as Chief Assessor of the Immigration and Asylum Accreditation Scheme between January 2010 and February 2013. Firms undertaking work in the immigration field who wish to receive remuneration from the Legal Aid Agency (LAA) must be accredited.

There are three levels of accreditation,³⁹ “advanced” (Level 3) being the level considered to reflect the highest level of competence. It is not currently a requirement of the LAA for every firm practising in this field to have an individual accredited to that level, but it is necessary to be accredited to at least senior casework level (Level 2) in order to ensure that there are adequate supervision mechanisms in place. There is a separate examination to assess an individual's fitness to supervise and if a firm does not have a supervisor it may experience difficulties in claiming funds for any legal aid work. The existence of the arrangements for supervision and accreditation were introduced in 2004 by the office of the Immigration Services Commissioner (OISC) long before LASPO, and were aimed at ensuring that only value for money services were being purchased by the Legal Aid Agency (and its predecessor), in the belief that this new system would eliminate poor practice.

Mr Luqmani told the Commission that in his opinion an accreditation scheme run by the Law Society is now required. He said that the Law Society's existing accreditation scheme is good, but it could be moved to a near-universal system instead. Some bad “unaccredited” firms even pride themselves on their “independence” from government, and although the situation is not as bad as it once was, the continued presence of unaccredited organisations who often give bad advice for a lot of money in an underhand manner is a “menace to the market”.

The effect of LASPO in immigration cases

Legal aid is now only available for:

- Asylum cases – defined as cases involving the right to enter and remain arising from the 1951 UN Convention Relating to the Status of Refugees (The Geneva Convention) and Articles 2 and 3 of the European Convention on Human Rights (The ECHR); Council Directive 2001/55/EC 20.7.2001 (The Temporary Protection Directive) and Council Directive 2004/83/EC (The Qualification Directive);
- Applications by a victim of trafficking for leave to enter or remain where there has been a positive conclusive decision concerning their status under the Trafficking Convention;
- Applications for indefinite leave to remain under the domestic violence immigration rules, and for residence permits on the grounds of a retained right of residence arising from domestic violence;
- Immigration detention (including bail applications and matters relating to temporary admission and release on restrictions). and
- Asylum support where accommodation is sought – but not for representation before the First Tier Tribunal (Asylum Support).

In general, judicial review remains “in scope” for legal aid in immigration cases (whether asylum or non-asylum), although there are specific exclusions, as where ‘the same issue or substantially the

³⁹ Level 1: basic immigration advice within the Immigration Rules. Level 2: more complex casework, including applications outside the Immigration Rules. Level 3: appeals.

same issue was the subject of previous judicial review or an appeal to a court or tribunal”, the application was refused and this occurred less than a year before the current legal aid application.

All cases before the Special Immigration Appeals Commission (SIAC) remain in scope. These are usually covered under licensed work.⁴⁰

The ‘out of scope’ work under LASPO includes anything that is not specifically identified as covered by legal aid. This ‘out of scope’ work includes:

- EU cases;
- Post-conviction deportation cases;
- Cases in which ECHR Article 8 is called in aid;
- Applicants who raise mental health or incapacity issues (other than on ECHR Article 3 grounds).
- Entry Clearance applications and appeals - for example, for family members (including family reunion for the family members of recognised refugees).
- Appeals in the excluded cases listed above, including appeals to the higher courts, such as the Court of Appeal and the UK Supreme Court.

Any matters not specified as being in scope under LASPO do not qualify for legal aid, and an application would have to be made for ‘Exceptional Case Funding’ (ECF).⁴¹

In June 2017, the LAA published statistics which showed that in non-asylum cases expenditure on legal help in immigration cases was cut by nearly £22 million from the 2009-10 baseline.⁴²

Although the Ministry of Justice did not anticipate that any immigration cases would qualify for Exceptional Case Funding, the effect of the Court of Appeal’s decision in *Gudanaviciene*⁴³ was to enable grants of ECF funding to be made in 688 cases in 2016-7, as the following table shows:

Year	Applications	Grants	Success Rate
2013-14	234	4	2%
2014-15	334	57	17%
2015-16	493	57	67%
2016-17	1007	688	68%

The number of grants of legal help and controlled legal representation in non-asylum immigration cases has been reduced from the pre-LASPO level of 23,526 to 3,672 in 2016-17 in accordance with the government’s intentions. The fact that the increased availability of ECF legal help in immigration cases has made so little difference to the overall statistics may be attributed to three main causes:

⁴⁰ This means the grant of a legal aid certificate as opposed to controlled legal representation.

⁴¹ The MoJ did not originally believe that any immigration cases would qualify for ECF support, because it believed, wrongly that ECHR law would not require state-funded help to be provided in any case in which the applicant/appellant was relying on ECHR Article 8. See Annex A to the June 2011 Impact Assessment for the LASPO Bill, Table 3.

⁴² Legal Aid Agency. (2017) *Legal aid statistics: January to March 2017*, Table 5.3. See fn 2 above. Table 6.5 shows that there was also a reduction of about £1.5 million in expenditure on civil representation in immigration cases, but no breakdown is given as between asylum cases (which remained in scope) and non-asylum cases (which did not).

⁴³ *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622 See fn 17 above.

- A continuing perception, notwithstanding recent statistics, that the probability of success in an ECF application is far lower than the probability of failure;
- The unwillingness (or inability) of immigration lawyers to spend their time making ECF applications for which they receive no payment unless the application succeeds;
- The fact that the overall number of firms who hold a contract with the LAA for immigration work has decreased from the pre-LASPO level of 235 to 170, and it is likely that many of those firms that have survived do not make ECF applications for their clients.⁴⁴ Mr Luqmani told the Commission that although there are still a number of large firms operating under legal aid contracts in this field. The pressure on billing and the low rates of remuneration may mean that corners are being cut, with more experienced fee-earners being encouraged to do a higher proportion of non-legally aided cases.

The Law Society told the Commission that, contrary to tabloid myth, immigration cases were not a significant factor in our relatively high legal aid expenditure pre-LASPO. A report by the Hague Institute for the Internationalisation of the Law in 2014 showed that the proportion of the legal aid budget spent on these cases was now highest in Belgium (17%) and the Netherlands (13%), and lower in Ireland (7%), Scotland (3.1%) and England & Wales (2%). The average costs per case were in the range of €1,000 per case in all countries, with England & Wales being at the low end.⁴⁵

The biggest impact of LASPO on those seeking advice in immigration or asylum law matters that are out of scope is the unavailability of advice for vulnerable clients who do not meet the new criteria. They must fund their advice themselves, and this is not possible for many of them. As a consequence, they either have to represent themselves in a very complex area of law that is constantly changing or they stay in this country without regularising their status. This in turns slows down the judicial process.

Some of those who do not address their immigration status will be assisted by local authorities if they have children or are very vulnerable,⁴⁶ which is a cost to the local authority. There is also the human cost where no advice is available. The very vulnerable can be open to exploitation or remain separated from other family members even where some of them will be British citizens.

The complexity of immigration law

The specialist immigration team at Garden Court Chambers told the Commission:

Immigration law is voluminous, complex and unintelligible to all but working specialists. This helps no-one. The Chambers' text Macdonald's Immigration Law and Practice – generally seen as the leading text on the subject – has grown from a single-volume to a two-volume work. The commentary (volume 1) and legislative instruments (volume 2) texts are each over 2,000 pages in length and as the preface to each recent edition has made clear, the text is "out-of-date" and therefore inaccurate in certain respects generally within weeks of publication.

Five quite different dependable sources bear witness to the complexity of the statutory and rule-based immigration appeals scheme:

⁴⁴Legal Aid Agency. (2017) *Legal aid statistics: January to March 2017*, Table 9.1. see fn 2 above. The numbers decreased sharply from 257 in 2014-15 to 170 in 2016-17.

⁴⁵ *Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* Maurits Barendrecht et al, Hague Institute for the Internationalisation of the Law (Hiil), 21st February 2014, page 73. Accessed September 2017:

<http://www.hiil.org/data/sitemanagement/media/Hiil%20Legal%20Aid%20in%20Europe%20Nine%20Different%20Ways%20to%20Guarantee%20Access%20to%20Justice.pdf>

⁴⁶ For instance, those with mental health issues.

- The Administrative Justice and Tribunals Council (now abolished) considered immigration law and practice to be an area of “extraordinary complexity”;
- In November 2011, Lord Justice Jackson said of the law that related to people *liable to removal*:

“...this area of immigration law has now become an impenetrable jungle of intertwined statutory provisions and judicial decisions...”⁴⁷

- In the Immigration Services Commissioner’s scheme to regulate immigration advice and services work on certain types of case - family reunion, removals and deportation, illegal entrants and overstayers, ECHR Article 8 applications and the lodgement of notices of appeal and applications outside the rules - are all treated as too complex to be performed by those who have only attained competence at Level 1 of the scheme. Very few not-for-profit advice agencies have attained competence beyond Level 1. This accentuates the difficulty of accessing dependable qualified advice.
- The UK Visas and Immigration website section on “Staff guidance, instructions and country information” contains 14 distinct sets of policy guidance, many descending to very detail, and often subjected to revision and restructure.
- The Immigration Rules are frequently changed - 33 times between January 2012 and April 2016.

The laws and the rules do not only prescribe the criteria for entry and stay. They also set strict procedural requirements. Applicants are obliged to submit the correct application form, to complete all the necessary parts of the form and to provide prescribed evidence through the medium of prescribed documentation. If they fail to comply with these procedural requirements, their application can be returned as invalid, and in many such cases they will lose their legal status and with this the rights they previously enjoyed to take employment, to rent accommodation, to drive their cars or to have access to medical services. These provisions affect lawful foreign residents who may lose their rights due to the vagaries of the application and appeal process, as well as long term overstayers or illegal entrants who have never held such rights.

This extract from the judgment of Lord Justice Maurice Kay in *Kaczmarek v Secretary of State for Work & Pensions*⁴⁸ encapsulates the unsurmountable barriers confronting those who try to steer their way through this statutory and regulatory morass without skilled assistance:

I do not propose to dwell on this in view of the common ground that, under it, the appellant was not entitled to income support at the material time. The provisions are labyrinthine but, to cut a convoluted story short, she was a "person from abroad" pursuant to paragraph 17 of Schedule 7 to the Income Support (General) Regulations 1987 and, although her presence in this country was lawful – unless and until removal pursuant to regulation 21(3) of the Immigration (European Economic Area) Regulations 2000 – she did not enjoy the right to reside here at the material time because she was not a "qualified person" as defined by regulation 5 of the 2000 Regulations. To be qualified, she would have had to be, for example, a worker, a self-employed person, a self-sufficient person or a student at the material time and she was not. In short, her lack of a right to reside (which is not the same

⁴⁷ *Sapkota* [2011] EWCA Civ 1320. Accessed September 2017:

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1320.html>

This is just one of many judicial criticisms of the complexity of immigration law and procedure.

⁴⁸ [2008] EWCA Civ 1310. Accessed September 2017:

<http://www.bailii.org/ew/cases/EWCA/Civ/2008/1310.html>

as lawful presence) disqualified her from access to income support. Essentially, domestic legislation confined qualification to EEA nationals who are economically or educationally active or otherwise self-sufficient. Those who do not qualify are able to remain here lawfully but subject to removal. A more comprehensive tour of the labyrinth can be found in Abdirahman.⁴⁹

We summarise the situation like this. In practice applicants are obliged to seek legal advice and assistance in the application and appeals processes by reason of complexity of the governing law, the array of legislation, rules and policies, the lengthy, detailed and often ambiguous application forms, and the sometimes dire consequences of procedural slip-ups. While skilled immigration lawyers are there to advise in many of the points-based cases, legal aid restrictions have limited the legal advice available to those who cannot afford to pay.

The effect of Article 8 ECHR

The Commission received the following valuable evidence on this topic from the Immigration Law Practitioners' Association.

Immigration cases are cases where the individual faces intervention from the State or seeks to hold the State to account. The Home Office has very extensive powers: for example, to refuse entry or to remove forcibly - not to mention its powers of entry, search and detention. Immigration cases concern, *inter alia*:

- whether people are allowed to join⁵⁰ or remain with⁵¹ their spouses, partners, children and parents;
- whether people will have to leave the UK where they have lived for years, sometimes for decades often because of someone else's decision⁵², for example that of a parent or former spouse or partner, including cases in which they will be leaving close family members (who may be British) behind;
- whether a person who has fled domestic slavery can live safely in the UK away from those who abused them;
- what happens to a person (including a child) when a relationship breaks down, including breakdowns that result from domestic violence;
- what happens to children whose claims for asylum have failed and who cannot be returned to their country of origin because their safety and welfare cannot be guaranteed;
- what happens to young people who as children have been allowed to remain in the UK, sometimes for many years, when they turn 18.
- whether a person should be deported from the UK following conviction despite having served their sentence and in some cases having been settled over many years⁵³;
- what happens to people who thought they were in the UK lawfully and turn out not to be, and to people who cannot prove their immigration status whether a person has a claim to British citizenship.

The crux of the test for cases under ECHR Article 8 is whether the proposed interference with the right to private and family life is reasonable and proportionate. Thorough-going knowledge of the established and developing principles in domestic and European jurisprudence is essential to do

⁴⁹ [2007] EWCA Civ 657. Accessed September 2017:
<http://www.bailii.org/ew/cases/EWCA/Civ/2007/657.html>

⁵⁰ Entry clearance cases.

⁵¹ Removal and deportation cases.

⁵² Removal and deportation cases.

⁵³ Recent alterations to statute law have made it very much more difficult to rely on ECHR Article 8 in post-conviction deportation cases.

justice to these cases. Those affected include people unfamiliar with UK laws and procedures, many with very limited or no support networks in the UK, with little or no understanding of what would constitute a correct application of the law, or a correct procedure. In many cases English will not be the litigant's first language. These difficulties for applicants, in the absence of advice from a qualified specialist, are compounded by the Home Office's regularly producing decisions which are wrong and many of which are inconsistent with the decided case law.⁵⁴

Home Office ministers have almost always expressed an antipathy to the idea that ECHR Article 8 rights should play any significant part in the administration of immigration policy. If their department it had been adequately equipped with the resources to enable it to implement ministerial policies in this field with any semblance of consistent efficiency then the courts would not have been faced with a plethora of cases involving applicants (and their families) against whom the Home Office has at long last decided to initiate deportation procedures many, many months, often years, after they became illegal overstayers or have been released from prison following a conviction.

Current concerns about the state of access to justice in immigration cases

The immigration team at Garden Court Chambers articulated a commonly held opinion when they told the Commission that in their view there were now some clear and increasingly insurmountable barriers that limited the access to justice which migrants and their families enjoyed in their quest to attaining lawful status. These included:

- The complexity of immigration law and practice (see above);
- The financial costs associated with the application, appeal and advice processes;
- The inequality of arms in appeals and review hearings where the Secretary of State is always represented but few applicants are – especially where such unrepresented applicants are obliged to pursue their appeals from outside the UK;⁵⁵
- The exclusion of most immigration cases from access to legal aid and the reduced fees now available under legal aid for the remaining cases, which are often quite complex;
- The 'root and branch' eradication or limitation of appeal rights and judicial review claims involving immigration decisions.

The practical effect of withdrawing cases from scope

The loss of legal aid encompasses a loss of assistance with fees for disbursements, including translators, court fees and expert reports. This means that even when pro bono assistance is available, a case often cannot proceed because the cost of disbursements cannot be met. Court and tribunal fees, as well as Home Office fees, must be paid for, and these fees can be very significant. When the Commission received evidence last year, the Ministry of Justice was consulting on raising fees for an appeal before the First-Tier Tribunal from £140 to £800, with a further £455 to be paid to appeal against the decision of the First-tier Tribunal to the Upper Tribunal. Home Office fees cost between £1,195 and £2,676 for a settlement (indefinite leave to remain) application.⁵⁶ People who have no

⁵⁴ ILPA submitted detailed evidence on these matters to the Justice Select Committee on 14 May 2014.⁵⁴

⁵⁵ In *R (Kiarie) and R (Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42. Accessed September 2017: <http://www.bailii.org/uk/cases/UKSC/2017/42.html> the UK Supreme Court allowed two appeals because the financial and logistical barriers to the appellants giving evidence on screen from abroad were almost insurmountable, so that the arrangements for an out-of-country appeal did not meet the requisites of fairness.

⁵⁶ Applications can be made for fee waivers, but these require considerable work by legal representatives. It is very difficult for an unrepresented person to apply successfully for a fee waiver.

permission to work, no access to benefits and who are surviving on subsistence support have no money with which to pay for representation.⁵⁷

Through a series of Freedom of Information requests which formed part of the research for their *Cut Off from Justice* report⁵⁸ the Children's Society ascertained that during the two years since the legal aid cuts came into effect in April 2013 there had been at least a 30% reduction in regulated immigration advice services⁵⁹ across the country and a decrease of almost 50% in the number of regulated non-fee-charging services to deal with appeals and representation in court.⁶⁰

The FOIs also highlighted huge discrepancies between the numbers of regulated advice providers across the different UK regions, with the highest numbers in Scotland, London and the South East. The distribution of providers also showed some areas where there were very limited services available: for example, in the East of England there were no OISC regulated non-fee charging service providers qualified to deal with appeals and representation (Level 3 OISC). There was only one such provider in the East Midlands, in the North East and in Northern Ireland.⁶¹ These figures show that even those who remain eligible for legal aid following LASPO – children seeking refugee protection and recognised victims of human trafficking, for instance – face difficulties accessing regulated service providers in their area, or may experience delays in obtaining advice and representation because such providers as exist are over-subscribed.

At the same time, there has been a growth in the number of rogue immigration advisers, despite the best efforts of the Office of the Immigration Services Commissioner. These people provide shoddy or partial services and in some cases defraud their clients, putting their very status in the UK at risk. Law Centres have been seeing more clients who come to them for help following a sub-optimal experience with an unqualified adviser.⁶²

Criticisms of the Legal Aid Agency

As in so many other fields of law, the very bureaucratic processes on which the LAA insists came in for sustained criticism. For example:

Completing forms takes a significant amount of legal representatives' time and is frustrating, soul-destroying work. Much of this work appears to be entirely futile. When the Legal Aid Agency is asked to interrogate the data it collects, for example by the Civil Contracts Consultative Group, it proves unable to do so.

Home Office shortcomings create avoidable expense

The Immigration Law Practitioners' Association told the Commission that apart from having to turn people away because they did not have the capacity to represent them, their biggest frustration stemmed from failures by representatives of the Home Office to follow precedent or to manage

⁵⁷ Mr Luqmani told the Commission that although relatives, demographic communities, churches etc come together to pay for legal services, this invaluable assistance is not always available, and the need for help continues unabated.

⁵⁸ The Children's Society. Helen Connolly. (2015). *Cut Off from Justice: The impact of excluding separated migrant children from legal aid*. Accessed September 2017: https://www.childrenssociety.org.uk/sites/default/files/LegalAid_Summary_0.pdf

⁵⁹ Services regulated by the Office of the Immigration Services Commissioner (OISC).

⁶⁰ Level 3 OISC providers – Further information on the OISC levels can be found online.

⁶¹ There were, however, fee-charging providers in these areas. See *Cut off from Justice*, fn 56 above, p 53 for the full tables.

⁶² In one case, an EU national who was simply trying to settle his permanent residence had gone through four immigration advisers over three years. He only succeeded in achieving his aim when he came eventually to a London Law Centre.

cases effectively. All too often, winning one test case was insufficient: it was necessary to fight again and again for clients with identical material facts. Similarly, in order to get a case stayed so as to await the judgment in a pending lead case it was all too often necessary to make an application to the Administrative Court, rather than being able to agree that no further action should be taken on the case until the lead case was decided. This approach drives up legal aid and court expenditure, as does a practice of the Home Office to appeal its defeats before the First-tier Tribunal almost as a matter of routine, regardless of merit and despite criticism by the Tribunal.⁶³

The Home Office's conduct of litigation can also create challenges with which an unrepresented appellant is ill-equipped to deal. Its behaviour as decision maker and litigant has sometimes driven judges to despair:

The history fills me with such despair at the manner in which the system operates that the preservation of my equanimity probably demands that I should ignore it, but I steel myself to give a summary at least... What, one wonders, do they do with their time? ...I ask, rhetorically, is this the way to run a wheelk store?⁶⁴

The Home Office continues to miss opportunities for early settlement of claims by its failure to provide instructions to its own lawyers so as to enable them to keep to deadlines for acknowledgment of service.⁶⁵

The Commission was also told that Home Office representatives frequently arrive at a hearing with few or no papers. Even the contents of a decision can be changed at the last minute on the day of a hearing or during the course of the hearing. For example, it is not uncommon for a decision set out in a “reasons for refusal letter” which accepts certain points to be withdrawn without any notice. New evidence is often served on the day of the hearing. These practices can lead to the delays and additional expense that are associated with an adjournment if justice is to be served. This adds to the overall expense.

It was also said to be the case that all too often the decision letter itself contains incorrect statements of the law or provides limited or incorrect information on rights of appeal.⁶⁶

One judicial citation can be taken as representative of widespread dissatisfaction with the parlous condition of immigration law and practice:

It is unfortunate that this court has now construed Rule 322(1A) to mean the opposite of what, at least on one view, it appears, on its face, to say...

⁶³ See, for example, *VV (grounds of appeal)* [2016] UKUT 53 (IAC) (13 November 2015) *Nixon (permission to appeal: grounds)* [2014] UKUT 368 (IAC), (*MR (permission to appeal: Tribunal's approach) Brazil* [2015] UKUT 29 (IAC). All accessed September 2017:

<http://www.bailii.org/uk/cases/UKUT/IAC/2016/53.html>;

http://www.bailii.org/uk/cases/UKUT/IAC/2014/%5b2014%5d_UKUT_368_iac.html;

<http://www.bailii.org/uk/cases/UKUT/IAC/2015/29.html>

⁶⁴ *MA (Nigeria) v Secretary of State for the Home Department* [2009] EWCA Civ 1229, per Ward LJ at paras 2, 4 and 7. Accessed September 2017:

<http://www.bailii.org/ew/cases/EWCA/Civ/2009/1229.html> .

⁶⁵ See *Kadyamarunga v Secretary of State for the Home Department* [2014] EWHC 301 (Admin). Accessed September 2017:

<http://www.bailii.org/ew/cases/EWHC/Admin/2014/301.html>

⁶⁶ For example, in some cases where the only rights of appeal are on the grounds of human rights or race discrimination, an applicant may be told that he or she has no right of appeal and is therefore not sent an appeal form.

*I am left perplexed and concerned how any individual whom the Rules affect (especially perhaps a student, like Mr A, who is seeking a variation of his leave to remain in the United Kingdom) can discover what the policy of the Secretary of State actually is at any particular time if it necessitates a trawl through Hansard or formal Home Office correspondence as well as through the comparatively complex Rules themselves. It seems that it is only with expensive legal assistance, funded by the taxpayer, that justice can be done.*⁶⁷

The impact of cuts on separated migrant children

While many lone children with immigration claims will already have a right to remain and will need legal advice or representation to help them with their applications for indefinite leave to remain or for citizenship, other children, who are undocumented, will need legal advice if they are to regularise their status. Research published in April 2016 estimates that there are approximately 144,000 undocumented children living in England and Wales, with most of these children being located in London and the West Midlands.⁶⁸ Many of the others will have grown up here and spent their formative years in the UK. However, their uncertain status means that they have not yet established a legal right to remain in the country, even though they may have legitimate reasons for needing to remain and their long-term future may be in this country. As the Government's agenda to create a 'hostile environment' for irregular or undocumented migrants by limiting access to services such as private rented accommodation, bank accounts and public funds, on the basis of status, the immediate welfare needs as well as the life chances of undocumented children increasingly depend on their ability to regularise their status quickly. Without status, they are increasingly left at risk of destitution, exploitation and social exclusion.

Separated migrant children no longer qualify for legal aid for advice or representation in their non-asylum immigration claims.⁶⁹ In 2015 a report published by The Children's Society⁷⁰ found that without legal aid children's claims were being avoided, or 'sat on', and remained unresolved. This often leads to a transitional crisis for the child as they turn 18 when their immigration status comes to bear more heavily on their access to services, such as housing, education and employment. Where children try to resolve their immigration issues on their own, for example as they approach adulthood or where they are not in local authority care, they are forced to become 'mini solicitors', struggling to prepare witness statements and to gather evidence about their past. This leaves them stressed, fearful and unable to participate properly in their education. Some young people told the researchers they had had to raise thousands of pounds to pay for legal advice themselves. The study showed how some children are being exploited or put at risk of serious harm⁷¹ because they are desperate to resolve their immigration issues.

⁶⁷ *AA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 773, per Longmore LJ at para 87. Accessed September 2017: <http://www.bailii.org/ew/cases/EWCA/Civ/2010/773.html> .

⁶⁸ The Children's Society. (2016) *Making life impossible: how the needs of destitute migrant children are going unmet*. Accessed September 2017: <https://www.childrenssociety.org.uk/sites/default/files/making-life-impossible.pdf>

⁶⁹ These claims may include applications for citizenship or applications for leave to remain on the basis of ECHR Article 8 (right to respect for private or family life).

⁷⁰ See fn 56 above.

⁷¹ Including being sexually exploited and groomed by criminal networks.

CHAPTER 5: Welfare Benefits

Expected reductions from baseline year to action outturns

Volume of cases

	2009-10	2016-17	Reduction	Expected Reduction
Legal Help & Controlled Legal Representation	136,825	811	-136,014	-135,000
Civil Representation	36	4	-32	0

Value of cases (£ million)

	2009-10	2016-17	Reduction	Expected Reduction
Legal Help & Controlled Legal Representation	22,179	226	-21,953	-25
Civil Representation	238	14	-224	0

The effect of the removal of legal aid for advice and assistance on welfare benefits

Housing benefit

There is an inherent link between housing benefit problems and homelessness. Problems with a housing benefit claim can lead to rent arrears, a breakdown in landlord-tenant relations, and eviction. Shelter told the Commission that their evidence suggested that this is particularly the case in the private rented sector, where landlords will be even less tolerant of tenants who fall behind with their rent and may look to evict rather than wait for housing benefit to be reinstated. In practice a landlord's attempts to gain possession of a property through the courts is often frustrated if the only reason for eviction is non-payment of rent due to housing benefit issues, because in those cases a possession order, if made, may well be suspended.

It is therefore a source of enormous frustration to Shelter – and to other practitioners in this field – that they are no longer able to provide legal advice (under legal aid) on most debt and welfare benefit problems and some housing matters, including tenancy deposits, disrepair and social housing allocation decisions – all of which can be precursors of threatened and actual homelessness.⁷²

Even at the point of threatened homelessness, they cannot use legal aid funding to resolve a housing benefit problem, or ensure that the household is getting all the benefits it should, although this would prevent the situation from reoccurring. The experience of Shelter is that the introduction of the “bedroom tax” and other welfare reforms has led to the increased issue of housing possession proceedings, so that housing benefit advice is needed more than ever.

The fact that legal aid is only available in this context in relation to possession proceedings inevitably leads to greater expense to the legal aid budget, to the cost of court proceedings that could have been avoided and, in some instances, to evictions which might have been averted if it had been possible to resolve the benefits issue.

⁷² The point at which Legal Aid may finally become available.

Other welfare benefits

The Law Centres Network told the Commission that comprehensive welfare reforms and a punitive approach from DWP had led to a sharp rise in sanctions and numerous questionable +decisions about benefits. By definition, those who seek such advice about welfare benefits cannot generally afford to pay for it and, in addition, they are seeking advice on challenges to decisions made by a public authority – the DWP or a local authority – who should be expected to make a legally correct decision. The means of ensuring that public authorities make correct decisions is to make free legal advice available- at an early stage, so that decisions can be challenged and reviewed.

Currently Law Centres and other advisory bodies have to find other resources to provide help to clients in challenging sanctions and in appealing decisions. Some law centres have turned to dedicated pro bono projects to meet this need: their great success reflects the remaining need for help, which is on a scale that it cannot be met – nor should it – by reliance on pro bono advice alone.⁷³

Z2K said that their clients experienced difficulty in understanding their rights. This was why they could not enforce them. They had recently seen a client who had received a letter from a housing benefit department purporting to explain her entitlement which was 83 pages long.⁷⁴ They also regularly saw clients who had received notification from DWP or their local authority that their benefits have been withdrawn or suspended without any explanation being given.⁷⁵

Alternative funding has been particularly difficult to find for welfare benefits advice, which one agency head described as being like a “dirty word” for funders. This was particularly problematic since the fundamental changes to the welfare benefits regime, including those in the Welfare Reform Act 2012, meant that clients were presenting with more complex cases requiring specialist advice. A report commissioned by the Local Government Association on the impact of the welfare reforms found that although the cuts were broadly the same across all areas of the country, there was a disparate impact in areas of greater deprivation.⁷⁶ There was no targeting of the post-LASPO transition response towards more deprived areas, so that a large part of the responsibility for transitioning the welfare reform programme and for mitigating its impact on the most vulnerable members of society was being passed to the third sector without adequate funding at a time when there was no sign of a let-up in the programme of reforms, with the continued roll out of universal credit and the cuts to tax credits.

Z2K’s director Joanna Kennedy told the Commission last year that one of the two areas in which LASPO had made most impact was the lack of any publicly funded advice on welfare benefits at a time of huge change in the welfare benefits system. She said:

⁷³ Avon and Bristol Law Centre has done this very successfully. They admit, however, that they are an exception that proves a rule: the service is only available locally, where they are resourced to provide it, whereas it should be equally available across the country and based on right. They attracted publicity when they celebrated the milestone achievement of recovering £1 million for clients through challenging 'fit for work' test decisions at tribunals.

⁷⁴ Z2K’s trained advisers themselves struggled to understand what was being said.

⁷⁵ Their difficulties are compounded by the fact that they find it too difficult to negotiate past the gatekeeping with which these departments protect themselves, so that they are unable to redress the problem because they don’t know what it is. They also do not have computers, and many of them suffer from language or literacy or mental health or other disability difficulties. The Trust struggles to find interpreters who can help those with language difficulties as it cannot afford to pay fees.

⁷⁶ The Centre for Economic and Social Inclusion and the Local Government Association. (2013) *The local impacts of welfare reforms*. Accessed September 2017: <http://www.learningandwork.org.uk/wp-content/uploads/2017/01/The-local-impacts-of-welfare-reform-version-7.pdf>

We now regularly have to turn clients away because we do not have the capacity to advise them and there are almost no other agencies to whom we can refer them. We are contacted, every week, by clients who have received a decision about their welfare benefits which they wish to appeal. For those we can take on and represent there is an 80% success rate. Those whom we cannot take on often then have to represent themselves and the statistics show that unrepresented Appellants have a roughly 20% lower success rather than those who are represented. Many others never know of their rights to appeal or how to do it because there is nowhere for them to turn to find that advice. There has never been publicly funded support for representation but there used to be for advice which helped clients know their rights and prepare submissions.

The growing impact of welfare reform and cuts to legal aid on defending possession cases is described in the following extracts taken from surveys of representatives of Housing Possession Court Duty Schemes (HPCDS) in England:

"[I]t is now very difficult to make referrals from HPCDS to agencies with the specialist expertise to resolve debt and benefit issues in particular, meaning that it is less likely that a long-term solution can be found to the presenting housing problem. Also, as contracted housing advice providers can no longer tackle housing benefit problems the capacity of the sector to provide an effective response to our clients' multi-faceted legal problems has been significantly reduced. The legal aid scheme is now focused on emergency and complex housing issues. We have almost entirely lost the ability to do 'preventative' work by resolving the legal issues that lead to housing crises. This undermines the ability of HPCDSs to act both as a safety net and as a gateway to specialist advice services." (HPCDSQ Update 3)

"Many housing advice providers can, through legal aid or other funding, help to raise a defence to a possession claim, but they do not have the resources to resolve the underlying problems. Some judges are therefore becoming frustrated by repeat adjournments, by an increase in litigants in person, and by the inability of defendants to access help before they attend court." (HPCDSQ Update 3)

Part of the gap in provision has been filled by Citizens Advice. Their Swansea – Neath – Port Talbot office told the Commission that advice on welfare benefits constituted their largest single area of advice in 2015-16 related to benefits problems. 4,023 clients consulted them that year, of whom about a quarter had problems relating to Personal Independence Payments (PIPs).⁷⁷ They did a great deal of work helping clients with form completion, mandatory reconsideration requests (the new procedure introduced post-LASPO) and appeals. Once the mandatory reconsideration process had failed to reverse the decision in the client's favour, as often happened, they were called upon to advise on the appeals process. They had been able to access some Welsh Government money for casework support through a Frontline Services grant, but there was much more demand than these services

⁷⁷ They said they were seeing what appeared to be a disproportionate number of people whose applications for PIPs were being turned down despite suffering from long term health conditions that were unlikely to improve. Because their clients were being reviewed every two years they were now starting to see people who had initially been granted a PIP having their awards withdrawn on a review despite the fact that their medical problems remained the same or had even deteriorated. Stephen Kinnock MP posed a parliamentary written question in 2016 which elicited the response that the DWP had failed to assess the impact on advice services following the "mass" migration of claims from Disability Living Allowance (DLA) to PIP.

could cope with and the grant was not of the same magnitude as the income from legal aid used to be.

The cost of medical evidence in support of a benefits claim

Two academic researchers in Liverpool⁷⁸ told the Commission of the results they obtained from local surveys of the impact of the LASPO cuts they carried out in 2013 and 2015. One of the problems they identified related to the absence of funding to obtain medical evidence to support people's applications or appeals for welfare benefits.⁷⁹ This compounded the problems they faced when seeking to access specialist advice. Pre-LASPO this advice could be paid for, although this encouraged GPs to charge £50 or £100 for their reports. Post-LASPO GPs were charging less, but many had stopped providing medical reports at all because they had been inundated with requests. As one manager explained:

Tribunals love medical evidence to back decisions up, unless the client's condition is very obvious. The burden is now on clients to fund this evidence, and many clients do not have the resources. They may not have received any support for weeks or months while on mandatory reconsideration of Employment Support Allowance (ESA).

Z2K was another of the respondents who spoke of this difficulty.

The cost of restoring legal aid in relation to housing benefit issues

The Law Society has calculated that advice could be brought back within scope for an annual cost of about £2 million per annum. This calculation is based on the costs of pre-LASPO advice for Housing Benefits and has not been verified by the MoJ's statistical modellers. A copy of it is set out in Appendix 2 to their response.

How can the present arrangements be improved?

In the opinion of the Commission there can be no quick-fix solution. The evidence of Joanna Kennedy, who was a partner in a leading commercial firm of solicitors before she became director of Z2K, gives a good indication of the range of the problems a reforming government would need to address. She wrote:

What minimum requirements to legal advice and assistance should the State provide? Should it be a minimum amount? Should it focus on specific problems or areas of law — and, if so, which ones?

There should be legal advice and assistance for welfare benefits and housing issues because without that advice many will face destitution and/or be evicted and face homelessness with all the personal and family trauma and cost to the State that entails.

The State should particularly provide this advice at times when it is making radical changes to people's rights as it has done in recent years with welfare reform. For example, the

⁷⁸ Dr Jennifer Sigafoos and Dr James Organ, lecturers at the School of Law and Social Justice at the University of Liverpool.

⁷⁹ This lack of disbursements for medical evidence was felt very keenly in the region due to the high level of disability deprivation in the Liverpool City Region. 46% of the region's "lower layer super output areas" (LSOAs) are in the most deprived 10% in England in the domain of health and disability deprivation: see the Department for Communities and Local Government, The English Indices of Deprivation 2015: Statistical Release (2015).

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/465791/English_Indices_of_Deprivation_2015_-_Statistical_Release.pdf. Accessed September 2017.

Government has realised, belatedly, that the introduction of Universal Credit and some of its characteristics will create serious problems and the need for advice amongst many recipients. It has dealt with this by giving local authorities specific funds to help their constituents understand and manage the changes. Some have passed this money on to local advice services, others are using it to fund internal services which do not of course provide independent advice. This money should have been given to local consortia of advice agencies who could have delivered independent advice to those struggling with the system and this should be the pattern with every introduction of radical changes for two years after the introduction of those changes.

Furthermore, Government should fund training for advice agencies in substantial new regulations when they are introduced. At present agencies have to fund this themselves and many have wasted thousands of pounds on training on universal credit which is being so substantially changed that more training will be needed, wasting advice agencies' scarce resources.

Do you have any thoughts on alternative savings/revenue raising schemes that could help provide sources of funding?

There would be substantial savings if the Government were to implement the provisions of the report of the Low Commission. We run a project which collects and pursues examples of poor process by benefits delivery agencies and housing departments in the hope of persuading those organisations to improve their systems so as to reduce the need for advice. For example, as mentioned above, letters are regularly sent to clients suspending their benefits without an explanation, and advisers have to spend many fruitless hours trying to find the source of the problem before it can be resolved. We asked the benefits delivery departments of our local authority why they did not include the reason in their letters, and they said that their computer system does not allow it. If all government departments were charged with improving IT systems then the Department for Communities and Local Government could, no doubt with minimal investment, resolve this system problem which would save many hundreds of hours of advisers' time.

Some advice services are located within local authority premises. This saves much needed resources being spent on rent and provides access to both records and officers, which means problems can be resolved much more quickly and cheaply.

Many local authorities devolve the delivery of benefits services and council tax collection (which also leads to much demand for advice) to outside agencies like Capita. If they would work with advice agencies on the terms of appointment of these subcontractors (as one or two of the good ones do) their service delivery might operate more flexibly and helpfully. This, again, would reduce demand and in the long run would reduce the cost to the local authority of the subcontracted service.

A concentrated effort to reduce unnecessary demand would be much more effective than looking for funds to increase supply.

How can we best spread public information about legal rights?

For our clients, because of various aspects of disadvantage, the only really effective way of teaching about rights is on the back of having resolved a specific problem for them. Once they see that they do have rights which can mean the system can be challenged successfully then

they are potentially receptive to learning more, and also to passing that on within their communities. There is no more effective advocate for the enforcement of rights than someone who has experienced this happening successfully. We have tried offering training to community groups but it is not successful. People only want to know the ins and outs of benefits and housing (which are immensely complicated) when they actually experience a specific problem.

How can we encourage a more integrated approach to solving people's problems (whether at the state, local or individual level)?

As I have mentioned the State should work with the advice sector on improved processes. At present most departments' response to complaints about denial of rights is to point to a complaints procedure instead of thinking about getting it right first time.⁸⁰

⁸⁰ A client applied in 2013 to be assessed for PIP. It took DWP over a year to assess her so we, with others applied for judicial review of the department's assessment process. It was found to be unlawful but no compensation was awarded because there was no power to do so. "We asked DWP for compensation and when they refused we lodged a complaint in January 2015. It took over a year to exhaust DWP's two-stage complaints process. In February 2016, as the rules require, we applied for the complaints refusal to be reviewed, since this is now a gatekeeping stage before an application to the Ombudsman. We have been told, in June 2016, it will be another nine months before that review will be completed. That means the complaints process will have taken well over two years before we can even apply to the Ombudsman. This shows that the process is not intended to drive improvement."

CHAPTER 6: The Legal Aid Gateway Telephone Service

Debt, discrimination and education law cases

The LASPO scheme introduced the Civil Legal Aid Gateway as the only way to obtain publicly funded advice and assistance for debt, discrimination and special educational needs matters. An individual seeking legal aid for such cases now must first telephone the Operator Service (manned by operatives who are not legally trained) who will determine whether the individual is financially eligible; whether their case is in scope; whether their case is within one of the Gateway categories; and whether their case meets the merits criteria for legal aid. If the Operator Service assesses the matter as meeting those requirements, they will refer the individual to a Specialist Telephone Advice Provider who can provide up to two hours' remote advice. Claimants can only obtain face-to-face advice if the specialist provider considers that they cannot be advised over the telephone or by email.

The take-up of this service has diminished year by year, as the following tables demonstrate:

Telephone Operator Service Legal Help (Value £'000s)	2013-14	2014-15	2015-16	2016-17
	2,769	1,638	1,228	1,089

Legal Aid Providers	2013-14	2014-15	2015-16	2016-17
Debt	100	92	56	40
Discrimination	0	1	1	2
Education	29	23	14	13

Legal Help Volume	2013-14	2014-15	2015-16	2016-17
Debt	17,569	1,789	626	500
Discrimination	1,582	1,770	1,579	1,414
Education	1,116	764	979	1,037

Legal Help Value (£'000s)	2013-14	2014-15	2015-16	2016-17
Debt	4,040	427	126	75
Discrimination	302	542	546	352
Education	1,057	1,001	1,097	1,457

Civil Representation Volume	2013-14	2014-15	2015-16	2016-17
Debt	157	123	68	44
Discrimination	0	1	2	6
Education	95	67	40	28

Civil Representation Value (£'000s)	2013-14	2014-15	2015-16	2016-17
Debt	578	581	361	229
Discrimination	0	35	1	10
Education	461	340	143	155

The use of the telephone gateway in discrimination cases

The Coram Children's Law Centre (CCLC) holds a specialist help education law contract with the LAA. CCLC told the Commission that there was very limited scope for face-to-face advice, even where this might appear necessary to the client and/or the provider:

The system is overly complex. The operator service helps callers determine if their query is in scope for legal advice. The operator does not ... employ lawyers and we are concerned that there is a high risk of callers being diverted away from specialist legal advice because they are unable to fully explain the scope and nature of their problem.

The Deaf and Disabled People's Organisation (DDPO) said that the arrangements under LASPO meant that disabled people had to use a telephone gateway to access advice on discrimination cases. This was operated by three providers (none of whom, as far as DDPO was aware, had any specialist expertise in bringing disability discrimination claims in relation to goods and services (for example access to shops, transport and so on). It is only these providers that can then obtain a full legal aid certificate to enable a disabled person to bring a challenge in the courts.

It said that the gateway raises significant hurdles for disabled people in accessing advice in itself. In addition, the lack of expertise in the three providers and the very small number of legal aid certificates granted in recent years for any discrimination cases (fewer than five in any one year as we understand it) would suggest that it is now virtually impossible for disabled person to secure legal aid – or the necessary expert advice - to bring a private law disability discrimination challenge in the county court for a breach of the Equality Act 2010.:

None of the providers' websites refer to their expertise in disability discrimination specifically, and the only discrimination work they appear to specialise in relates to employment or education cases. Disability discrimination arising from the provision of goods, services and transport is a particularly complex area and requires specialist representation; this is simply not available to disabled people under the current arrangements.

The Law Centres Network also observed that the number of new legal aid discrimination cases has declined sharply, due in part to telephone's limitations as a delivery channel and the complexity of this developing area of law.

The Housing Law Practitioners' Association (HLPAs) said that if potential clients wanted to obtain advice on a mortgage arrears possession⁸¹ or on discrimination, they must first contact a telephone advice service, and it is only if the advice service decides that it is necessary for the client to obtain face to face advice, they can authorize this. HLPAs members are concerned that particularly vulnerable clients

⁸¹ Under LASPO this was re-categorised as a debt matter rather than housing.

may struggle to articulate their issue, with the result that the kind of client who is likely to require face to face advice will be unable to obtain it.

This evidence was echoed by the Islington Law Centre who said that they once many hours (funded under their local authority grant) in trying to ensure that someone with a discrimination case was able to get assistance. She had to return to them frequently because the nature of her disability meant that she found it incredibly difficult to give informed instructions remotely. They say that this problem has diverted money away from front line provision, has created duplication, and has been a major barrier to many people, without any evidence that other equally high needs are being effectively met.

The use of the gateway in debt cases

JustRights, for its part, was strongly opposed to the telephone gateway. Not only did it introduce unnecessary steps and bureaucracy when children and young people were trying to access advice, but there was plentiful evidence that they are less likely than other age groups to access advice services via the telephone.⁸² More fundamentally, they said, awareness of the service is so low amongst both children and young people and the professionals who work with them as to render it invisible.

The Children's Society told the Commission that its work on the impact of problem debt showed that the strain of living in debt can be simply too much to bear.⁸³ It can not only mean that children miss out on the things their peers take for granted, but it can also cause problems in every area of a child's life - arguments at home, isolation and being bullied at school, to name just a few.

It referred to the report of the House of Commons Justice Committee which had found that the Government's failure to provide adequate public information on the Civil Legal Advice telephone gateway was one of the primary reasons why it was underused.⁸⁴ The Committee recommended that 'the Ministry of Justice undertake an immediate campaign of public information on accessing the gateway for debt advice, as well as for the other areas of law it covers.'⁸⁵ In its response⁸⁶ the Government said:

- We continue to work with key partners to increase awareness of the gateway and promote the enhanced digital service;
- As part of the Government's commitment to ensure full accessibility, especially for vulnerable clients, the following standard adaptations and adjustments are available, delivered by fully trained Civil Legal Aid delivery partners:
 - A free telephone interpreter service for over 170 languages;

⁸² Youth Justice. J. Kenrick (2009) *Young People's Access to Advice – the evidence*.

⁸³ The Children's Society. (2014) *The Debt Trap: Exposing the impact of problem debt on children*. Accessed September 2017:

https://www.childrenssociety.org.uk/sites/default/files/debt_trap_report_may_2014.pdf

⁸⁴ Judith March, Director of the Personal Support Unit, a charity which has ten centres across the country supporting litigants in person at court, told the Committee: "Over the last week, I asked all our staff to tell me about the gateway. It is never mentioned; nobody who comes to us ever mentions it. That is quite an interesting bit of evidence in itself."

⁸⁵ House of Commons Justice Committee. (2015) *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*. Accessed September 2017: <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>

⁸⁶ *The Government's Response to Justice Committee's Eighth Report of Session 2014-15*, July 2015 Accessed September 2017. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444939/response-to-justice-committee.pdf.

- Minicom, text relay and British Sign Language delivered via webcam for deaf and defined users, allowing an authorised personal or professional representative to contact the service and communicate on behalf of the user;
- A cheaper local 0345 telephone number for the service, together with calling the user back where the cost of the call may be an issue; and
- access to a free post system and provision of correspondence in accessible and alternative formats and method.

The Public Law Project's Report

In March 2015, the Public Law Project (PLP) published a report of their research into the operation of the Gateway.⁸⁷ Their findings indicated a risk that, contrary to the stated policy intentions, the Gateway hindered access to justice for those who had to use it. They found that

- There were significantly lower volumes of advice being given than had been anticipated, and an ongoing reduction in the volumes of advice being given;⁸⁸
- Service users had experienced difficulties in navigating and proceeding beyond the Operator Service;⁸⁹
- There was a very low level of awareness of the service amongst potential service users; and
- Significant numbers of matters resulted in 'outcome not known or client ceased to give instruction',⁹⁰ indicating that individuals were struggling to engage with it.

The Public Law Project found that *"the number of debt matters started under the Gateway has been about 90% less than the Ministry of Justice should have expected on the basis of its initial calculations on the impact of the Gateway"* and *"[S]imilarly, the numbers of special educational needs and discrimination matters started have been at least 45% and 60% less, respectively, than figures provided in the Legal Services Commission tenders for Gateway services."*

Their findings also indicated that in some areas the Parliamentary and policy intentions in introducing the Gateway might in fact be being undermined, and that the system might not be achieving value for money (and could be more expensive than face-to-face advice) across its services.⁹¹

Whilst technology could and should play a role in the future of legal aid, they said that it was no substitute for face-to-face advice. Their research into the Gateway pointed to the risks posed by 'one size fits all' entry routes, particularly when they are manned with gate-keepers who are not legally trained. It had to be remembered that many of those who require legal aid are vulnerable individuals who may struggle to engage with technology and, vitally, will not always have a clear idea of why they need advice or be able to provide a coherent account of their experiences. A legal aid scheme must be designed to be accessible by such people if it was to be genuinely accessible to all.

In this context PLP reported that the Equality and Human Rights Commission had commented on the potential barriers presented by the gateway, particularly for disabled clients, including those with poorer mental health, or cognitive or learning impairments. The mental health charity Mind referred to low levels of awareness of the gateway and issues with accessibility, and issues with accessibility

⁸⁷ Public Law Project. (2015) *Keys to the Gateway: An Independent Review of the Mandatory Civil Legal Advice Gateway*. Accessed September 2017. <http://www.publiclawproject.org.uk/data/resources/199/Keys-to-the-Gateway-An-Independent-Review-of-the-Mandatory-CLA-Gateway.pdf>

⁸⁸ See fn 85 above; Chapter 6.

⁸⁹ See fn 85 above; see e.g. pg. 41.

⁹⁰ See fn 85 above; pg.4 and Chapter 7.

⁹¹ See fn 85 above; pg. 4 and Chapter 8.

were also raised by the National Deaf Children's Society and Sheffield Citizens' Advice Law Centre." Other witnesses were also very critical of the telephone gateway as a means for disabled people to obtain advice."

Nicola Mackintosh QC (Hon), a solicitor with vast experience of clients with every kind of disability, told the Commission:⁹²

In the disability sphere - particularly in relation to mental incapacity - every single client whom I represent (and I am usually representing that person via the official solicitor as their litigation friend) has a different level of need, a different level of ability to communicate, and different methods of communication. For example, some of my clients are able to communicate verbally. All of them need face to face contact, and all of them need non-verbal communication skills and the potential for developing that kind of communication relationship. Some clients need interpreters, some clients need Makaton interpreters or British Sign Language interpreters and other disability interpreters.

What is absolutely crucial in mental capacity law is that the odd nuances in a person's presentation are picked up by the legal advisors. This is why, whilst a telephone advice system will work very well as one of the tools for different areas of law or initial advice, it does not work for this particular client group where face to face advice is needed, because it's also us assessing the client.

⁹² She is herself a member of the commission.

CHAPTER 7: Exceptional Case Funding

Introduction

The common law right to access to the court has never been recognised to encompass a right to legal aid. For the time being⁹³ the only sources of enforceable rights to legal aid for people in England and Wales are the European Convention on Human Rights (ECHR) and European Union (EU) law. Section 10 of LASPO provides for Exceptional Case Funding (ECF) to be made available in a case (which would otherwise be out of scope) where a failure to do so would breach, or risk breaching, an individual's Convention or enforceable EU law rights. The ECF scheme was introduced as the "safety net" by which LASPO was supposedly made compliant with the UK's obligations under the ECHR and EU law.

During the passage of the LASPO Bill through Parliament, the Government placed great emphasis on clause 10 of the Bill and the availability of ECF. In particular, ministers repeatedly assured MPs and peers from all parties who were worried about the prospect of children and young people being denied access to advice and representation that an expanded ECF scheme would provide an adequate safety net.⁹⁴ The Government's pre-LASPO estimates of the percentage of "out of scope" cases likely to be readmitted under the ECF scheme were modest,⁹⁵ but they nonetheless implied at least 847 children and 4,888 young adults being granted ECF each year. The Government also identified Section 10 of LASPO to the United Nations CEDAW Committee as being the "safety net" for women unable to obtain legal aid because they could not prove they were victims of violence.

In advance of the implementation of LASPO, the Government's best estimate of the annual number of ECF applications for non-inquest legal representation was 6,500, with further applications being anticipated for legal help.⁹⁶

The first year

Legal Aid Agency statistics record that they received only 1,315 "applications" for non-inquest ECF in the first year of the scheme, and 947 in the second year.⁹⁷ The figure given for "applications" includes both initial applications and applications for a review of an initial decision. In the first year of the scheme approximately 1% of all these applications were granted. Not only were the numbers applying to the scheme a fraction of those said to be anticipated by the LAA, but those who were able to apply had a vanishingly small chance of succeeding. This table, taken from the LAA's Statistics, shows the outcome for the first year of the scheme:

Case Category	Year	Applications	Grants	Success Rate %
Family	2013- 14	819	9	1.1
Immigration	2013-14	234	4	1.7
Other	2013-14	262	3	0.8

⁹³ Unless special provision is made in a domestic statute.

⁹⁴ For example, Lord McNally, then a Justice minister with responsibility for legal aid, stated on 16th January 2012 "where a child brings an action without a litigation friend, this will be an important factor in deciding whether they have the ability to present their case." House of Lords Hansard, 16 Jan 2012: Column 447.

⁹⁵ The Ministry of Justice's 'Impact Assessment Annex A: Scope' (*Reform of Legal Aid in England and Wales: The Government Response* (London, TSO, 2011), para 10, Tables 1 and 3 show the forecast reductions in the volume of cases as a result of the legal aid reforms.

⁹⁶ Ministry of Justice: *Legal Aid Reform: Excluded Cases Funding Process Equality Impact Assessment*; March 2012 p. 9.

⁹⁷ Legal Aid Agency. (2015) *Legal aid statistics, January to March 2015*. Accessed September 2017: <https://www.gov.uk/government/collections/legal-aid-statistics-2014-2015>

One reason for the very low ECF grant-rate was that from the very outset the Government contended for a narrow interpretation of section 10. In short, the poor success rate in the first year was in large part attributable to the fact that until Mr Justice Collins's decision in *Gudanaviciene* ("G") LAA caseworkers were instructed by the Lord Chancellor to use some very restrictive guidance on the effect of the ECHR which did not correctly state the law,⁹⁸ as both Mr Justice Collins (in June 2014⁹⁹) and the Court of Appeal (in December 2014¹⁰⁰) were to hold. The LAA has also said that in the early days a number of applications were rejected because they covered issues which were already "in scope" for legal aid, or were refused because they provided insufficient information for its purposes.

The Public Law Project (PLP) received funding which enabled it to study the way the scheme was working, and to understand the barriers that were preventing people from accessing ECF in its early days. These barriers included:

- The complexity of the forms the LAA required to be provided with an application;
- The time-consuming nature of the ECF application process and its onerous evidential requirements;
- The need in many cases to engage in pre-action correspondence before ECF would be granted;
- The lack of an emergency procedure;
- The lack of funding for providers to make applications, and providers' consequent unwillingness to make them; and
- The LAA's decision-making when determining applications.

Of particular note were the lengths to which it could be necessary to go for an applicant to obtain a grant of ECF. Of the 31 grants of ECF obtained with PLP's assistance in the first two years of the scheme, 23 required either a pre-action letter or the issuing of judicial review proceedings before funding was granted.

Southall Black Sisters told the commission last year:

We ... remain sceptical of the exceptional funding scheme for those who cannot access legal aid and whose human rights may have been breached. Our experience and that of experienced solicitors with whom we work, shows that obtaining funding through this scheme is a huge, uphill battle. The application process is unwieldy and unnecessarily complex and the number of successful applications remains shockingly low. A further disincentive to such applications is that solicitors are not paid for completing the extensive exceptional funding application forms unless the application is successful. We are of the view that the scheme is not fit for purpose.

⁹⁸ The guidance suggested that a Convention right to funding arose only under Article 6 ECHR, and that it was only necessary to provide such funding if its absence would make it "practically impossible" for the applicant to bring the case. ECF was not, therefore, available in immigration cases that did not engage enforceable EU law rights, and the test to be applied in cases in which Article 6 ECHR was engaged was very high indeed.

⁹⁹ *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWHC 1840 (Admin). Accessed September 2017: <http://www.bailii.org/ew/cases/EWHC/Admin/2014/1840.html>

¹⁰⁰ *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622. Accessed September 2017: <http://www.bailii.org/ew/cases/EWCA/Civ/2014/1622.html>

The Court of Appeal, incidentally, held that Mr Justice Collins was wrong to hold that refugee family reunion cases were already "in scope".

The Children's Society told the Commission that research it sponsored in 2015 highlighted the fact that the process of applying in the first instance was "overly laborious, complex and practically impermeable". It said that one of the most striking findings of its *Cut Off from Justice* research was the lack of engagement by solicitors with the ECF scheme:

Not one participant across the participant groups spoke about knowing children that had been assisted through this. When exceptional funding was raised during the interviews, it was highlighted as an elusive opportunity rather than the 'safety net' that it was designed to be. It was noted by some participants that lawyers did not see the point in submitting an exceptional funding application given the poor quality decision-making process in conjunction with the long and complex process of putting an application together. It was not considered a good use of time and practitioners considered it more time efficient to secure pro-bono work. One practitioner did highlight to us the complications she saw with an 18-year-old young man going through the process. Indeed, it turned out to be too complicated for him to navigate even with the full support of his lawyer that in the end he abandoned the process altogether.¹⁰¹

The second year

The second full year of the scheme revealed a slightly higher success rate, although the number of applications in family cases was greatly reduced:

Case Category	Year	Applications	Grants	Success Rate %
Family	2014-15	464	48	10.3
Immigration	2014-15	334	57	17.1
Other	2014-15	149	14	12.6

The improved success rate in the second year would have reflected the fact that for three quarters of that year case workers were instructed to use the more relaxed approach which was indicated by the two judgments in *G*.

Following the Court of Appeal judgment new formal guidance, published on 9th June 2015, dictated the approach that caseworkers were to adopt in future.

It was the outcome of the first two years of the scheme which fell to be considered in the subsequent litigation known as *IS*, in which Mr Justice Collins held¹⁰² in July 2015 that the Government's approach to ECF funding was unlawfully restrictive. In May 2016, however, the Court of Appeal¹⁰³ reversed that decision by a 2-1 majority. It accepted, however, that:

It is plain that there have been real difficulties; and there is no contest but that improvements could be made, not least to the ECF form... the success rate remains low and the number of applications strikes me as modest (para 54);

¹⁰¹ The Children's Society. Dr Helen Connolly (2015) *Cut Off from Justice: the impact of separating migrant children from legal aid*, (2015). See fn 56 above.

¹⁰² *IS v Director of Legal Aid Casework* [2015] EWHC 1965 (Admin). Accessed September 2017: <http://www.bailii.org/ew/cases/EWHC/Admin/2015/1965.html>

¹⁰³ *IS v Director of Legal Aid Casework* [2016] EWCA Civ 464. Accessed September 2017. <http://www.bailii.org/ew/cases/EWCA/Civ/2016/464.html>

Lord Justice Laws also observed that

The extent of the difficulties is however troubling. No doubt the Legal Aid Agency and the Lord Chancellor will be astute to look for improvements, and will do so on a continuing basis (para 57).

Amendments to the original Regulations came into force towards the end of July 2015 in order to meet some of Mr Justice Collins's criticisms in *IS*,¹⁰⁴ but this part of his judgment was unanimously reversed by the Court of Appeal in May 2016, and further amendments have now been made to the Merits Regulations¹⁰⁵ which as from 22nd July 2016 largely restored the position as it stood before Mr Justice Collins's intervention.

The *IS* litigation led to a number of changes which improved the accessibility of ECF. The application form has been shortened and simplified. The urgency procedure has been improved. It is now possible to apply for "ECF for ECF" so that providers can be paid for time spent investigating or gathering evidence in support of an application for ECF. The new form asks five quite simple additional questions that are directed to the issues identified in the Court of Appeal's judgment in *G*. And individual applicants can now receive a grant of ECF which they can take to a provider, rather than merely a positive indication.

The present state of the law

Summary:

By section 10 of LASPO legal services which are not "in scope" will be made available if the LAA makes an "exceptional case determination"¹⁰⁶ and it also determines that the applicant qualifies for those services (by satisfying the means test and the merits test,¹⁰⁷ to which reference is made in section 11).

An "exceptional case determination" will be made in two different situations.

The first arises where the LAA decides that it is necessary to make legal services available to the applicant because failure to do so would be a breach of his/her Convention rights.¹⁰⁸ The other arises where the LAA decides that it is appropriate to make them available in the particular circumstances of the case, having regard to any risk that failure to do so would be a breach of his/her Convention rights.

In *G* the Court of Appeal found that the Lord Chancellor's original guidance was unlawful for two main reasons. First, it set the bar too high. The test was not whether it would be practically impossible for the litigant to proceed without legal aid. Nor was there a "very high threshold". Instead, "*the critical question is whether an unrepresented litigant is able to present his case effectively and without obvious*

¹⁰⁴ *The Civil Legal Aid (Merits Criteria) (Amendment No 2) Regulations 2015*. Accessed September 2017: <http://www.legislation.gov.uk/uksi/2015/1571/made>

¹⁰⁵ *The Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016*. Accessed September 2017: <http://www.legislation.gov.uk/uksi/2016/781/regulation/2/made>

¹⁰⁶ Formally, it is the Director of Legal Aid Casework who makes the determinations. In practice, the LAA tells us that their Principal Legal Adviser and their Director of High Cost Cases must approve all grants of ECF.

¹⁰⁷ The merits test is not required when, for example, the ECF application is for Legal Help for investigation purposes.

¹⁰⁸ For ease of presentation reference to section 10(3) (b) is omitted. It refers to breaches of any rights of the applicant to the provision of legal services that are enforceable EU rights. In *G* the Court of Appeal doubted (at para 58) whether there was any material difference between Article 47(3) of the European Charter of Rights and Article 6 of the ECHR for present purposes.

unfairness” (paragraph 56). Secondly, as the Lord Chancellor conceded shortly before the hearing in the Court of Appeal, there will be a legal obligation to provide ECF in immigration cases where it is necessary to ensure that an individual is able to participate effectively in a decision-making process which affects his family and private life rights.

Paragraph 46 of the Court of Appeal’s judgment in *G* contains a succinct summary of the correct approach to cases where the applicability of ECHR Article 6 is in issue:

- The Convention guarantees rights that are practical and effective, not theoretical and illusory in relation to the right of access to the courts;
- The question is whether the applicant’s appearance before the court or tribunal in question without the assistance of a lawyer was effective in the sense of whether he or she was able to present the case properly and satisfactorily;
- It is relevant whether the proceedings, taken as a whole, were fair;
- The importance of the appearance of fairness is also relevant: simply because an applicant can struggle through “in the teeth of all the difficulties” does not necessarily mean that the procedure was fair;
- Equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage viz-à-viz their opponent.

And in paragraph 56 of that judgment the Court of Appeal summed up the position in these terms:

It can therefore be seen that the crucial question is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness. The answer to this question requires a consideration of all the circumstances of the case, including the factors which are identified at paras 19 to 25 of the Guidance. These factors must be carefully weighed. Thus the greater the complexity of the procedural rules and/or the substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the stress, demands and complexity of the proceedings, the more likely it is that article 6(1) will require the provision of legal services (subject always to any reasonable merits and means test). The cases demonstrate that article 6(1) does not require civil legal aid in most or even many cases. It all depends on the circumstances.

The Lord Chancellor’s current guidance to caseworkers¹⁰⁹

In the June 2015 re-issue of the Guidance the gist of paragraph 56 of the judgment in *G* is reproduced in paragraphs 19 and 20.

Paragraph 21, headed “How important are the issues at stake?” adjures caseworkers to consider whether the consequences of the case at hand are objectively so serious as to add weight to the case for the provision of public funds. It suggests four questions that might be asked:

- What are the consequences to the applicant of not bringing/not being able to defend proceedings?

¹⁰⁹ Accessed September 2017:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477317/legal-aid-chancellor-non-inquests.pdf

- Does the case merely involve a claim for money, or does the claim relate to current (as opposed to historic) issues of life, liberty, health and bodily integrity, welfare of children or vulnerable adults, protection from violence or abuse, or physical safety?
- If the claim is financial, what are the sums at stake?
- Does the claim relate to adjustments, care provision or medical equipment without which the applicant cannot live an independent life?

Paragraph 22 of the Guidance (headed “How complex are the procedures, the area of law or the evidence in question?”) adjures caseworkers to consider whether the proceedings in question involve unusually complex issues of fact, procedure or law. It suggests that the following questions might be asked:

Factual complexity

- Does the case turn on issues of fact that lie within the applicant’s own knowledge?
- Will there be a significant number of witnesses or a large volume of evidence?
- To what extent have the facts in the case already been explored? (for example, has the case already been through other tribunals or hearings, and have the issues been fully explored and the key point or points to be determined clearly identified?)
- Will expert evidence (e.g. complex medical evidence) have to be obtained and tested in cross-examination? If so, will multiple experts be required? How relevant is the expert evidence to the case itself? Has the court given permission for expert evidence to be submitted under the relevant rules, for example FPR 25.4(1)?

Procedural complexity

- How complex is the procedure in the forum where the case takes place? How clear and straightforward are the relevant rules of procedure?
- Is the case before a court or a higher court? If so, are the rules of procedure in that court nonetheless clear and unambiguous?
- Is the case before a tribunal that possesses specialist or expert knowledge which can assist the applicant?

Legal complexity

- Does the case in question involve any particularly complex issues of law?

Paragraph 23 of the Guidance (under the heading “How capable is the applicant of presenting their case effectively?”) adjures caseworkers to consider whether the applicant would be incapable of presenting their case without the assistance of a lawyer. After some general comments, the following questions are suggested:

- How complex is the case?
- Has the individual received prior assistance from a lawyer? (Although such assistance should not be treated as an absolute bar; it will depend on the particular circumstances of the case, the nature and extent of the assistance afforded)
- How long is the case likely to last?
- What is the applicant’s level of education?
- Is the degree of emotional involvement that the applicant is likely to have in the issues in the case incompatible with the degree of objectivity expected of advocates in court?

- Does the applicant have any relevant skills or experience (either in the area of law or the factual subject matter)?
- Will the case be heard in a tribunal or other venue that is well used to dealing with litigants in person?
- Is there a Mackenzie friend who could be granted permission to speak on behalf of a party to proceedings?
- Does the applicant have English as a first language? If not, what is the applicant's level of skill in English? Will the court or tribunal be able to assist with interpretation and/or the translation of documents? Could family or friends who do not have an interest in the case provide interpretation/translation?
- Does the applicant have any special caring responsibilities which may represent a genuine barrier to the presentation of the case?
- Does the applicant or their carers/dependants have any relevant disabilities? Would the absence of legal representation put a disabled person at a disadvantage vis-à-vis their opponent?

Paragraphs 25 and 26 of the Guidance suggest questions that might be asked in relation to child applicants or adult applicants who lack capacity, and paragraphs 27-29 contain guidance on applications that rely on ECHR Article 8, in terms similar to those mentioned under ECHR Article 6.

Paragraph 30 dismisses any possible effect of ECHR Article 13, and paragraphs 31 to 35 contain guidance on cases in which the applicant relies on enforceable EU rights in relation to the provisions of civil legal services in terms so dense that caseworkers would need help from some other source in order to understand how such rights might arise in a way that is different from the rights conferred by the ECHR.

Paragraphs 36 to 39 remind caseworkers that if they conclude that legal aid must be provided under LASPO s 10, this should be limited to the minimum services required to meet the obligation under ECHR or EU law. The value of Legal Help (as opposed to legal representation) is stressed in this context.

The different elements of caseworkers' current guidance have been set out at some length because although this edition of the Guidance is a very marked improvement on its predecessor, it demonstrates vividly the very large volume of information caseworkers will need to receive if an application is to succeed, quite apart from all the information the LAA requires when satisfying itself that the application also satisfies the merits test (where this is necessary) and the means test. In *JS* Lord Justice Laws recognised (at para 55) that the scheme was heavily dependent on the participation of legal aid providers. However, no lawyer will be paid anything by the LAA for his/her services unless the application is successful.¹¹⁰

The third and fourth years

As the following table shows, the changes that were made two years ago led to an enhanced success rate, although the number of applications is still nowhere near the annual figures that were predicted before Section 10 was enacted.

Case Category	Year	Applications	Grants	Success Rate %
Family	2015-16	394	154	39

¹¹⁰ If the application succeeds, the cost of preparing the application is reimbursed by the LAA in accordance with a scale fee.

	2016-17	303	98	32
Immigration	2015-16	422	326	77
	2016-17	1,007	688	63
Other	2015-16	219	21	9
	2016-17	277	22	8

PLP was formerly in receipt of a funding grant that enabled it to assist applicants with their ECF applications. When the grant came to an end earlier this year, PLP published a news release¹¹¹ which stated:

Because legal aid providers are still not paid for making unsuccessful applications, for many it is economically unviable for them to do so. It is difficult for individuals to apply for ECF without assistance, but it is not impossible to do so. Some organisations run pro bono projects to help individuals to apply for ECF but there remains a far greater need than there is available assistance. The Public Law Project, which has run an ECF project assisting with applications for ECF since the start of the scheme, has developed a guide for individuals wanting to have a go at applying for ECF. The guide can be downloaded from PLP's website [here](#).¹¹² And there is more useful information about applying for ECF [here](#).

Jawaid Luqmani told the Commission that despite the improved success rate in immigration cases, the number of applications remained very low. He explained that there were a number of inhibitors preventing access to ECF:

- A perception that the probability of success is far lower than the probability of failure (incorrect on the present data)
- The inability or unwillingness of practitioners to spend time making an application on a speculative basis where the application may take between 2-3 hours to progress.¹¹³

He said it was likely that the spread of cases where applications for ECF had been made would be limited to a number of organisations, with many more firms not applying than applying – and the number of firms with legal aid contracts had reduced significantly since the advent of LASPO. His own firm had a 100% success rate, but the number of applications it had made were comparatively few.

¹¹¹ Public Law Project. Alison Pickup (2017) *How safe is the legal aid "safety net"*. Accessed September 017: <https://www.opendemocracy.net/openjustice/alison-picku/how-safe-is-legal-aid-safety-net>

¹¹² Both accessed September 2017:

<http://www.publiclawproject.org.uk/resources/254/exceptional-case-funding-ecf-applying-as-an-unrepresented-person> <http://www.publiclawproject.org.uk/exceptional-funding-project> .

¹¹³ *JustRights* told the Commission that some legal aid providers specialising in working with children and young people had reported giving up applying for exceptional funding altogether as they considered it a waste of valuable time

Specific fields in law

An Annex to the Guidance contains advice on the following specific categories of case:

- Private Family Law
- Business Cases
- Clinical negligence
- Debt
- Education
- Employment
- Housing
- Human Rights
- Immigration
- Welfare Benefits (including asylum support)

In all these categories of case the Guidance provides a reminder that section 10 is only engaged under ECHR Article 6 in relation to the determination of civil rights and obligations, or, in immigration cases, where the process will engage the ECHR Article 8 right to respect for family and private life. Extracts from the earlier guidance were then repeated, in so far as they were believed to be relevant.

Although the evidence given to the Bach Commission showed the extent of the hardship caused by the fact that a category of case is “out of scope” so that legal aid is only available under the ECF scheme, the first four years of LAA statistics show how little effective use has been made in these other categories of case of the safety net ECF was supposed to provide, and how unsuccessful the applications generally were. See the following table:¹¹⁴

		Applications	Grants	Success Rate %
Housing/Land Law	2013- 14	80	1	1.3
	2014-15	29	3	10.3
	2015-16	54	2	3.7
	2016-17	48	7	14.3
PI/Clin Negligence	2013-14	65	0	0
	2014-15	2	0	0
	2015-16	1	1	100
	2016-17	8	1	12.5
Welfare Benefits	2013-14	11	0	0
	2014-15	18	3	16.7
	2015-16	7	2	28.6
	2016-17	20	8	40
Inquiry/Tribunal	2013-14	13	1	7.7
	2014-15	3	1	33.3
	2015-16	0	0	0
	2016-17	0	0	0
Debt/Contract	2013-14	6	0	0
	2014-15	0	0	0
	2015-16	0	0	0
	2016-17	2	0	0
Education	2013-14	2	0	0

¹¹⁴ These tables contain a rather more detailed breakdown of the “other” cases that were included in the short tables at the beginning of this paper.

Appendix 5: An analysis of evidence received by
the Commission

	2014-15	3	0	0
	2015-16	0	0	0
	2016-17	0	0	0
Discrimination	2013-14	1	0	0
	2014-15	0	0	0
	2015-16	0	0	0
	2016-17	4	0	0
Other	2013-14	84	1	1.2
	2014-15	94	7	7.7
	2015-16	157	15	9.4
	2016-17	195	6	3
Totals	2013-14	262	3	1.1
	2014-15	149	14	9.4
	2015-16	219	20	9.1
	2016-17	277	22	7.9
Grand Total	2013-17	907	59	6.5

CHAPTER 8: Exceptional Case Funding (Inquests)

Introduction

In his second annual report (for 2014-5) the Chief Coroner said that although about 230,000 deaths are reported to coroners across England and Wales each year, most of them are signed off by coroners as a death from natural causes, and only about 25,000 cases proceeded to an investigation and inquest, with juries being summoned in 397 of them.

In contrast to the position for non-inquest cases, Legal Help has always remained in scope for inquest cases.¹¹⁵ This means that if otherwise qualified and if it is appropriate to seek legal advice, the family of the deceased can receive Legal Help for all the preparatory work associated with an inquest. This may include preparing written submissions to the coroner, and suggesting questions for the coroner to ask witnesses. Funding is also available for the family to ask a MacKenzie Friend to attend the inquest, and to offer informal advice (if the coroner permits it).

Legal representation, however, in the sense of retaining an advocate to represent the family at the inquest, is “out of scope”, and the statistics in the table below refer to the success (or otherwise) of applications for legal representation at the inquest. Nobody suggests that legal representation is required by a family at every inquest. Because ECHR Article 2 is so influential in inquest cases, the success rate for Exceptional Case funding (ECF) grants in these cases has always been higher than for non-inquest cases.

The first four years of post-LASPO¹¹⁶ statistics provide these figures:

	Applications	Grants	Success rate %
2013-14	201	54	26.9
2014-15	225	110	48.9
2015-16	240	163	67.9
2016-17	283	145	51.2
Total	949	472	49.7

The improved success rate in the third year no doubt has much to do with the decision of Mr Justice Green in February 2015 in the case of *Letts*¹¹⁷ and the subsequent redrafting of relevant parts of the Lord Chancellor’s Guidance to caseworkers which was issued in August 2015.

In addition to the general provisions about ECF that are contained in sub-sections 10(1) – (3) of LASPO, sub-sections (4) to (6) contain provisions that are specific to inquests. In short, the LAA may make a “wider public interest determination” in relation to the applicant family member and the inquest. This means

¹¹⁵ See LASPO Schedule 1, Para 41(1).

¹¹⁶ The Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹¹⁷ *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin). Accessed September 2017:

<http://www.bailii.org/ew/cases/EWHC/Admin/2015/402.html> The deceased Christopher Letts had recently been discharged from a psychiatric hospital where he was a voluntary in-patient when he committed suicide by throwing himself under a train. Although his family was granted legal aid following an admission of liability at the start of the judicial review proceedings, Mr Justice Green nevertheless went on to consider the appropriateness of the text of the Lord Chancellor’s Guidance in Inquest cases and held that it misstated the law in certain relevant respects.

“a determination that, in the particular circumstances of the case, the provision of advocacy under this Part for the [applicant] for the purpose of the inquest is likely to produce significant benefit for a class of person other than the [applicant and the members of his/her family].”

In addition, the LAA is currently obliged to conduct intrusive inquiries in every case into the means of members of the deceased’s family, although it has a discretion to grant waivers.¹¹⁸ A recent Freedom of Information Act request from INQUEST elicited the information that for the year up to September 2015 no applications were refused by the LAA on the basis of financial eligibility. It would be very good if this blanket requirement could be reconsidered, because intrusive inquiries of this kind by a bureaucratic agency so soon after a bereavement are to be avoided whenever possible.

In the Lord Chancellor’s Guidance to caseworkers it is suggested that in the context of an inquest the most likely public benefits are the identification of dangerous practice, systemic failings or other findings that identify significant risks to the life, health or safety of other persons.

The meaning of the systemic and operational duties in ECHR Article 2

It was, however, the interpretation of the requirements of ECHR Article 2 (“Everyone’s right to life shall be protected by law”) that was central in the case of *Letts*, and this turned on the right of the Letts family to receive an “exceptional case determination” under section 10(2) of LASPO (because otherwise there would be a breach of that article).

In a judgment that is a model of clarity Mr Justice Green explained that Article 2 imposed two substantive obligations on states:

“(i) a duty to set up systems of laws in individual cases which are designed to protect life; and

(ii) a duty in individual cases not to be complicit in the taking of life.”

The first of these duties is called “the systemic duty” and the other “the operational duty”.

He went on to say:

“The duty which lies at the core of this dispute is the duty to investigate a death which arises, or might arise, as a consequence of a breach of one or other of the substantive duties referred to above. This duty of inquiry or investigation is sometimes termed the ‘procedural duty’. Because it arises as a consequence of a

¹¹⁸ In contrast funeral grants are automatically awarded to anyone in receipt of income-related benefits without any means inquiry. In one of my last judgments, *Stewart v Secretary of State for Work & Pensions* [2011] EWCA Civ 907, Accessed September 2017: <http://www.bailii.org/ew/cases/EWCA/Civ/2011/907.html> I quoted an extract in a 1985 Government White Paper which said: “The Government accepts that it will be important to handle this part of the fund with a minimum of detailed investigation into personal circumstances at a distressing time for the person seeking help. We believe this is best done through making clear that receipt of any of the main income-related benefits – income support, family credit and housing benefit – will qualify someone for help. This avoids a separate assessment of income. It also means that more people, not less, will be able to get proper help with the costs of a funeral.” The LAA itself is not obliged to conduct a means inquiry in relation to public law care and supervision proceedings in relation to children, to child abduction cases, or to certain cases under the Mental Health Act and the Mental Capacity Act, cases where similar sensitivities arise.

violation or possible violation of the substantive obligations it is derivative or parasitic in nature. However, as I set out below, it has nonetheless been accepted as being of very great importance in any democratic society and its secondary character is by no means a reflection of indication of secondary importance.”

In his original Guidance the Lord Chancellor made the mistake of thinking that caseworkers would have to identify an arguable breach of one or other of the substantive duties before any question could arise that the state was under a relevant procedural duty in relation to the inquest. Mr Justice Green said that this was wrong, because there are some categories of case in which the mere fact of death gives rise to a possibility of State responsibility, and this suffices to trigger the Article 2 procedural duty automatically.

The revised post-Letts Guidance reflects this part of his judgment. It states that:

The case-law in this area is complex and developing but indicates that the categories in which the Article 2 procedural duty will be automatically triggered include at least:

All intentional killings by state agents (e.g. a police shooting);

All violent deaths and suicides of persons detained in police or prison custody or during the course of arrest or search; and

All violent deaths and suicides of persons detained in mental hospitals.¹¹⁹

The Guidance goes on to explain that where the “procedural obligation” does arise, an investigation is needed which satisfies these five criteria:

- The inquiry must be on the initiative of the State, and it must be independent;
- It must be capable of leading to a determination of whether any force used was justified, and to the identification and punishment of those responsible for the death;¹²⁰
- It must be prompt and proceed with reasonable expedition;
- It must be open to public scrutiny to a degree sufficient to ensure accountability; and
- The next of kin of the deceased must be involved in the inquiry to the extent necessary to safeguard their legitimate interests.¹²¹

Guidance is then given about the circumstances in which funded representation might be necessary to discharge the procedural obligation.

It seems likely that ECF funding was refused in 2015-2016 in those cases where LAA caseworkers decided that these criteria would be satisfied without the family having to be represented by an advocate at the inquest. Unfortunately, although the LAA’s statistical bulletins record how quickly (or

¹¹⁹ It added: “In Letts it was said that the suicide of a voluntary psychiatric patient is also capable (depending on the facts) of automatically triggering the Article 2 procedural duty. However, the precise circumstances in which the suicide of a voluntary psychiatric patient will automatically trigger the procedural duty are presently unclear, so caseworkers should have regard to any relevant case law that emerges.”

¹²⁰ These criteria were set out by the European Court of Human Rights in a case that related to the shooting by police of a young unarmed man in Belfast in 1992.

¹²¹ Where there has not been a previous investigation, or where the family has not played an active role in a previous investigation, the inquest may be the only investigation the State conducts into the death where the family is involved to the extent necessary to safeguard their legitimate interests.

slowly) their caseworkers took their decisions, they say nothing about the types of reasons why funding was refused (or whether it was only granted following a review or, perhaps, as a result of the threat or institution of judicial review proceedings), so we are left to guess what the reasons might have been. Greater clarity on issues like this in the LAA's future reports and bulletins would be very helpful in promoting a constructive dialogue between the LAA and legal aid providers which does not always seem to exist everywhere at present.

The current pressure for the most generous approach

There is currently a very strong feeling that public funding for advocacy for the deceased's family should be available in a class of complex inquest in which the "big battalions" are all represented at public expense while the deceased's family are denied such funding.

This problem re-surfaced recently in relation to the inquest into the death of seven-year old Zane Ghangbola. He died in 2014 after falling ill during floods at his home. The official view was that he had died from carbon monoxide poisoning caused by a petrol-driven pump in the family home.¹²² His parents believed, however, that he had died after inhaling cyanide gas which had leaked into their home from a nearby landfill site, and they also relied in this regard on the fact that his father was paralysed from the waist down, a fact that a doctor attributed to cyanide gas. Although the Environment Agency, the local council and a local NHS hospital trust had each engaged publicly funded barristers, and the coroner had instructed counsel to the inquest, an application for a fixed sum of £70,000 ECF funding was denied to the family, who were eventually only represented by a Q.C. at the inquest following a crowd-funding appeal which raised over £70,000.

The inquest verdict concluded that Zane had indeed died of carbon monoxide poisoning. There can, however, be little doubt that the presence of their own Q.C. gave the family a confidence that their worries were being properly aired at the inquest in a way that would not have occurred if they had been unrepresented spectators.

It is no doubt cases like this which encouraged the Chief Coroner to say in his latest annual report¹²³ that:

201. In a small number of inquests the family of the deceased is unable to obtain legal aid funding for representation at the inquest, despite individuals or agencies of the state being funded for legal representation as 'interested persons'. In some cases one or more agencies of the state such as the police, the prison service and ambulance service, may be separately represented. Individual agents of the state such as police officers or prison officers may also be separately represented in the same case. While all of these individuals and agencies may be legally represented with funding from the state, the state may provide no funding for representation for the family.

202. Many less complex or contentious inquests are conducted entirely satisfactorily in the absence of legal representation for interested persons,

¹²² At the inquest the pathologist who conducted the post mortem on Jade said that there was no evidence of cyanide poisoning.

¹²³ Report of the Chief Coroner to the Lord Chancellor. (2016) *Third Annual Report (2015-16)*. Accessed September 2017.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/550959/chief-coroner-report.pdf .

including some cases involving the state. But in some cases the inequality of arms may be unfair or may appear to be unfair to the family. It may also mean that the coroner has to give special assistance to the family which may itself give the appearance of being unfair to others.

203. The Chief Coroner therefore recommends that the Lord Chancellor gives consideration to amending his Exceptional Funding Guidance (Inquests) so as to provide exceptional funding for legal representation for the family where the state has agreed to provide separate representation for one or more interested persons. the Lord Chancellor should consider amending her ECF guidance so as to provide legal representation for a family where the state has agreed to provide representation for one or more of the other parties to the inquest. In other words, these are cases where justice demands equality of arms.

Before the recent General Election the then Shadow Home Secretary, Andy Burnham MP, sought amendments to the law to make it more likely that representation would be granted in more cases, but his efforts were successfully resisted when put to the vote.

CHAPTER 9: The Rights of Children to Access to Justice

International obligations

The United Nations Convention on the Rights of the Child (UNHRC), which this country has ratified, provides, so far as is relevant:

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind...,

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In December 2013, the Joint Committee on Human Rights, in its report on the Government's 'Transforming Legal Aid' proposals¹²⁴ criticised the Government for its failure to fulfil its duties to consider the specific needs of children and young people. It stated unequivocally:

We do not consider that the removal of legal aid from vulnerable children can be justified.

Whilst commenting that it was "sure that the Government does not intend vulnerable children to be left without legal representation", it said that the Government had failed to fully consider its obligations under the UNCRC.

In September 2014 the Office of the Children's Commissioner (OCC) in England published a Child Rights Impact Assessment which examined the impact on the rights of children and young people under the UNCRC of the changes to civil and prison law legal aid that had been implemented since April 2013.¹²⁵ It contained the following findings:

- Children and young people were attempting to deal with decision-makers directly without support, including the pursuit of formal proceedings as a litigant in person (LIP) (or through an adult litigation friend). They said that they felt intimidated from appearing unrepresented at hearings. The OCC report stated that:

in these circumstances, it is very unlikely that a child or young person can effectively participate in the hearing, nor that all relevant information can be put before the tribunal to enable them to make a decision fairly and in the child's best interests.

- Children and young people had been attempting to obtain legal assistance pro bono or from the voluntary sector, which was unable to cope with the increased demand.

¹²⁴ Human Rights Joint Committee of UK Parliament. (2013) *The implications for access to justice of the Government's proposals to reform legal aid*. Accessed September 2017: www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/100/10002.htm

¹²⁵ Office of the Children's Commissioner and Just for Kids Law. Joel Carter (2014) *The impact of legal aid changes on children since April 2013: Participation work with children and young people*. Accessed September 2017: http://www.justforkidslaw.org/wp-content/uploads/2014/09/Just-for-Kids-Law-Report_final1.pdf

- Children and young people had been paying privately for legal advice, assistance or representation – an option that was only available to very limited numbers of young people acting without adult support.
- Children and young people were ceasing to attempt to resolve their legal problems. This left “significant numbers” of children and young people with problems requiring resolution which were no longer in scope for funding, and in respect of which alternative help was limited. “A negative impact on them and their families” was the result.

The OCC concluded that a wide range of rights under the UNCRC were likely to be negatively impacted by the civil and prison law legal aid changes:

These include both the rights enjoyed during proceedings – those under Articles 2 (non-discrimination), 3(1) (best interests to be a primary consideration), 12 (right to be heard) and the specific guarantees attached to specific proceedings (e.g. in Article 9 re separation from parents) – and substantive rights which are being infringed because of the legal problem that the child or their parent/carer is encountering. Therefore, we consider that urgent review and reform is needed in order to ensure that the Legal Aid system can adequately protect the rights of children and young people and that the Government’s obligations under the UNCRC are met.

In March 2015, the Joint Committee on Human Rights again criticised the Government for its failure to fulfil its duties under the UNCRC, this time in starker terms:

*The Government’s reforms to legal aid have been a significant black mark on its human rights record during the second half of this Parliament.... the evidence we heard from the outgoing Children’s Commissioner for England and from all the NGOs we took oral evidence from provides firm grounds for a new Government of whatever make-up to look again at these reforms and to undo some of the harm they have caused to children.*¹²⁶

The UN Committee on the Rights of the Child, which will be examining the UK Government’s record on children’s rights later this year, has recently signalled that access to justice for children in the context of cuts to legal aid is amongst its primary concerns.¹²⁷

Options for the future

In June 2017 *Justrights*, which campaigns for fair access to advice for children and young people, published an updated edition of its options paper entitled “Securing Access to Justice for Children and Young People”. This paper set out options for decision-makers to tackle the adverse impact of legal aid cuts on children and young people. Although it considered that all these options were viable, it thought the priority for decision-makers should be a combination of Options 1 and 4, which are reproduced below:

OPTION 1: Reinstate cuts to legal aid for children and vulnerable young adults¹²⁸

There is cross-party support for providing access to legal aid for all children under the age of 18 and vulnerable young adults.

¹²⁶ Joint Human Rights Committee. (2015) *Eighth Report, The UK’s compliance with the UN Convention on the Rights of the Child*. Accessed September 2017:

<https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/144/144.pdf>

¹²⁷ *Seventy-second session 17 May-3 June 2016, Item 4 of the provisional agenda: Consideration of reports of States parties: List of issues in relation to the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, Committee on the Rights of the Child, 29 October 2015.

¹²⁸ Young adults are age 18-24.

During the passage of the Legal Aid, Sentencing and Punishment of Offenders Bill 2012 (LASPO), the Government was defeated in the House of Lords in a vote on an amendment that would have exempted all children with legal cases in their own right (i.e. independently from parents/carers) from the scope changes. The amendment was subsequently overturned in the House of Commons, affecting 6,000 children each year.

There was also cross-party support during the debates on the LASPO Bil for protecting vulnerable young adults, defined as those who are care leavers, have a disability or are otherwise vulnerable.¹²⁹

Estimate of cost implications¹³⁰

To bring back into scope all cases where the recipient of legal aid is:

- A child under 18 – c.£7m per annum to reverse LASPO. Number of cases: 5,685
 - Immigration – 2,490 cases costing £1.1m
 - Debt – 280 cases costing £0.1m
 - Employment – 90 cases costing £0.0m
 - Housing – 430 cases costing £0.1m
 - Welfare Benefits – 1,330 cases costing £0.3m
 - Actions Against Police – 90 cases costing £0.1m
 - Education – 110 cases costing £0.4m
 - Clinical Negligence – 400 cases costing £3m
 - Personal Injury – 300 cases costing £1.6m
 - Miscellaneous others (incl. Asylum, Consumer and Public Law) – 165 cases costing £0.3m
- A young adult aged 18-24 with a disability, who is a care leaver or ‘otherwise vulnerable’ – £4m per annum
 - Number of cases: c.12,000 – primarily social welfare and family cases

In addition, reversing scope cuts to prison law for all children and young people (under 25) would cost c.£1m per annum.

Advantages of this option include:

- Existing cross-party support
- A relatively low administrative burden for the Legal Aid Agency compared to other options – once the cases are back in scope, children and young people will be entitled automatically.

OPTION 4: Create a new young person-focussed legal support scheme

Create a new scheme dedicated to providing quality young person-focussed legal information, advice and representation. This, in conjunction with rolling back the cuts to legal aid (Option 1), would be by far the most effective option.

Key features, based on extensive consultation conducted with hundreds of young people earlier in 2014, should include:

- Public legal education and self-help – including the development of a single website where young people could access all the information about their rights in one place: costs borne potentially by a charitable trust.

¹²⁹ House of Lords. (2012) *Hansard*, 27 March 2012, Column 1256. Accessed September 2017: <http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120327-0001.htm#12032757001721> .

¹³⁰ Based on data provided by MOJ on 10 November 2011 in response to a Freedom of Information request made jointly by JustRights and The Children’s Society.

- General information and advice provided through youth advice and support services in the community – dedicated funding to be provided by local authorities and the NHS in line with Department of Health policy to expand the provision of youth advice and counselling services as part of youth mental health reforms.
- The establishment of a new fund for ‘Young people’s law’ – potentially including elements of social welfare, family and immigration law, but enabling specialisms – and tendering for legal aid providers in this new area. Contracts should allow flexibility for providers to meet the needs of vulnerable children and young people in the most efficient and effective way – with bureaucracy at a minimum. Funded out of existing legal aid spending on children and young people’s cases.
- A network of specially trained lawyers for children and young people – potentially quality-assured through some form of kitemark for either practitioners or contract-holders. These could be professionals working in one area of law or working across multiple areas, but all would have specialist expertise in working with, safeguarding and representing children. National Occupational Standards for providing legal advice to young people have already been developed. The cost of the quality assurance system could be borne by the profession, as with the children’s panel or mental health accreditation schemes.
- Delivery of legal advice would be co-located and integrated within services and institutions young people with the highest legal needs are already using – youth advice agencies, prisons, immigration detention units, mental health institutions, Youth Offending Services etc. There are some additional costs to providers of delivering services through outreach locations, but overall costs would not need to increase, and outcomes would improve, if existing spending was targeted on these specialist services.
- The current exemption for children under 18 from the requirement to access the single mandatory Civil Legal Aid Gateway for legal aid funded advice in the areas of debt, discrimination and special education needs would be extended to age 24. Costs would be saved by dismantling the bureaucracy associated with the telephone gateway and eligibility assessments.

Cost:

This option would involve improving access, quality and outcomes at small additional cost. We would expect that legal aid budgets for independent, specialist advice would be ring-fenced under this model. This option does contain elements that would require additional financial support – including from local authorities and the NHS – to ensure the model works as envisaged. However, there would be some savings and cost efficiencies through utilising existing spend far more effectively, and drawing in co-funding from charitable trusts, the legal profession, NHS and local authority commissioners.

The advantages of this option include:

- It would be based on children and young people’s needs rather than trying to change an existing bureaucratic system that has failed to serve young people’s needs consistently well.
- Legal aid services for children and young people would be far better integrated with general advice for young people and public legal education.
- It would involve less bureaucracy than the other options – a high proportion of spending would be on direct service delivery to the most vulnerable children and young people.

CHAPTER 10: Judicial Review

Introduction

Judicial Review (JR) is an essential tool in the citizen's armoury against unjust or unlawful decisions by the state or other public authorities. Although they accepted that it was a remedy of last resort, experienced practitioners told the Commission that all too often local authorities – and the Home Office, too – refused to reconsider a matter until JR proceedings were contemplated – or, in some cases, actually issued.

In general, JR proceedings remained in scope under LASPO. The Lord Chancellor, however, introduced regulations¹³¹ which had the effect of preventing a legal aid provider from receiving any remuneration at all unless the court gave permission to bring JR proceedings or, if they came to an end before the court made any decision, if he considered it reasonable to pay remuneration in the circumstances of the case, taking into account, in particular:

- i. the reason why the provider did not obtain a costs order or costs agreement in favour of his client;
- ii. The extent to which, and the reason why his client obtained the outcome sought in the proceedings; and
- iii. The strength of the application for permission at the time it was filed, based on the law and on the facts which the provider knew or ought to have known at that time.

In 2015, however, while rejecting a frontal assault on the *vires* of these regulations, the Divisional Court held in the case of *R (Ben Hoare Bell) v the Lord Chancellor* that because they extended to putting providers “at risk” in circumstances outside their immediate control, they were invalid in three main respects which were in due course reflected in the amendment regulations that were introduced following the court's decision.¹³² These added three new situations in which providers might be paid for the work they had done, namely when:

- (c) The defendant withdraws the decision to which the application for judicial review relates and the withdrawal results in the court –
 - (i) refusing permission to bring judicial review proceedings, or
 - (ii) neither refusing nor giving permission;
- (d) The court orders an oral hearing to consider –
 - (i) whether to give permission to bring judicial review proceedings;
 - (ii) whether to give permission to bring a relevant appeal; or
 - (iii) a relevant appeal, or
- (e) the court orders a rolled-up hearing.¹³³

¹³¹ *Civil Legal Aid (Remuneration) (Amendment) Regulations 2014*, SI 2014/607, which introduced a new Regulation 5A to the earlier regulations.

¹³² *R (Ben Hoare Bell) v the Lord Chancellor* (2015) EWHC 253 (Admin). Accessed September 2017: <http://www.bailii.org/ew/cases/EWHC/Admin/2015/523.html>

¹³³ *Civil Legal Aid (Remuneration) (Amendment) Regulations 2015*, SI 2015/898. Accessed September 2017: http://www.legislation.gov.uk/uksi/2015/898/pdfs/uksi_20150898_en.pdf

The problems that are created when providers are placed on risk

Despite these changes the Public Law Department of Irwin Mitchell¹³⁴ wrote from no doubt bitter experience of “*the unacceptable costs risks placed on providers that provide a disincentive to pursue JR claims*”.

The Community Legal Partnership said that it remained the case that a legal aid provider would have to bring a case entirely at risk in terms of costs, and that this was clearly dissuading a number of such providers from taking on these vital cases.¹³⁵

Evidence was given to the Divisional Court in the *Ben Hoare Bell* case to show that it was particularly hard to predict the outcome of the permission stage of an application for JR. One of the reasons for this was the imprecision of the test applied by the courts at that stage in the absence of a “rigid definition” of the criteria for granting permission. The court accepted that any predictive assessment included a risk of error, and that litigation was notoriously risky: it was inherent in judicial decision-making that there would be a variation in how judges applied test such as “arguability”:

“Some of this is a reflection of the nature and complexity of the case, some may reflect the experience of the judge, but in general the variation follows a normal distribution”.

The court, however, was impressed by the fact that some of the evidence indicated an ability to predict decisions on permission with considerable success.

Concern, in short, was expressed about the chilling effect of the regulations, which could lead providers to prioritise the risk of not being paid over the objective assessment of the merits of the client’s case.

JustRights drew attention to the great concern expressed by the Divisional Court about the fact that there had been a 23% decline in applications for legal aid in JR claims since the changes came into force. This trend has continued, as the following statistics show:

<i>Public Law</i>	Civil representation costs met by LAA (volume)	Civil representation costs met by LAA (value) (£’000)
2012-13	1,050	5,415
2013-14	984	5,134
2014-15	795	5,187
2015-16	611	4,172
2016-17	581	3,412

The Police Action Lawyers’ Group said that the refusals of permission can be arbitrary, unpredictable and outside the control of the lawyer or his client:

“They introduced a heavy costs risk in circumstances where claimant legal aid firms are already working with extremely tight margins and where no matter how conscientious and professional the lawyers, something may happen beyond their control that means they do not get paid for the work they have done even though it was reasonable for them to have done that work.”

¹³⁴ A firm of solicitors which conducts a large volume of JR work on a national basis. Its public law department has 60 staff, headed by three partners, and is based in seven offices across the country.

¹³⁵ They explained that JR was an essential tool for gypsies and travellers seeking to challenge the unlawful activities of local and public authorities.

They pointed out that the new regime affected test cases, because where there was no clear legal precedent the financial risks were far too high for practitioners to face.

They added that the consequences of a failure to obtain legal aid are serious. Not only is a litigant in person faced with the prospect of having to pay “prohibitively high” court fees as well as adverse costs orders. They are also extremely unlikely to be provided with the appropriate documentary evidence, to be able to quantify the value of their claim for damages, or to navigate civil procedure effectively:

“This is in the context of seemingly limitless funding for legal advice to public defendants, paid for by the public purse. The effect is that claimants face insurmountable hurdles at every turn and access to justice is rendered meaningless for many.”

It should be remembered that legal aid contracts will only be awarded to firms and not for profit agencies who have satisfied the LAA that they are competent to carry out JR work, and that they are audited for their compliance with quality standards. As things stand, they will not be granted legal aid in a JR case unless they have satisfied the LAA that the particular case qualifies for support. The new regulation (as amended) has merely introduced another hurdle, using the unpredictable exercise of discretion by an Administrative Court judge as a proxy for the kind of decision LAA staff are being paid to make.

And since JR was not taken out of scope, and since no budgetary provision was made for any reduction of expenditure in JR cases, this change has had an effect not intended by the originators of LASPO.

CHAPTER 11: Criminal Justice

Introduction

In this paper the Commission will provide a snapshot of the main themes that emerged from the evidence it received on criminal justice issues. Inevitably some respondents wished the Commission to range more widely (to include, for example, examining the continued usefulness of areas of substantive law which tend to clog up the courts), but in what follows it will be concentrating on its main task – to see whether citizens are being afforded appropriate rights of access to justice in the criminal courts today, and if not, what should be done about it.

The scene in the criminal courts today

Bill Waddington,¹³⁶ a very experienced criminal defence solicitor from Hull and a former Chair of the Criminal Law Solicitors' Association, told the Commission:

What works and what doesn't work in the current Legal Aid scheme? Well, what works I think I can answer in one line which is that the defence side of things works. I am not sure that anything else actually works in the system at the moment, and I am not being too cynical about that. I think that is probably fairly accurate. What doesn't work? There isn't enough time in the rest of the year for me to talk in enough detail about what actually doesn't work in the system. I think the experience of everybody here who is in the criminal justice system would probably say about much the same thing.

The Prosecution side fails, I think, almost completely in everything they try to do. That isn't because of the quality of the staff, but I think it is lack of resources, I think it is maladministration, I think it is constant imposed changes upon them and so on. The Court system is probably at the lowest ebb, I think, that I have ever seen it at in all my years, in that it's slow, it is cumbersome. Much the same with the Crown Court... Listing in the Crown Court is just a complete and utter farce. It has never been very good, but nowadays, it is absolutely appalling. It is all geared around box ticking, because cases have to be listed within a certain period of time and if they are listed - that means "put in the list" - then the box is ticked. It doesn't matter if they subsequently come out of the list, because the box is ticked, because it was listed within the specified time frame.

And so on. The Commission received very similar evidence from the present chair of the Criminal Law Solicitors Association (CLSA), from the immediate past president of the London Criminal Courts' Solicitors' Association (LCCSA) and from the Society of Labour Lawyers¹³⁷, as well as from a handful of other witnesses.

The troubles now besetting our criminal justice system are multi-factorial. They all stem from successive governments' determination to reduce the cost to the taxpayer of our arrangements for achieving criminal justice. In this endeavour cost-cutting has all too often been given priority over the interests of justice. Serious problems have resulted from a combination of cuts to the police budget, cuts to the CPS budget, cuts to HM Courts Service's budget and successive heavy cuts to the

¹³⁶ He is himself a member of the Commission.

¹³⁷ Their written evidence was more or less identical to the evidence of the criminal group in Garden Court Chambers

remuneration of practitioners funded by legal aid. At the same time there has been a drive to reduce the incidence of adjournments and “cracked trials” by introducing more sophisticated arrangements for pre-trial management, a determination to resist adjournments wherever possible, and the introduction of attractive inducements to defendants to plead guilty at the first possible occasion.

These reforms and cuts have been accompanied by a very distinct deterioration in the quality of criminal justice – with the concomitant risk that innocent people may be convicted of crimes they did not commit; or may decide to plead guilty through a fear of a harsher sentence if they are convicted following a “not guilty” plea; or because they will be financially worse off if they are acquitted following a contested trial than they would be if they pleaded guilty at the outset. And there are now very strong grounds for concern that young practitioners on both sides of the legal profession are not being attracted into the ranks of criminal defence lawyers because the pay and the working conditions are so unattractive.¹³⁸

In Appendix II¹³⁹ there is an outline description of some of the methods used by successive governments prior to 2010 to bring criminal legal aid expenditure under some kind of control. These attempts continued under the new Coalition Government, but any root and branch changes were strenuously and successfully resisted by practitioners, and the government suffered a series of setbacks between 2010 and 2016 in their efforts to make further economies. There has been outright resistance to competitive price tendering of the type supported by Lord Carter’s Review more than ten years ago, or to any efforts to introduce an enlarged “public defender” scheme, even though experience in some other jurisdictions has shown that such a system, if well-regulated, has certain advantages.¹⁴⁰

Given the turbulent history of the last ten years the Commission sees no merit in recommending further radical change of a kind that would be hotly resisted by the legal profession. On the other hand, there are significant improvements that can be made to the present lamentable arrangements, so long as the goodwill of the profession is harnessed and so long as the government is willing to engage consistently in constructive discussions with practitioners on ways to remedy the most serious of the defects existing today¹⁴¹.

The police and the CPS

Two complaints surfaced again and again in the evidence we received about police and/or prosecutorial practice. The first relates to the police practice of saving money by inviting people to attend a police station for a chat (as opposed to arresting them) and then obtaining incriminating admissions in the absence of a solicitor. The solicitor’s absence does not result from any failure to explain the interviewee’s rights but because, in ignorance of the dangers, the interviewee prefers to proceed directly to an interview rather than wait an indefinite length of time for a previously unknown lawyer to come and advise him.

The second – which might arise from prosecutorial failings just as much as from failings by the police – relates to problems arising from late disclosure or non-disclosure of prosecution evidence. In a climate in which issues of this kind could be cured by an adjournment or by a judicial determination to exclude evidence it would be unfair to admit these shortcomings might not matter so much, but

¹³⁸ Details will be found in Chapter 14: “Legal aid lawyers: the effect of LASPO”.

¹³⁹ Henry Brooke. (2016) *A History of Legal Aid 1945-2010*. Appendix 6 to this Report.

¹⁴⁰ See the evidence of Professor Roger Smith about the arrangements in United States federal courts.

¹⁴¹ The stop-start history of constructive engagement over the last five years, a period which has seen no fewer than five Lord Chancellors in office, was one of the most depressing features of the evidence the Commission received.

where there is such a determination to avoid adjournments and where failures in prosecution disclosure are so widespread that dangerous criminals would go free if judges were scrupulous in excluding evidence unfairly disclosed long after the due date (and some of it during the course of the trial itself) there are obvious risks to the integrity of the justice system.

The vigorous complaints the Commission received from defence lawyers have been amply confirmed by the Crown Prosecution Inspectorate. In a report published in June 2017 it noted that the duty of disclosure was complied with fully by prosecutors in only 56.9% of applicable cases within the file sample – an improvement from the previous inspection when only 34.8% of cases met expectations. It said that CPS disclosure was hampered by the standard of police compliance with their disclosure requirements: in the current inspection this fell below the required standard in 40.7% of cases. In 19.5% of these cases the police did not provide a schedule, in 18.5% the items were poorly described and in 15.4% they were wrongly listed.¹⁴²

So far as the CPS is concerned, Raj Chandra, a very experienced criminal defence lawyer, told the Commission:

The CPS has been a failing institution for a number of years. We have to face up to that. Often you receive no response if you write to them. Five years ago as a defence lawyer I would have said that it was the CPS who should receive more funding. Today defence services are equally overworked and under-resourced – pretty much as badly as the CPS. This is a real problem. You cannot prepare a case properly if the CPS does not respond to your correspondence.

And this despite Lord Justice Leveson's observation in his Review which stated that "part of the solution to improving the efficiency of the whole system is to acknowledge the critical role that the defence can play".

The harnessing of technology

There has been a significant increase in the deployment of different applications of modern technology in support of criminal justice. While it is introducing some very distinct advantages, the evidence the Commission received shows that it has also brought in its wake some very distinct disadvantages¹⁴³: what happens when the video link to court breaks down or is otherwise unavailable, or when the links to the repositories of vital information are hard to access, or are simply not working? All too often these deficiencies result in defence practitioners being unpaid (either for their time or for their travel expenses) when cases have to be postponed, or in the defendant being prejudiced because of the court's insistence that a hearing should proceed even when the defence still lacks vital information through no fault of its own.

¹⁴² HM Crown Prosecution Inspectorate. (2017) *Business as usual? A follow-up review of the effectiveness of the CPS contribution to the Transforming Summary Justice Initiative*. See now The CPS Inspectorate and the Inspectorate of Constabulary (2017) *Making it fair - a joint inspection of the disclosure of unused material in volume Crown Court cases*. Accessed September 2017:

<http://www.justiceinspectorates.gov.uk/cjji/inspections/making-it-fair-the-disclosure-of-unused-material-in-volume-crown-court-cases/>

¹⁴³ Raj Chandra told the Commission: "It is very good that court papers are now to be accessible digitally, but the digitalisation does not extend to the defendant in custody. They forgot about him. Here the burden of cost is being shifted to the defence with no additional recompense. Recently we were served with 10,000 pages digitally, and we tried to get a laptop for our client in prison so that he could view them. We were told that there were insufficient resources to fund this."

The CLSA told the Commission:

The technology breaks down a great deal, there are frequent staffing problems which prevent its use delaying justice and keeping courts, lawyers and, more importantly, people in custody waiting. Lawyers are often stacking around video conference booths like aircraft around Heathrow whereas before we could all be seeing our clients at the same time in different cells or conference rooms.

Criminal proceedings: the initial police interview

Attention has already been drawn to a police practice of securing an interview with the defendant in which they obtain damaging admissions in the absence of a solicitor (because the defendant sees no value in waiting for a lawyer to attend). This may happen when, in ignorance of the law relating to reasonable self-defence, a defendant who is ashamed of his involvement in an act of violence makes self-inculpatory admissions of a kind that will make it very difficult for his/her lawyers to undo the damage when they are eventually instructed. Another is when the police obtain admissions from a young adult who is clearly suffering from learning disabilities in the absence, not only of a lawyer, but even of the appropriate adult to whose presence he is legally entitled.¹⁴⁴

Bill Waddington again:

What I have found over the years is that people who are appearing for the first time and the only time in their lives come before the courts, are absolutely horrified at the experience. That is from the moment when a friendly Police Officer either knocks on the door or rings them up to say we would like you to come into the Police Station for a chat, which happens in most cases nowadays because it is cheaper for the Police to get people to come in voluntarily, rather than for the Police to go out in the car and arrest them. So, they ask them to come in for a chat. Most people think it is a chat, and they get to the Police Station at a pre-arranged time and the Police get them into the Police Station, they say we are not arresting you but we are going to interview you. You are under caution, here are your rights.

You can have a solicitor, it can be free, but we are ready to go now and it will be hours before we can get a solicitor here and you've got nothing to worry about, so shall we crack on?

Now we hear that, day in, day out, from clients and so, we can assume from that, that it is actually true, and that it is only the very, very wise who think for themselves after the police have rung them "well, maybe I ought to ring a solicitor and see what the situation is." They then take somebody along with them. Only the very wise have somebody with them at that first interview.

¹⁴⁴ In her evidence Zoe Gascoyne (Chair, LCSA) gave a vivid description of her inability to achieve justice for an 18-year old with severe learning difficulties who had made admissions during a police interview of this kind about a sexual act towards a 12-year old girl whose significance he was almost certainly incapable of appreciating. Since the girl would not give evidence, there was no evidence against him apart from his admission, and a previous solicitor had advised him to plead guilty as soon as possible.

Alternatively, a young person may be detained at a police station for a very long time without the police attempting to contact a solicitor. Jonathan Black¹⁴⁵ told the Commission:

Last week I was night duty solicitor between 11 pm and 8 am, in the North London scheme. I was called out at 11.30 pm. A 15-year old girl had been in custody since 1 pm, for an alleged credit card theft. She had not been questioned. Her mother would not come to the station, her father could not be contacted, and her grandmother could not come, either. Social services were contacted at 11 pm, and said that she must have a lawyer first. Then they couldn't get anyone to come to the station until the morning. So she was interviewed next morning. She had a perfectly reasonable explanation. There was nothing in the allegation and she was released. It is not acceptable that we are tolerating a situation like this. It is not justice, and currently other players in the system have no access to justice.

Duty solicitors

This is not to say that the quality of duty solicitors is uniformly good. The Commission received very strong submissions from both Richard Miller (The Law Society) and from the CSLA about serious deficiencies in the current procurement arrangements.

By way of background, Jonathan Black told the Commission:

PACE introduced a solicitors' advice scheme in police stations. Solicitors needed an incentive to go to the police station when they got a call from a custody sergeant. Nobody wanted to do it. It was not glamorous work.

Solicitors were then incentivised to do the work by relatively generous hourly rates, higher rates for evenings and weekends, and different rates for different types of offence. There was an enhanced rate for murder cases, for which a solicitor would be paid properly. This meant that quality representation was provided for those who were most at risk and in need of proper representation. People were being paid properly, and were enabled to take time for the task and ensure proper disclosure.

Things improved still further after the Cardiff Three case.¹⁴⁶ Accreditation was introduced to prevent a re-occurrence of the problems in that case. Quality representation was always to be key.

The duty solicitor scheme was seen by some as a means to an end. Newly qualified young solicitors wanted to achieve duty solicitor status for their self-respect, if nothing else. They had autonomy over their cases and could decide how they were run, and they were not at the beck and call of supervisors.

... From 2008 onwards there was an attempt to control the cost of police station payments by introducing a fixed fee scheme. This was not welcomed by the profession. Corner-cutting took place to minimise the time spent in the police station, so as to balance off the hours of dead time. The fixed fee constituted a

¹⁴⁵ The immediate past president of the LCCSA.

¹⁴⁶ On an appeal in 1992 against a conviction for murder, the interview tapes were listened to for the first time and the Lord Chief Justice (Lord Taylor) said of the interrogation of one of the appellants that "short of physical violence, it is hard to conceive of a more hostile and intimidating approach by officers to a suspect".

reward for getting in and out of the police station quickly. When the police messed you about and forced you to wait several hours, you might be too far from your office to go back to it, and this constituted dead time. You might have to wait all night for an appropriate adult.

This swings and roundabouts system didn't do justice any favours. In making savings in one place, they were running up costs elsewhere, as a National Audit Office report made clear. Mistakes were being made elsewhere as a result of cuts in justice.

Julian Hunt, an experienced criminal defence barrister, told the Commission:

In the magistrates' courts, in particular, I have also observed more and more ropery duty solicitors clearly doing one or two days a month as a pension filler or some sort of pin money hobby. A small but dangerous minority cannot frankly be bothered to do anything other than this rush job usually due to the demands on their time and it is interesting to see in the last few years more and more clients tell me they don't "trust" or "want" the duty solicitor. I have dealt with clients given disastrous advice at police stations who then come and see me privately when it is often too late – the worst examples being the number of clients who have been told by a police rep (who has passed a few simple exams and is then able to advise vulnerable individuals in police stations which is terrifying) to accept cautions as it will then just "be over and done with" without thinking of the other consequences of a criminal conviction and when in the circumstances it is patently not right to accept the caution.¹⁴⁷ Access to justice means access to a motivated, qualified professional and competent lawyer, not some unqualified non-solicitor rep cadging around £80 a hit (after the firm has taken their fee) for police station work. I should say that I don't blame the rep or firm at all but the increasing lack of quality control and the terrible fees that mean this sort of incompetence / "get 'em in; get 'em out" attitude is becoming more frequent. It stems from a systemic lack of funding in the system.

The service of a summons and the first hearing before magistrates

After the interview with the defendant, there can be an extremely long delay before anything else happens.¹⁴⁸ Then a summons may be served, with a first hearing date five or six weeks away. If a solicitor was present at the interview, he/she will have made a note of what was said. On the other hand, if first instructed long after the interview took place, there may be the greatest possible difficulty

¹⁴⁷ "My favourite example is a minicab driver I represented whose licence was revoked by TFL. He lost his living after seventeen years as an honest, decent cabbie. He had been accused of taxi touting and had a strong defence (surprisingly) but the duty rep at the police station told him to take the caution for taxi touting to get him in and out. It meant that he automatically lost his cab licence due to the TFL zero tolerance policy and one cannot go behind the caution. I tried my best with the magistrates on his TFL licence appeal but it was all hopeless. Cheap is dear as my father says – very dear, indeed."

¹⁴⁸ Jonathan Black (LCCSA) suggested that if defence lawyers were permitted to make representations to the CPS during the review they will conduct after a defendant has been bailed, there would be far fewer erroneous charging decisions.

in obtaining any details of what occurred until a few days before the first hearing – and very often not until the hearing itself, as Bill Waddington described:

There is a court date four to six weeks away. The solicitor is left saying, "Well okay I'll take instructions from you but I don't know what the prosecution case is because we weren't at the interview, and strangely enough, even though it was six months ago, I can't get hold of the prosecution evidence until a maximum of five working days before the first court appearance, in theory." In reality, I can't be told of it until the morning of the hearing because my email to the CPS requesting the initial details of the prosecution case (IDPC) won't be answered until the morning of the first hearing, when it's mayhem at court, because courts now funnel people, not into five-day court sittings, but in our area - it could be different in others - but in our area Monday and Thursday are the dates when first timers are funnelled into court.

So, all your clients are turning up there, some of whom you have not seen before and didn't know were even appearing. Some of whom you have seen but you haven't been able to discuss the evidence with them and then you start emailing, from court, to the prosecution hub to get the evidence sent to you. When the evidence arrives, the initial details of the prosecution case should mean "Well we will have a summary of the facts and we'll have a summary of what the client said in the interview and we might have a statement or two." A statement from the complainant we would expect, or something like that, and if there was a medical injury, a statement of what the medical injuries were, that's what you ought to get.¹⁴⁹ What you actually get, in most cases, is probably a page, or a page and half, a very sketchy summary of what is alleged and what your client has said in interview. You can't get an adjournment, adjournments simply don't happen in the magistrates' courts because it delays the justice system. It's very ironic, considering your client has been on bail for six or eight months, but you can't get one, so, it's either guilty and full credit, or it's not guilty and lose your credit.

He explained that in his local court, if a defendant pleads not guilty, he/she is transferred to the district judge, who will customarily warn the defendant that if the plea is maintained, he will be the trial judge and that if the defendant is convicted at trial he/she is at risk of a custodial sentence which would not be the case following an immediate guilty plea. This often leads to a change of plea and to the defence lawyer being worried that his client has been bullied into entering a plea which does not reflect the reality of the case.

This desire to obtain an early plea, whatever the surrounding circumstances, was reflected in the evidence of Zoe Gascoyne (CLSA) who told the Commission of a complex and serious case in which her

¹⁴⁹ By Rule 8.2 of the Criminal Procedure Rules, when the defence requests initial details of the prosecution case, they must be served as soon as practicable and in any event no later than the beginning of the first day of the hearing.

By Rule 8.3, if the defendant is on bail, these details must include a summary of the circumstances of the offence, any account given by the defendant in interview, whether contained in that summary or in another document, any written witness statement or exhibit that the prosecutor then has available and considers material to plea, or to the allocation of the case for trial, or to sentence, the defendant's criminal record, if any, and any available statement of the effect of the offence on a victim, a victim's family or others.

client offered a plea of guilty for misconduct over a two-year period, rather than the five years for which she was being charged. She said that she told the prosecutor:

“Listen, the instructions we can get to date on the paper work that we were provided with, shows that this lady accepts guilt in relation to this particular matter over a 2-year period.”

In the past the CPS would have thanked her for the information and said they would re-examine their evidence in the light of it. As it was, in view of the pressure on all parties for an early resolution of every case, they instantly accepted the plea. Zoe said:

Now is that justice? It might well be, and I would say that it was a fair result for my client because her instructions were just that she was guilty for that period, but if she had not been guilty for that period and been guilty for the full five-year period, it’s not justice. The Crown Prosecution Service is literally folding because they don’t want to go into Court to have to say to the Judge “Do you know what, your Honour, we need more time on this.”

Andrew Keogh told the Commission of a case in which his client was charged with a driving offence in which the victim suffered catastrophic injuries. Because the case had been incompetently prepared, the most potent piece of prosecution evidence could only be viewed on the prosecutor’s laptop in Court, which the magistrates refused to look at. They also refused to adjourn the case. As a consequence, the summons was dismissed, with the victim no doubt feeling that a very great injustice had occurred.

Cases transferred to the Crown Court: the first hearing

If a case is transferred to the Crown Court, the first hearing will customarily take place a few days later, when there will be the same emphasis of the desirability of an early plea.¹⁵⁰ Bill Waddington told the Commission:

Bear in mind, the prosecution has everything on their laptop. The Judge has everything. The defence, even at that stage in the Crown Court, have very little information. I suspect that the judiciary thinks that we actually have the full paperwork because we should have. That is what the criminal procedure rule indicates we should have, and the judiciary just think we are messing about if we say ‘Well, we haven’t had all the paperwork or we haven’t seen it or whatever.’ So, that is the situation that we face on a daily basis.

Jonathan Black observed:

Committal proceedings were abolished in about 1998 for indictable-only cases which were transferred straight to the Crown Court. You can only submit ‘no case to answer’ at the case management stage in the Crown Court. This is seldom done. It was a useful tool in the past. Prior to this change these cases were challenged in the magistrates’ court. Now all ‘triable either way’ cases are transferred immediately if the magistrates decline jurisdiction or if the defendant elects Crown Court trial. Now there are Plea and Trial Preparation hearings when there is often

¹⁵⁰ The commission was told that practitioners often misdescribe the Plea and Trial Preparation Hearing (PTPH) as the “Pressure to Plead Hearing.”

only a limited opportunity to make a challenge. We are required to enter a plea at a time when there has been minimal disclosure of information. As a result we can only submit “no case” when the case is proceeding towards trial. There would be huge costs savings if the prosecution evidence could be challenged at an early stage.

This is another untoward consequence of the pressure to dispose of cases quickly and cheaply.

Listing in the Crown Court

The present listing arrangements for Crown Court hearings, including trials, came under severe criticism. In the old days the relevant clerk at the Crown Court would meet the representatives of the parties, and any serious case would be given a fixed date which would be selected, whenever possible, because the chosen advocates on both (or all) sides were available. Now, due to a combination of factors – a lack of appropriate resources at the Crown Court, a rationing system for judicial availability, the lack of consideration for the convenience of defence lawyers, or simply the all-pervading pressure to list cases as soon as possible – this tradition has come to an end, particularly in London, where even rape cases may be placed on a warned list. This means that they may be listed at any time during the listing window, or not at all.

It is clearly impossible for a busy advocate to empty his or her diary in the hope/expectation that the case may be called on early during the listing window, and advocates receive no remuneration for pre-trial preparation for cases in which they do not in fact appear at trial. Instead, the client may well meet on the day of the trial an advocate whom he/she has never met before, who has had to prepare for trial from scratch in a very great hurry.¹⁵¹

Listing inadequacies do not only present problems for the parties to a case and their advocates. They may also cause great hardship to complainants and to witnesses. Bill Waddington described a historic sex case in which his client had been arrested in 2014, bailed for a further interview in April 2015, and eventually charged towards the end of that year, with the initial hearings taking place in January and February 2016, with the case being listed for trial in July 2016. It was adjourned then due to lack of court time and re-listed for trial in March 2017, when it was again adjourned, this time until January 2018 (although the trial date was later brought forward to October 2017). The complainant and the witnesses have now attended court and been sent away again twice, and the case will have taken 3½ years if it comes to trial next time.

Expert witnesses

The Society of Labour Lawyers told the Commission that there were many recent examples of cases (up to and including murder cases) where the retention of a medical expert had proved extremely difficult. These difficulties arose not only from the problem of finding experts of suitable calibre who were willing to work for legal aid rates (meaning that those that do are exceptionally busy and therefore difficult to instruct) but also, once such an expert is identified, because of disputes with the Legal Aid Agency (LAA) over the funding.

The Commission agrees with them when they say there is a need for professional and expert witnesses of the appropriate quality for both the prosecution and the defence in a multitude of cases. This need is not being adequately met at present. Poor fee payment, the plethora of warned lists and last minute requests add, for example, to the burdens of doctors who are already running clinics and are under

¹⁵¹ Raj Chandra told the commission that a member of the team who prepared the evidence for the Society of Labour Lawyers had been working up to 3 am the previous night, without suggesting that this was in any way out of the ordinary.

unsustainable levels of pressure in terms of their ordinary day job. This in turn mitigates against finding sufficient high calibre experts willing to take professional instructions.

Zoe Gascoyne described the problem in graphic terms:

There are huge problems in getting experts. The rates are appalling. We should take cases back to court and say we can't get an expert. We have to have one, but there is no one in this field who will do a report for the money on offer. That's not justice. The defendant needs a report but is denied one because of the situation we are in. Because we can't get a report and we have to report back to court, the timetable is out of the window.

Problems with disclosure

If parties always complied with the guidance set out in the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases (2013)¹⁵² no significant problems should arise. Unhappily, as has already been observed, both the police and the CPS often fall short of what is required of them. Joanne Cecil told the Commission [uncorrected transcript]:

The disclosure regime, I think, is actually a very dangerous one right now. It's completely underfunded and misunderstood, certainly within the Magistrates' Court. At the Magistrates' Court it simply doesn't exist, notwithstanding the whole disclosure review that was conducted¹⁵³ and the papers that were put out and so on and so forth. Those issues are still arising time and time again. And that leads to real potential miscarriages of justice for obvious reasons, because that is where, often, [...] material actually lies. So, there are real difficulties with that.

There are also real issues within the disclosure process in the Crown Court in terms of whether it is counsel ... or a disclosure officer ... or an officer reviewing the items. There's a CPS worker reviewing the items. The quality of that review varies quite dramatically. Even in the most serious cases, in one I'm aware of at the present time, there are some huge disclosure issues. The disclosure process is key and it's an incredibly serious case.

Even in that case I'm aware that the Crown, including leading and junior counsel, have not reviewed the material themselves. As a consequence of subsequent issues there is more and more that is being disclosed.

I've been, myself, in a case where both individuals were convicted on conspiracy to murder charges and appealed to the Court of Appeal. Their conviction was quashed on the basis that the case presented by the Crown at trial could not be factually right and accurate. There were issues over the disclosure of certain material that were being raised throughout that trial and in the Court of Appeal, who ordered a retrial.

¹⁵² Accessed September 2017: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Protocols/Disclosure+Protocol.pdf>

¹⁵³ Judiciary of England & Wales. (2014) *The Magistrates' Court Disclosure Review*. Accessed September 2017: <https://www.judiciary.gov.uk/wp-content/uploads/2014/05/Magistrates%E2%80%99-Court-Disclosure-Review.pdf> .

We began the retrial with, I think, disclosure request No 56. And three weeks in, the Crown offered no evidence... We still do not know what the problem was, but we do know it must have been within that disclosure process. And that is a case involving very experienced Queen's Counsel for all parties, junior counsel, disclosure officers, joint ... and police force operation, and with profound ramifications, involving life sentences for these individuals.

... Another case, which was a terrorism case I'm aware of, was where a forensic service report from the Miscarriage of Justice Unit within the Forensic Services team itself was never served at all on the defence, notwithstanding the fact that it undermined the key aspect of their forensic evidence in the trial.

The means test in criminal courts

Access to justice has very different connotations in relation to criminal justice as opposed to civil justice. In criminal justice, those who are prosecuted have no choice as to whether to face justice. It follows that access to criminal justice ought to ensure that everyone, regardless of their means, has "equality of arms" in the process.

The best way of trying to achieve equality of arms is to ensure that all those who want legal advice and advocacy have access to it, and that that access is not at a punitive cost.

Means testing in the magistrates' courts was introduced about ten years ago following a media storm after a Premier League footballer had received legal aid on a charge of spitting on a football pitch. With some exceptions, eligibility for legal aid is now governed by a person's means. In magistrates' courts the threshold for legal aid is £22,325 disposable household income. In those courts full legal aid is either granted or refused.

In the Crown Court, the threshold is now £37,500 disposable household income, although defendants whose disposable household income is between £12,475 and £37,500 have to pay contributions towards their costs. These contributions, whose make-up is never explained, can be very high: the level of monthly contributions demanded sometimes exceeds the cost of the case, and frequently exceeds the client's ability to pay.¹⁵⁴ In such cases clients will either represent themselves or, if they can, they may come to an arrangement with their solicitor to pay privately at a lower rate than normal.

Bill Waddington described to the Commission the practical effect of this innovation in the magistrates' courts:

There are certain urban areas where means testing makes no difference whatsoever, because the clientele has never worked. It will never work and it has all been on passported benefits, so it is no problem at all. There are certain areas, and Hull is one, where there are an awful lot of self-employed people. The minute a self-employed person walks through the door wanting representation in a criminal case, you know you are in for a hard time trying to get legal aid because a window cleaner, a taxi driver, somebody who works three day a week for his builder

¹⁵⁴ Bill Waddington told the Commission of a case in which a couple's joint disposable household income was only £2,500, yet after one month bailiffs arrived unannounced to enforce payment of the first of six monthly instalments of £500, despite the fact that the defendant had not been told what to pay or whom to pay it to. In the event the defendant decided to represent himself, rather than continuing with a liability for monthly payments which he could not afford.

friend, just does not have wage slips, bank accounts, books of account, and so on and so forth.

So, you either do something that is extremely foreign to the criminal lawyer and say "I'm really sorry, we won't be able to help you on this occasion, so just go next door and see whether they can help you", or else, more than likely, you will say, "Look, you are never going to get Legal Aid, but I will help you out. We will do as much as we can," and so on and so forth.

Jonathan Black (LCCSA) suggested that because means-testing is such a complex process in the magistrates' courts, justice requires that cases should be adjourned while the complexity of a defendant's means is being collated and put before the LAA. Costly adjournments, however, themselves carry a high cost, and this cost would hugely counter-weigh the savings derived from denying legal aid in magistrates' courts, where the fee is £220 for a guilty plea or £360 for a trial.

In a contrast to the usual arrangements the courts will appoint a lawyer on private fee rates to represent a defendant for cross-examination purposes in the circumstances provided for in sections 36 and 38 of the Youth Justice and Criminal Evidence Act 1999. This lawyer will submit a bill for £400-£600, properly billed and claimed.

The means test in extradition cases

Another issue relates to means testing in extradition cases, which go to the Westminster Magistrates' Court. Typical clients include many East Europeans for whom a European Arrest Warrant has been issued for a minor crime in their home country. Most are not passported for benefits. As self-employed painters and decorators they earn cash, and it is often impossible to obtain proof of their earnings if they are remanded in custody. As a result they are remanded week in and week out. Some of them can employ a lawyer privately, but often they are within the criteria for legal aid. They need to provide proof of what they earn, but there is often a language barrier and an interpreter cannot be provided unless there is legal aid. Many of these cases reach a final hearing and then have to be adjourned while the legal aid position is sorted out.

Access to restrained assets for payment of legal aid costs

The Society of Labour Lawyers observed that the Proceeds of Crime Act 2002 prohibits a defendant in criminal proceedings from using their restrained assets to contribute towards the costs of their legal advice and representation. As a consequence, many defendants who would ordinarily have been ineligible for legal aid are forced to rely on it.

They suggest that the prohibition on using restrained assets to fund legal representation should be lifted. The individuals involved are sometimes inordinately wealthy. In the alternative, they say, the prohibition could be amended to allow the costs of a defendant's representation to be recovered by the Legal Aid Agency from restrained funds as they are invoiced, or as a priority debt from the sums recovered in confiscation proceedings following conviction.

Unrepresented defendants

Unrepresented defendants in the criminal justice system present a multitude of problems, not least in cases involving vulnerable witnesses. Any hope of achieving efficiencies within the system is negated when a defendant appears without the benefit of representation. The charity *Transform Justice* has published research¹⁵⁵ which shows that many people who are not particularly wealthy are

¹⁵⁵ Transform Justice (2016) *Justice denied? The experience of unrepresented defendants in the criminal courts*. Accessed September 2017.
http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf :

excluded from criminal legal aid. They are thus faced with either representing themselves or paying privately for a lawyer. Those who represent themselves in criminal courts are at a significant disadvantage and this leads, they say, to their receiving tougher sentences, and to minor and major miscarriages of justice.

As evidence for this conclusion, the Introduction to the research contains three particularly telling quotes:

"I have prosecuted trials against unrepresented defendants. It is a complete sham and a pale imitation of justice" (prosecutor)

"The magistrate probably thinks if [someone] is stupid enough to represent himself he's probably guilty... Going unrepresented certainly hinders any defendant, without a shadow of a doubt" (prosecutor).

"What should come out is my huge disapproval and I can't help that...having seen the difference between having good representation and [not]... I want to go home at the end of the day feeling that I've made appropriate disposals, appropriate decisions, where the outcome has been fair, and unfortunately you can't" (magistrate).

The thrust of this research is succinctly summarised like this:

What is clear is the cost to justice – interviewees had witnessed unrepresented defendants not understanding what they were charged with, pleading guilty when they would have been advised not to, and vice versa, messing up cross examination of witnesses, and getting tougher sentences because they didn't know how to mitigate. Most advocates felt more and better access to legally aided lawyers was the only answer.

The Society of Labour Lawyers observed that unrepresented defendants and litigants are an unacknowledged cost that surfaces in the budget of HM Courts Service as judges waste hours in trying to be both advocate and tribunal, causing other cases to be delayed, only for such cases to surface again on appeal, because self-represented defendants either were, or felt that they were, disadvantaged in trying to represent themselves.

Reimbursement of costs on an acquittal at legal aid rates

A minority of people pay privately for lawyers in the criminal courts. Some do so through choice (because they think they will get a better quality service), others because they are excluded from access to legal aid because they are above the means test threshold or because of the type of charge they face. Lawyers working privately charge considerably more than they would be paid under legal aid. Whether they are convicted or acquitted the private payer loses out financially. If they are acquitted or if the case against them collapses, they can be reimbursed the equivalent of legal aid fees. In the Crown Court, defendants can only obtain this level of reimbursement if they applied for legal aid in the first place and were turned down. This curiosity of the current arrangements attracted a lot of publicity when a former Deputy Speaker of the House of Commons, Mr Nigel Evans MP, was acquitted at the end of a long high profile Crown Court trial and found himself £130,000 out of pocket.

This is another area which *Transform Justice* has been interested in illuminating.¹⁵⁶ One case is cited in which a defendant had to face two trials before being acquitted. He was saddled with irrecoverable costs of £120,000, which included a bill for £5,000 to cover the transcript of the first trial.

The Legal Aid Agency

Practitioners in the criminal justice field were just as critical of the LAA as their peers in the civil and family justice fields. Typical comments included:

“We have many systems that are not fit for purpose. We have problems with them. The Bravo e-tendering system was one, and the Portal (through which we have to submit applications for legal aid funding) is another. We couldn’t access the Portal for a long time, and it is now partially down quite often. We are told ‘You need to log in for seven minutes at a time’, but if you have your client with you and you are not being paid this is unrealistic. Huge savings could be made on the administrative side of the LAA’s operations.”

“It used to take two minutes to complete a 4-page legal aid application form. Even with a passporting benefit, it takes 30 minutes online, if you can get on. The portal breaks down regularly. A solicitor is at a busy court, with 10 clients and lots of evidence to go through.”

“The change to a civil service body has meant that they won’t communicate. No effective dialogue with the profession. The defence community are not part of the conversation. The MOJ will throw money at pilot schemes and hope that enough people will volunteer. There is a perpetual state of war, driven by the desire to save money.”

Other common issues relating to the LAA’s operations are fully discussed elsewhere.

Recommendations

The Commission has furnished this snapshot of the evidence it received because it believes that the parlous condition of our criminal courts needs to be more widely understood. In its view the defects are so glaring that they cannot simply be remedied by trying to apply sticking-plaster to the most obvious of the wounds. A more strategic approach is needed, which can be summarised under four main headings:

- i. The Lord Chancellor must have a clear constitutional duty to provide reasonable access to justice (including criminal justice), for which he must be accountable;
- ii. There must be a well-resourced independent body with a responsibility to lay reports before Parliament, which will then have an evidence base on which to hold ministers to account;
- iii. There should be minimum standards for defence representation, on which defence lawyers should be able to insist; and
- iv. There should be urgent reform of the Legal Aid Agency, including the level of fees paid for different aspects of criminal work.

¹⁵⁶ Transform Justice. (2015) *Innocent but broke – rough justice?* Accessed September 2017: <http://www.transformjustice.org.uk/wp-content/uploads/2015/10/TRANSFORM-JUSTICE-INNOCENT-BUT-BROKE.pdf>

CHAPTER 13: The Effect of the Cuts on Legal Aid Providers

The reduction in the numbers of legal aid providers post-LASPO:

Number of Legal Aid Providers' Offices	Crime	Civil
2012-13	7,015	4,173
2016-17	5,671	2,092

Number of offices of legal aid solicitors' firms (civil)	Legal Help	Civil Representation
2012-13	2,732	3,315
2016-17	1,751	2,350

Number of offices of legal aid not for profit agencies (civil)	Legal Help	Civil Representation
2012-13	483	145
2016-17	253	145

These statistics demonstrate the way the number of solicitors' offices providing civil legal aid services has decreased dramatically during the four years since LASPO was introduced. In contrast, although the number of not for profit agencies offering legal aid help has nearly halved during the same period, the numbers providing civil representation services in the courts have remained unchanged.

The number of offices handling legal aid criminal work has gone down by 20%.

There has been no increase in civil legal aid fees, even to allow for inflation, since the 1990s. In 2010 there was a general all-round reduction of 10%, and in April 2013 the LASPO changes came into effect, taking large areas of civil legal aid work out of scope altogether. It is therefore not surprising that many firms have given up civil legal aid altogether, and others have moved much of their capacity towards acting for privately funded clients. Two very large legal aid firms¹⁵⁷ have disappeared completely, and another¹⁵⁸ told the Commission that the funding cuts represented a huge loss to their practice as a major regional provider. They said that massive hidden costs involved their individual fee-earners undertaking huge volumes of pro bono work just so that their clients could be in a position to apply for legal aid.

The practical effect of LASPO

Adam Tear, a solicitor who had the experience of working in a firm that was very rapidly increasing in size as it bought up failing practices throughout the country¹⁵⁹, said that only the most efficient firms would be able to continue carrying out business lawfully, and even then they would only be making a

¹⁵⁷ Blakemores (the largest civil firm outside London in 2014) and Blavo & Co (the second largest civil firm in 2015). The Solicitors' Regulation Authority intervened in the latter practice to protect its clients, saying there were grounds to suspect the firm's principal solicitor of fraud.

¹⁵⁸ Ben Hoare Bell.

¹⁵⁹ Duncan Lewis. Founded in 1998, it now has 22 offices in London and 32 in cities outside London.

small profit. This would never encourage external investment, and without significant investment when there is a downturn, the firms will simply fall over and cease to be effective. Currently larger firms were picking up the work, but this is expensive in cash terms, not to mention the human costs involved when a client, who may be a very vulnerable person, has to instruct a new solicitor and start building a relationship of trust all over again.

The Legal Aid Practitioners' Group (LAPG) spoke, quite bluntly, of the lack of sustainability in civil legal aid work which had been caused by inflexible fee regimes, the LASPO cuts, too much bureaucracy, and the shortcomings of the CCMS system used by the LAA. For criminal legal aid, the cuts had made it difficult for practices to survive, far less to be sustainable over the next ten years. Although the introduction of fixed fees was originally said to be fair on a "swings and roundabouts" approach, the fact that only complex cases remained in scope while large swathes of simpler work had been taken out of scope, made this practice unfair in the absence of any compensating increase in fees.

The Liverpool Law Society said that fewer private firms were available to provide publicly funded services. It mentioned one long established legal aid firm which had ceased to do legal aid work,¹⁶⁰ and said that others no longer saw legal aid work as viable, and all too often it was not.

The Mary Ward Legal Centre said that because so many firms and individual solicitors were withdrawing from legal aid practice, there had been a huge increase in demand from the remaining organisations, which were already thinly stretched. They had to turn people away even if they had a good case and qualified for legal aid, because they had no capacity to help.

Rights of Women, for its part, referred to the 20% drop in the number of civil legal aid providers between April-June 2012 and January-March 2015. It said that one of the reasons why many firms had stopped or reduced the legal aid work they took on was that the fixed fees they received were so low that the work was not financially viable for them as a business. The knock-on effect of this was that even women who were eligible for legal aid were finding it increasingly difficult to find a solicitor to represent them. 70% of respondents to a 2015 survey¹⁶¹ said it was difficult (40.7%) or very difficult (34.3%) to find a legal aid solicitor in their area. 33% of respondents were having to travel between 5 and 15 miles to find a legal aid solicitor, and 23% had to travel more than 15 miles.

Both Southall Black Sisters (SBS) and the Coram Children's Legal Centre described the unwillingness of many legal aid firms to take on asylum clients due to lack of capacity and the high probability that their client would be dispersed elsewhere in Great Britain. SBS wrote:

A particularly difficult and distressing outcome for our users who claim asylum is the fact that even when their case is taken on by a legal aid solicitor, they find themselves having to seek a new legal aid solicitor when they are dispersed to another area. As we understand it, the LAA will not cover the costs of a solicitor travelling to their client beyond a limited distance. The client is therefore expected to find a solicitor and build trust all over again with a new solicitor in her new location. The reality is that the client not only struggles to find any legal aid solicitors in their new area, but even if she does, she is forced to re-tell her story and in doing so is often re-traumatised.

¹⁶⁰ Yaffe Jackson Ostrin.

¹⁶¹ Rights of Women. (2015) *Evidencing domestic violence nearly 3 years on*. Accessed September 2017: <http://rightsofwomen.org.uk/wp-content/uploads/2014/09/Evidencing-domestic-violence-V.pdf>

In its March 2015 report¹⁶² the House of Commons Justice Committee devoted Chapter 5 to the question of sustainability and “advice deserts” in the legal aid market and concluded:

The National Audit Office found that 14 local authority areas saw no face to face civil legal aid work at all in 2013-14 and very small numbers of cases were started in a further 39 local authority areas. We are deeply concerned that this may indicate the existence of a substantial number of “advice deserts”.

We urged the Government in 2011 to carry out research into the geographical distribution of legal aid providers to ensure sufficient provision to prevent access to justice. Not only did the Ministry of Justice failed to heed our warning, it has also failed to monitor the impact of legal aid reforms on the geographical provision of providers. We do not know for certain if there are advice deserts in England and Wales, and nor does the Ministry of Justice. This work needs to be carried out immediately because once capacity and expertise are lost the Ministry of Justice will find it difficult, and potentially expensive, to restore them. In some areas it may already be too late.

In its response¹⁶³ the Government expressed general satisfaction about the availability of civil legal aid across the country, but concluded:

“The Ministry of Justice recognises it could do more and will continue to investigate geographical variations in the take up of legal aid. To support this, three pieces of research have been commissioned and are due to report later in 2015¹⁶⁴. Once the conclusions from the reports are available, the department and the Legal Aid Agency will compare this to the provision of services by area and implement any appropriate action.”

The situation has deteriorated still further in the two years since the Justice Committee’s report was published.

On the criminal side of things, in addition to the reduction in the number of criminal legal aid firms the average age of the solicitors practising in the criminal legal aid firms that remain in business is uncomfortably high, on account of the difficulties of attracting new entrants to a way of life which involves working long hours in unsatisfactory working conditions for inadequate reward. These issues are more fully explored in Chapters 12 and 14.

¹⁶² House of Commons Justice Committee. (2015), *Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, 4 March 2015. See fn 83 above.

¹⁶³ *The Government’s response to the Justice Committee’s Eighth Report of Session 2014-15* (2015) p 12.

Accessed September 2017:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444939/response-to-justice-committee.pdf

¹⁶⁴ See, for instance, *Survey of Legal Advice Providers in England and Wales*, Ashley Ames et al, Ministry of Justice Analytical Series, 2015. Accessed September 2017:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/485636/not-for-profit-la-providers-survey.pdf

CHAPTER 14: Legal Aid Lawyers – The Effect of LASPO

The evidence of Young Legal Aid Lawyers

Young Legal Aid Lawyers (YLAL) told the Commission that the reforms to legal aid have had a detrimental impact on access to the profession. Firms and chambers carrying out publicly-funded work are offering fewer training contracts and pupillages, with no guaranteed minimum salary for trainee solicitors and pupillage awards persisting at a level of £12,000 per annum. In a report they published in October 2013,¹⁶⁵ they said that paralegals and junior lawyers were under increasing pressure due to increased caseloads, often with cases concerning complex and/or traumatic issues, at minimal levels of pay.

Anecdotally, they were aware that many young practitioners were moving into NGO or third sector roles due to fatigue, job insecurity and low levels of remuneration within the legal aid sector. This has had a knock-on effect on social mobility and diversity across the profession, as low rates of pay drive competitive candidates from under-represented groups, such as those from black and minority ethnic backgrounds, those who care for dependent family members and those without independent financial means, away from the legal aid sector and into more financially rewarding commercial and corporate roles.

Many of their members commented on how they were struggling with debt liabilities whilst surviving on a very low income from legal aid work. Of the respondents to our survey who were in legal work:

- 5% were earning less than £10,000 per year (all were paralegals)
- 8% were earning between £10,001 and £15,000 (including 3 pupil barristers and 5 paralegals)
- 37% were earning between £15,001 and £20,000 (including 18 paralegals and 15 trainee solicitors)
- 17% were earning between £20,001 and £25,000 (including 6 paralegals, 6 trainee solicitors and 4 solicitors)
- 15% were earning between £25,001 and £30,000 (including 8 solicitors and 2 barristers)
- 8% were earning between £30,001 and £35,000 (including 7 solicitors and 1 barrister; none were paralegals or trainee solicitors)
- 11% were earning more than £35,000 (4 were solicitors and 7 were barristers although not all were working in the legal aid sector)

YLAL has recently¹⁶⁶ brought these figures up to date. 79% of their members now have debt exceeding £20,000, with 10% having over £50,000 of debt. Overall, 87% of respondents were now earning £25,000 or less (up from 67% in their 2013 report) and only 2.5% were earning over £35,000. When invited to identify the biggest challenge facing them, their members responded as follows:

- Underpaid (34%);
- Stress (21%);

¹⁶⁵ Young Legal Aid Lawyers. (2013) *Social Mobility and Diversity Report, One Step Forward, Two Steps Back*. Accessed September 2107: <http://www.younglegalaidlawyers.org/sites/default/files/One%20step%20forward%20two%20steps%20back.pdf>

¹⁶⁶ The Justice Gap, Proof Issue No 3. (2017) *Why legal aid matters*, pp 86-89.

- Workload (11%); and
- Long hours (8%).

Criminal legal aid fees: the effect on morale and recruitment

Jonathan Black, a former chair of the London Criminal Courts Solicitors' Association, described the changes that were made to the arrangements for remuneration in magistrates' courts:

In the early 1990s a fixed fee scheme was introduced, and lawyers were encouraged to reduce the number of hearings required in each case. In 2008 fees for travelling and waiting, whether to or from court or police station, were removed. There is now a huge cost-driver for firms to minimise the time spent in court. Solicitors are not paid for travelling or waiting. The problem is even huger outside urban areas, where solicitors and their clients may have to travel long distances – and to meet the cost of travelling themselves.

Some of the fixed fees are so derisory that solicitors won't take the cases on. For lower end cases with significant penalties such as actual bodily harm, harassment or burglary, the fixed fees are so low that people are turning their back on them. This causes huge access to justice problems. One size doesn't fit all for these types of claim. There may be language difficulties or the client may be mentally ill. Then there are specific London difficulties, such as the transient nature of our client base, language problems and wider mental health issues.

The average age of the 21 solicitors in seven criminal defence firms in Hull was recently found to be over 54. At the same time, the average age of the 85 solicitors in the 13 firms represented on the committee of the Criminal Law Solicitors' Association was 45. At the Bar, the Commission was told by Joanne Cecil that the incidence of "third six-month pupillages" in her large set of chambers had completely dried up (for lack of available work from which they could make ends meet) and new tenants usually wanted to move from crime to less badly paid and less demanding areas of practice within two years of being admitted to their tenancies.

Zoe Gascoyne (CLSA) summed up the situation in a nutshell:

It is fair to say that for a number of years the criminal justice system is being underpinned by good will, because the majority of people who go into criminal legal aid work, do so because it's a vocation. They don't do it because you earn vast amounts of money because you certainly don't. It's offensive when we read reports in the Press of what people think fat cat lawyers do in criminal legal aid work because the fact is they just don't. It's hard work, it's 24/7, I don't know any criminal lawyer who isn't available 24/7. I am available on the phone continually. I have three young children. This is something we have to do if we choose to go into criminal law. It's an area where there hasn't seen any increase in pay - and I'm sure other people have mentioned this - in the last 18 years and then we're faced with cuts.

The evidence of the Society of Labour Lawyers

The Society of Labour Lawyers said:

We continue to pay lip service to diversity for as long as those working at the junior end on both sides of the profession are not properly remunerated. Newly qualified

barristers continue to attend in the magistrates' courts for a fee of £150 for trials which could take hours of work in preparation. Other fees for magistrates' court advocacy work are significantly less. These fees are gross of chambers expenses, travel expenses and incidental professional costs, including the cost of loans taken out to enter the profession.

Women who have managed to establish a trial practice in the Crown Court with a commensurate increase in earnings face the following problems when they have children:

Towards the end of pregnancy - unable to commit to trials in the coming weeks/ warned lists/ trials running towards due date, not to mention undertaking an at times punishing workload during the latter stages of pregnancy being less than conducive to good health of mother/ child;

Breastfeeding through to weaning (about 6 months minimum) before returning to anything approaching full time practice, which then takes another 6 months or so to re-build (PTPH to trial often taking many, many months);

The cost of childcare in the early years (approx. £13,500 p.a. for full-time nursery care, and more in London).

This combination makes practice at the criminal bar financially unsustainable for most working mothers. This is the economic reality and it is why we continue to recruit marginally more women than men into the profession and continue to see an exodus of the late 20's / early 30's females, with few women continuing on into the highest levels, taking silk, or entering the criminal judiciary.

The volume of work required to make a reasonable living mitigates against high standards, which in turn costs the state more money. There are a number of recent examples of appeals in criminal law that are for no reason other than less than effective representation.

Of the problems that face new recruits to the Bar they wrote:

Many new barristers have taken on substantial debt not only to qualify but to survive financially for the first few years. This debt is often in the form of unsecured personal loans or credit cards. The profession is concentrated in large urban centres, where the cost of housing has rocketed. The financial burden is a heavy one and for too many is now proving unsustainable, to the detriment of the future health of the profession.

Newly qualified barristers and pupil barristers spend the majority of their time in the magistrates' court for the first two years or so of practice where they are paid £75 for a half day trial, £150 for a full day trial and £50 for all other hearings. Most summary trials are listed and paid for half a day, but will absorb a whole day of the barrister's time because of travel, delays at court and preparation time. After the payment of chambers rent (around 20%) and tax, barristers are often working for less than the living wage, the London living wage and the minimum wage.

The fees of the most junior have not been properly reviewed for many decades or index linked to inflation. This is a real time pay cut. Solicitors are paid a single fee for a magistrates' court case and often struggle to cover their own costs. The 'old system', that the difficult first few years would eventually be compensated for, following a move into the Crown Court, no longer holds true. Increasing numbers of talented young barristers are pushed out of the profession for financial reasons long before there is any prospect of building a practice.

The pay is not only low, but slow. It can take months, sometimes years, to be paid for magistrates' court appearances and for travel to be refunded. Meanwhile the debts and interest accumulate. The timing of payment is unpredictable.

The financial pressures are so great that many new barristers undertake long secondments in large organisations (most commonly the SFO and FCA) in order to earn enough money to pay off their debts. This stop / start practice development usually operates as a revolving door because it is inimical to the uninterrupted availability for work and development of advocacy skills that is required in the early years to get a practice underway. Much is said about the scourge of secondments for the junior criminal bar, however they are the inevitable result of a remuneration system that traps new barristers into a cycle of debt.

Consequently, those who are not financially independent are leaving the criminal bar in droves. We face the bleak prospect of the 'bad old days': a criminal bar and solicitors' profession populated by those with independent incomes, working for private fees.

Other evidence about poor pay and conditions at work

When the Commission inquired about average annual rates of remuneration, Bill Waddington said that duty solicitors earned £24,000 and criminal defence solicitors between £30,000 and £34,000, figures which had seen little change over the last ten years. Joanne Cecil said that a gross income (net of VAT and expenses) of more than £25,000 could not generally be expected from criminal legal aid work during the first five years at the Bar, and Andrew Keogh suggested that even for barristers up to ten years' call £50,000 was probably the most they could usually expect to recover from a criminal legal aid practice.

And this is not 9 a.m. to 5 p.m. work. Joanne Cecil spoke of

the need to be on call almost, you know, all hours because when it comes to working practice, the reality is that you may be in court until about 4:30. But your work very rarely ends at that point, and you're still working late into the evening. There's an awful lot of pressure from the court to get things done overnight.

The Commission did not get itself involved in the minutiae of the arrangements for paying different fees for different types of case, topics which are currently the subject of major government consultations. It was accepted that a system of pay rates which are bound up with the number of pages of documents served by the prosecution is bound to produce a number of indefensible anomalies, but the Commission had no evidence on which to judge the extent to which savings in one area could adequately compensate for gross levels of under-payment in others.

The Association of Costs Lawyers wrote about the fact that, over the years, physical access to

competent, qualified members of the legal profession had been eroded. This was in part due to the move away from high street practices into an environment where contact is often remote, but it was also due to the drive within the profession towards a law firm operating more as a commercial enterprise:

The latter has meant that fewer and fewer qualified solicitors are available, having been replaced with paralegals who often have no training before being parachuted into live files. This has a knock-on effect of ineffective representation with the associated costs of rectification of the errors.

Adam Tear, a solicitor in a very large firm of legal aid lawyers told the Commission that legal aid had always worked on the basis of committed individuals doing good quality work, and thinking about charging as an afterthought:

With the cuts legal aid firms can no longer afford to employ as many of the dedicated lawyers to social justice as they once did, and must rather focus on recovery of costs. I spend a considerable amount of my time checking bills, pursuing claims for Judicial Review against the LAA, and generally not doing the work that I used to enjoy of helping vulnerable individuals.

The degrading of the value given in terms of both recognition and remuneration is concerning. The tipping point has gone, such that legal aid firms must employ more and more money-orientated lawyers, rather than those that are attempting to ensure the highest standards for social justice. This is not simply a legal aid issue, but also a political, judicial and general attitude towards legal aid lawyers. A firm commitment to stop taking pot shots at lawyers because they represent unpopular groups must be firmly established.

The Coram Children's Legal Centre said they were deeply concerned about the capability of the legal aid sector to continue to encourage good lawyers into the profession and to grow talent, and the impact on young people who want a career in legal aid. The financial pressure on providers meant they cannot offer job security or development opportunities to staff, including financing the career progress sought by most young people who will want to transition from paralegal to solicitor or barrister, and this makes for a volatile working environment. Those who are unqualified are working for less than the Living Wage (£8.25 per hour) and the problem is particularly acute in London where rent increases have left many young legal aid lawyers unable to afford their living costs¹⁶⁷.

The Haldane Society of Socialist Lawyers said that their experience was that for the most junior barristers the level of remuneration in many cases is set at a level lower than minimum wage. The standard fees in London for magistrates' court work are: (i) £50 for first appearances, remands, bail applications, sentences, adjourned trials; (ii) £75 for half day trials, half day contested committals and where a defendant pleads guilty at trial; (iii) £150 for full day trials and full day contested committals:

The references to contested committals demonstrate the length of time for which these fees have not increased since they were abolished in 2013. Some chambers are content to allow the most junior barristers to attend court for even lower sums.

¹⁶⁷ For further information, see the Young Legal Aid Lawyers (2013) *Social Mobility & Diversity in the Legal Sector: one step forwards and two steps back*, which found that 50% of their members were earning £20 000 or under. See fn 163 above.

The closure of courts, leading to the over-listing of cases in magistrates' courts, results in large numbers of cases scheduled to start at 10am not being called on until late in the afternoon. Where the preparation and follow-up work for a case is added to the time spent at court and travelling from chambers to court, fees regularly fall to the level of £5 per hour or less. No legal system can hope to provide adequate representation in court to a defendant at a level far below the minimum wage, let alone the living wage or London living wage.

The Islington Law Centre was deeply concerned about the loss of skills within the sector – for example, Housing Benefit issues are no longer taught to law students, as they are not in scope of legal aid. They welcome the excellent Justice First Fellowship initiative, and other development programmes such as the Leadership programme funded by the Baring Foundation and JP Getty, and the LAPG programme. However, these are relatively small scale, and as current social welfare lawyers retire and move out of the sector, it will be increasingly difficult to recruit suitably experienced staff.

Whilst pay is not the major factor, they said they were now in a situation where their experienced solicitors who have 20 -year and more post-qualified experience (PQE) were earning less than the starting salary of volunteers who are about to take up a training contract at a City firm.

Julian Hunt, a criminal barrister wrote of:

- *The ludicrously low legal aid fees paid supposedly on a swings and roundabout basis but with far more swings, most of which are broken, than roundabouts, most of which are busted, and the effort in collecting it with AF1 forms rejected and having to be resubmitted for technical and absurd reasons – something I see as I clerk myself.*
- *Everyone having to do a rush job. The result of the case may not change but I see on a regular basis individuals on both sides completely demoralised and just not really even trying. I doubt, like many, there was a “golden age” of advocates but these days we have demoralised, poorly paid lawyers being harangued by overly powerful hectoring District Judges (or worse lay magistrates) creating a perfect storm. I am sorry I can only give anecdotal evidence but I am sure I will not be the first person to have made this observation. At least they remain polite in the Crown Court rather than ranting and raving about criminal procedure rules.*

CHAPTER 15: Law Centres and the Law Centres Network

The number of law centres and their location

In 1970 there were two law centres. Their number grew to 34 in 1980 and to 62 in 1991. They went down to 54 in 2001, and up again to 63 in 2005. They tended to be established – and to survive - in areas where Labour-controlled local authorities provided generous funding support.

Between 2007 and 2011 their numbers dropped to 54, largely because law centres with inadequate reserves went under when the new civil legal aid contracts provided for payment to be made in arrears. By 2014, following the introduction of LASPO, the numbers fell again, this time to 45, when those who had survived since 2007 by drawing on their reserves were unable to withstand the steep fall in income when so many fields of work – particularly in the social welfare field – were taken out of scope.

Many other law centres have had to reduce the services they can provide, and they can now help fewer people. On average, law centres lost 40% of their income between 2010 and 2015 (including a cut of over 60% in their legal aid revenue as a direct result of LASPO). Only one in three people now obtain the help and assistance they need.¹⁶⁸

Since 2013-4, however, the numbers have held more or less steady, despite the additional pressures caused by the local authority spending cuts. The purpose of this paper is to describe what is going on within the law centre movement today.

Geographically the 43 surviving law centres are very unevenly spread. There are only four in the North-East¹⁶⁹ and five in the North-West¹⁷⁰ (where the recent establishment of the Merseyside and Greater Manchester Law Centres is to some extent compensating for the closure three years ago of the Trafford, South Manchester and Wythenshawe Law Centres, and others before that). In the Midlands there are four.¹⁷¹ In the West, there are also four.¹⁷² In the South-East (including East Anglia) there are two outside London.¹⁷³ In contrast, there are 21 in Greater London.¹⁷⁴ There are two in Northern Ireland.

Every law centre now has to explain what it is doing. At long last they are all using the same logo.

¹⁶⁸ The Avon & Bristol Law Centre has said: *“Demand is high and resources are low, so now we only take the people who are the most destitute – those who face the most barriers. Ethically it is incredibly difficult for staff to think that a person hasn’t quite reached rock bottom, so that we have to turn him away.”*

¹⁶⁹ Newcastle-upon-Tyne, Bradford, Sheffield and Kirklees.

¹⁷⁰ Cumbria, Bury, Rochdale, Merseyside and Greater Manchester.

¹⁷¹ Nottingham, Derbyshire, Central England and Derby. Central England is an amalgam of Coventry and the new Birmingham Law Centre. In Derby the abrupt cut of £200,000 in local authority funding last year led to the closure of the former Derby Citizens Advice and Law Centre, but a new Derby Law Centre has now been established.

¹⁷² Avon & Bristol, Gloucestershire, Wiltshire and the Isle of Wight.

¹⁷³ Luton and Surrey. A new Suffolk Law Centre is being established at Ipswich.

¹⁷⁴ Brent Community; Bromley-by-Bow; Camden Community; Cambridge House; Central London; Ealing; Hackney Community; Hammersmith & Fulham; Haringey; Harrow; Hillingdon; Islington; Lambeth; North Kensington; Paddington; Plumstead Community; Southwark; South West London Law Centres; Springfield; Tower Hamlets; Vauxhall. South West London Law Centres run free legal advice clinics in Croydon, Kingston, Merton, Wandsworth and Wimbledon.

Some advice agencies, including ISCRE in Ipswich, are preparing to become law centres. LCN insists that they must have two lawyers and there must be quality control.

The bulk of the service must be free. And they must be independent – not tied, for instance, to a trade union.

Developments (2013-2017)

Developments over the last four years have included the following:

- In 2013-4 the Government ceased all its funding support for LCN. 16 major trusts now fund LCN's activities.
- LCN commissioned advice on the way in which law centres might charge for some services in order to achieve long-term sustainability. About six are now charging some clients.¹⁷⁵ Others started, but ten stopped because they were not generating enough funds to cover the cost.
- Now that many local authorities have cut back their funding for advice services, LCN has provided funding consultants to support law centres in writing bids or funding support, either locally or regionally. UK fundraising support helped to raise £2.8 million for law centres and their partners in 2015-6.
- LCN obtained a €400,000 grant from the European Commission for the Living Rights project (which involves 5 law centres and 5 partners).¹⁷⁶ Currently 12 law centres are engaged in EU-funded projects, alongside 7 partner agencies.
- LCN has encouraged law centres to take on new projects, new partners and new ways of working.¹⁷⁷ It also advises law centres when large funders, such as the Big Lottery, change their funding strategies.
- LCN has helped policy-makers, commissioners and funders to recognise the power of the law as a tool for positive change.
- In 2013 LCN was awarded the national Upper Tribunal legal aid welfare benefits contract. This is now managed by the Harrow and Central England Law Centres, and 8 law centres across the country are involved.
- 5 London law centres are taking part in new pro bono clinics which are targeted on specific topics¹⁷⁸
- The LCN has negotiated the provision of LexisNexis [LN] online resources for all law centres, and a 35% discount for law centres on LN printed materials. It has also set up a national professional indemnity policy for law centres.
- A national upgrade of law centres' ICT infrastructure is now in progress.¹⁷⁹
- In 2015-6 LCN provided 23 low-fee training sessions for law centres which covered topics like fundraising; legal aid contract management; law updates (e.g. housing or community care

¹⁷⁵ For example, LCN helped Avon & Bristol, Gloucestershire and Wiltshire Law Centres to set up a regional community interest company [CIC] which will extend their services throughout south-west England, beyond the areas they already cover.

¹⁷⁶ This project targets help at people with a limited knowledge of English.

¹⁷⁷ For example, the Islington Law Centre were involved with partner agencies in the Safe Passage Project, helping children in the jungle camp in Calais who have relatives in the UK.

¹⁷⁸ For example, retrieving withheld rental deposits; releasing unpaid wages; challenging benefit sanctions; assisting residents from Commonwealth countries to obtain British nationality.

¹⁷⁹ It will recommend a preferred Client Management System for law centres, which will make their data collection easier to collect and disseminate. LCN has also developed a data analysis pilot project for London.

law). It has also launched an online learning hub, a themed resource which is updated regularly.;

- LCN has updated the Law Centres Quality Manual, so as to ensure that law centres continue to adhere to Lexcel 6 requirements.¹⁸⁰

Thriving law centres are using different models.

Different developments in the use of technology

The LCN is upgrading IT systems nationally with support from Legal Education Foundation and generous in-kind support from Freshfields and others. Nine so far, and it is now helping another 15.

The Hackney Law Centre is developing a very simple system, to remind people of their appointment and of the papers they need to bring with them. This will be done by text message because most people have mobile phones even if they do not use the internet. It is receiving pro bono help from Freshfields. Once ready, it will be rolled out nationally.

Another digital application being developed with assistance from CAST with Big Lottery funding. This is designed to help with First Tier welfare benefit appeals, to assist legal advisors who have no welfare benefits expertise. An automatic document generation system is being developed with assistance from Lexis Nexis and other a national CMS is also underway.

On the LCN website are listed the different advice resources that are available on the Internet.

Citizens Advice do not do this. They have invested resource into a particular way of giving advice. They need to add: "If this doesn't help, try"

Citizens Advice and Shelter have access to great resources. They can provide better matching in search names.

New partnerships and other working methods

Legal advice is slotted into broader community work.

In Coventry a specialist legal adviser, based at the law centre, worked directly with clients of the local authority's Troubled Families scheme who needed legal advice. It also collaborated with a local charity on a Youth Migrant project.

Southwark has established a good division of labour with the Southwark CAB. Southwark also supports a day centre for asylum seekers at which they will be able to supply advice to those who ask for it.

At Coventry, they have a protocol to identify the point at which people should be signposted towards the law centre. They have developed software which can be used by any advice centre in Coventry. The client's case is added, and through a triage system all the details are fed into the system. The local authority has funded someone to monitor the service. He/she sees that a case will be taken on by a lawyer within 24 hours, and the lawyer who receives the reference then has to account for what has happened. Other agencies can then see what has happened.

They are using a similar model in Avon and Bristol.

¹⁸⁰ Law centres must now comply with 7 different regulatory frameworks.

In Greater Manchester [GM] the GM Immigration Service worked with other agencies to create the new GM Law Centre. They received some money from a community trust. A number of co-producers developed the new law centre. They now have a Justice Fellow as a trainee. The GM Law Centre is a solid model.

Law Centres have developed a number of new service models over recent years aimed at using the law as a tool for change, co-produced with other local agencies, with pro-bono assistance, with law students, in different settings, aimed at early intervention and with the client at the heart of what they do.

CHAPTER 16: Advice Services

1. The Advice Services Alliance

The Advice Services Alliance (ASA) is the umbrella group for the social welfare legal advice services across the UK. Founded in 1980, it works to promote better co-operation between advice organisations and to improve the quality of advice given to the public. It also encourages research and undertakes projects which address issues which relate across the advice sector. It has eight membership organisations who are themselves network bodies and who together represent about 1,4000 advice-giving organisations. It now has one full-time member of staff: its director Lindsey Poole.

Written and oral evidence from the ASA was given to the Commission by Lindsey Poole on 21 June 2017 and is to be found in Appendix 4. This note covers a few matters that are not to be found there.

The Advice Quality Standard

The ASA inherited the Advice Quality Standard from the Legal Services Commission. This is the only sector-owned, independently audited standard that focuses on advice. It is awarded to organisations that give advice to the public on legal issues. Organisations are audited every two years and have to demonstrate that they are accessible, effectively managed, and employ staff with the skills and knowledge to meet the needs of their clients. Most of the Alliance's work is devoted to delivering the standard to about 700 organisations¹⁸¹ and to its general oversight of how the standard is working. This gives it direct contact with all the organisations involved.

Health Outcomes of Advice

The Alliance conducted a joint evidence review with the Low Commission, which culminated in a report published in 2015¹⁸² which contained the key findings from 140 research studies in the field, and an overview of 58 integrated health and welfare advice services. A clear message came from these wide-ranging sources to the effect that welfare advice in health care settings results in better individual health and well-being, and a lower demand for health services.

This was a very big assignment, which showed that the people the Alliance wanted to help are very often to be found in health settings. Its key findings have been summarised¹⁸³ in these terms:

“The provision of good welfare advice leads to a variety of positive health outcomes and in addition addresses health inequalities highlighted in the Marmot Review 2010. The effects of welfare advice on patient health are significant and include;

- *Lower stress and anxiety;*
- *Better sleeping patterns;*
- *More effective use of medication;*
- *Smoking cessation; and*

¹⁸¹ These include all Citizens Advice offices, about 80 AgeUK offices and various independents.

¹⁸² Sir Michael Marmot wrote the Foreword to the report.

¹⁸³ Advice Services Alliance and the Low Commission. (2015) *Welfare Advice and Better Health, The Role of Advice Services in Health Outcome; Executive Summary*. Accessed September 2017: <http://asauk.org.uk/the-role-of-advice-services-in-health-outcomes/>

- *Improved diet and physical activity.*

These findings are important in the context of addressing the wider social determinants of health and suggest that stronger collaborative working across a range of sectors is required. In particular, there is demonstrable evidence that when advice and health sectors work more closely and strategically to meet advice needs this contributes to reducing health inequalities. Direct commissioning of welfare advice services within specific health settings is most effective as it targets the most vulnerable within settings which they trust and where their specific health needs are understood.”

The Advice Services Transition Fund – Learning and Support

In January 2014 the Alliance was awarded the Big Lottery Fund contract for providing Learning and Support to the 226 Advice Services Transition Fund partnerships. This formed part of a post-LASPO Cabinet Office/ Big Lottery initiative to promote better, more sustainable local advice provision. The work included setting up a website which provided useful links, resources and information at local level for practitioners working in the local partnerships. This project ended in 2016.

2. Citizens Advice

Statistics¹⁸⁴

Advice is provided from 600 local Citizens Advice (CA) premises and over 2,250 courts, community centres, doctors’ surgeries and prisons across England and Wales. 99.7% of the population can access a local CA unit within 30 minutes’ drive from their home.

More than 800 staff work for CA, and across the network its service is provided by more than 23,000 volunteers¹⁸⁵ and 6,500 staff.

They dealt with 6.2 million issues.¹⁸⁶ They helped 2.7 million people in the following ways:

- Face to face 50%;
- By telephone 40%;
- By email/webchat etc (10%).

Through their website they received 36 million visits¹⁸⁷ for advice (55 million page views). In their 2016 report on digital capability¹⁸⁸ CA said that in a survey of 3,000 “face to face” clients twice as many of them were likely to lack basic digital skills and that they were also more likely to lack digital access compared with the general population.

Nearly 3 in 4 clients said that their problem affected their lives, referring among other things to anxiety and financial difficulties.

¹⁸⁴ Statistics are for 2015-6, unless otherwise stated.

¹⁸⁵ Volunteers donated about £114 million worth of volunteering hours.

¹⁸⁶ 0.2 million were categorized “legal”.

¹⁸⁷ 2.6 million were categorized “legal”. 46% used a desktop or laptop for access, 41% a smartphone and 13% a tablet.

¹⁸⁸ Citizens Advice. (2016) *Digital capability: Understanding the digital needs of face-to-face clients of Citizens Advice*. Accessed September 2017:

[https://www.citizensadvice.org.uk/Global/Public/Impact/Digitalcapabilityreport_final_July%20\(3\).pdf](https://www.citizensadvice.org.uk/Global/Public/Impact/Digitalcapabilityreport_final_July%20(3).pdf)

Using a Treasury-appointed model,¹⁸⁹ CA states that for every £1 spent on them, they benefited their clients by £11. They saved the Government and public services at least £361 million, and they estimated their social and economic value to society to be £2 billion.

Their total income for their national office was £108.6 million (£88.2 million in 2015). Their core income from the Department of Business, Innovation and Skills (BIS) was flat in cash terms, but they received two new sources of income: from the Ministry of Justice (MOJ) contract for the Witness Service (£11.7 million) and from HM Treasury for Pension Wise guidance (£13.8 million).

This Table provides a snapshot (in £million) of the sources of their income in 2011-2, 2013-4 and 2015-6.

	2011-2	2013-4	2015-6
BIS Core	18.9	22.1	22.3
BIS Consumer	0	9.3	15.7
BIS Projects	10.1	8.3	0
Money Advice	17.9	19.5	23.9
HM Treasury	0	0	13.8
Ministry of Justice	0	0	1.7
Welsh Government	1	3.9	5.4
Other Public Sector	2.6	2.2	0.4
Other income ¹⁹⁰	12.2	11.9	15.4
Total.	62.7	77.2	108.6

Unrestricted core income is static. The growth is in restricted funds. The income of the local offices is recorded separately. The CA Service received £37 million in funding from all sources.

The national office increased its grant funding to local offices by almost 50% to £44.2 million, and it helped local offices to secure 319.2 million funding from local services.

*Overall view*¹⁹¹

Overall the Citizens Advice network is holding up fairly well. Investment in a digital presence and in webchat advice has helped to combat the presence of advice deserts on the ground.

¹⁸⁹ See Citizens Advice (2016) *Technical Annex: Modelling our value to society in 2015-16*,. Accessed September 2017:
<https://www.citizensadvice.org.uk/Global/Public/Impact/ModellingthevalueoftheCitizensAdviseservicein201516.pdf>

¹⁹⁰ Corporates, charities, donations, trading.

¹⁹¹ The remainder of this note is based on what was said at a meeting between Sir Henry Brooke & Julie Bishop with Julia Gillies-Wilkes & Andrew Seager (who are senior executives within Citizens Advice) on 3 May 2017.

22 million people looked at the CA website. This is a very great increase on earlier years. Face to face advice has remained broadly constant with the demographic largely remaining the same. CA has worked hard to open up a range of channels, not just telephone. Now the website and digital channels are enabling it to reach more people in different ways that are built around their needs.

Raising awareness about what the service does remains a constant challenge. It can feel as if it is sometimes just by luck that people come to the service. CA has found through extensive user testing for the rebrand that the name “Bureau” put people off: hence the change that was recently made. CA has got to bang the drum, to explain that the advice sector is part of the solution. Proper frontline advisory support must be in place. Otherwise the particular problem will move elsewhere and will be more costly to solve.

CA would say that it can never meet all the demands. The environment is tough out there for clients. One of the strengths of the network is that the local offices can be imaginative, and they are constantly seeking new ways to reach more people

There is no big gap in advice provision. CA constantly watches the map, providing support to its network. Every year so far it has managed to hold up and continue to provide services to clients.

Local authorities as commissioners of advice services

There is evidence of local authorities (LAs) being poor at commissioning advice services. They pick the high-volume services they are obliged to fund, with a growing preference for social care and housing. It can be very hard for a local office to say “no” to the ‘bundling’ of services. They are innovative and keen to take on new responsibilities, but they need to protect the CA brand and the business.

Another tension arises because Citizens Advice is lumped together with different funding streams for different agencies within the voluntary sector spend at local level. This translates itself into examples like these:

- (a) A LA can put all its grant funding to the Voluntary & Community Sector into a single pot and invite consortia bids; or
- (b) It can put “advice” into a pot with an associated voluntary sector funding stream such as community car driving schemes or library services.

The “Troubled Families” scheme provides a flip side. The Government used to provide a ring-fenced pot. Now it has reduced the fetters on the money it provides for advice services. CA encourages its offices to hold on to the things they are good at.

Key workers in the Troubled Families scheme are now trying to give advice on discrete topics such as debt advice. How well this works depends on the quality of the adviser. The Troubled Families Progress Review¹⁹² provides some useful lessons.

CA has raised a lot of money nationally which has enabled it to increase national programmes of delivery that are delivered locally through its network. It encourages good relationships with local authority funders beyond just talking about money. In the next two years local authorities may run into problems unless they receive new funding. The black hole in local authority finances has been

¹⁹² House of Commons Public Accounts Committee. (2016) *Troubled Families: Progress Review, December 2016* Accessed September 2017.

: <https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/711/711.pdf>

widely reported on.

CA has been trying to persuade local offices to rebrand their product with LAs and thereby encourage LAs to view local offices differently. Advice agencies should be seen as part of the solution LAs can provide, and not as a problem.

There is nothing to be gained by loud protests about what is happening. There is no magic pot of money. The sector has got to do our best with what it has. Constant policy shifts waste a lot of money.

The sector needs to bang the drum about the quality of commissioning. If it is done well, it recognises the needs of the local communities. The Social Value Act isn't being properly used.¹⁹³ How do you get good quality public sector commissioning? Quality commissioning and skills commissioning are both so important. The question should be: how do we get this money out to help as many people as possible? - a focus on outcomes for individuals and communities and not one on outputs.

Good quality advice is valued in a relationship which functions well at local level. Every part of the engagement has to be business-focused.

There is quite a churn of people coming and going at LA level, especially with commissioners. This makes it a tough ask for a local office to maintain a network of local relationships to ensure the LA understands both the role and the value of the service which is provided.

Who is the champion of the advice sector?

There is an unresolved issue as to who is the champion of the advice sector. Is it local government? Or national government? Or the Cabinet Office? CA has submitted "manifesto asks" on this ownership issue. Government should require local authorities to devise a five-year strategy for funding advice services.¹⁹⁴ CA gave written and oral evidence to the Select Committee on charities about this issue.

Funding the advice which will be required whenever policy changes

When public policy changes, Government sometimes recognises that it must meet a demand for advice in order to make the policy work. Pension reform is a good example. Money was made available to enable consumers to know what to buy and where to seek reliable advice, given their new-found freedom to withdraw their money from their pensions pot. That was a good model.

¹⁹³ A Cabinet Office Note says: The Public Services (Social Value) Act came into force on 31 January 2013. It requires people who commission public services to think about how they can also secure wider social, economic and environmental benefits. Before they start the procurement process, commissioners should think about whether the services they are going to buy, or the way they are going to buy them, could secure these benefits for their area or their stakeholders. The Act is a tool to help commissioners get more value for money out of procurement. It also encourages commissioners to talk to their local provider market or community to design better services, often finding new and innovative solutions to difficult problems.

¹⁹⁴ The final section of this Manifesto states:

Invest in advice to support people through change and uncertainty

1. Use fines levied against companies such as banks, energy and telecoms to help meet people's needs for advice services.
2. Make advice available in GP surgeries and mental health settings to help people to solve the social issues that cause and exacerbate health problems, and relieve the pressure on the NHS.
3. Provide information, education and advice to people worried about the impact of Brexit on them and their family.
4. Require local authorities to develop a 5-year strategy for the provision of advice in all communities.
5. Ensure that the Social Value Act is fully taken into account in public sector commissioning to recognise the value of volunteering to individuals and communities.

CHAPTER 17: Public Legal Education (PLE)

The Citizenship Foundation and Law for Life: Background

The Citizenship Foundation has been engaged in explaining aspects of the legal system in schools for over 25 years. It has been using different techniques, and in many schools its annual Mock Trial competition is now a regular feature of the school year. Its current Chief Executive Officer, Tom Franklin, was appointed in 2016.

Law for Life was founded in 2011, as explained below, following the report of the PLEAS Task Force in 2007.

Both these organisations gave written and oral evidence to the Commission on 21 June 2017, which is to be found in Appendix 4. This paper covers background matters not included in that Appendix.

The report of the PLEAS Task Force

In July 2007 Hazel Genn's PLEAS Task Force published its report.¹⁹⁵ It said that about one million civil justice problems went unresolved every year because people did not understand the legal system or know how to use it for their benefit. It described this as "legal exclusion on a massive scale". MoJ economists estimated that over a three-and-a half year period unresolved law-related problems cost individuals and the public purse £13 billion.¹⁹⁶

The Task Force recommended the creation of a new PLE Centre as a non-departmental public body with statutory powers, which should be funded for the first five years by central government, with first year funding in the region of £1.5 million. It suggested that the new centre should:

- Create a coherent focus and identity for PLE;
- Create a practitioner network and an online knowledge bank;
- Develop and spread good practice, including evaluation and quality frameworks;
- Secure sustainable funding; and
- Work to establish a statutory remit for the development of PLE.

The formation and early years of Law for Life

Following the publication of the report Sir Henry Brooke chaired a small working party at the premises of AdviceNow which began some of the work envisaged by the Taskforce, largely aided by an annual MoJ grant of £200,000 core funding. This ended after the 2010 General Election at about the same time as an independent charity called *Law for Life* was formed to carry on the work.

Michael Smyth CBE QC was its first chair. He has recently been succeeded by Amanda Finlay, the former head of MoJ's Access to Justice Division. Julie Bishop was a member of the earlier working party and she also served as a trustee of *Law for Life* for some time. Its first chief executive, Martin

¹⁹⁵ PLEAS Task Force. (2007) *Developing capable citizens: the role of public legal education*. Accessed September 2017:

<http://www.lawforlife.org.uk/wp-content/uploads/2013/05/pleas-task-force-report-14.pdf>

¹⁹⁶ This estimate was quoted by the then Lord Chancellor, Lord Falconer of Thoroton, in his Foreword to LSRC Research Paper No 14, Pascoe Pleasence at al (2006) *Causes of Action: Civil Law and Social Justice, Second Edition*. Accessed September 2017:

https://www.researchgate.net/publication/271209992_Causes_of_Action_Civil_Law_and_Social_Justic

Jones, was one of the three instigators of the new PLE movement 15 years ago. When he retired last year, Lisa Wintersteiger, who has been involved with its work as a senior researcher ever since the first MoJ grant was put in place, became its chief executive.

In the last three years MoJ has provided about £100,000 each year towards the support of the AdviceNow website.¹⁹⁷ Its projects are also supported by grants, coupled with an element of core funding. It is a member of the official group concerned with LIP engagement; language issues; and simplifying procedure.

In short, *Law for Life* is an independent information and education charity. It serves over a million people in England and Wales by means of the online provision of multimedia legal information and learning tools which can be accessed through its Advicenow service.¹⁹⁸ Its curated information service brings together 1,600 pieces of public legal information from over 250 UK websites.

¹⁹⁷ A new AdviceNow service went live in June 2015. In 2015-6 the service was accessed by 931,000 users.

¹⁹⁸ <http://www.advicenow.org.uk/> Accessed September 2017

CHAPTER 18: The use of applied technology

The need for a multi-channel strategy

The evidence before the Commission showed, on the one hand, the vast strides that have been made in the last two years or so in the use of applied technology in the legal and judicial systems, and on the other hand a widespread concern that policy-makers must pay great attention to the needs of those who currently have no access to the Internet and to the large number of people who, while having access to the Internet, do not have nearly enough confidence to use it on their own without any recourse to face-to-face advice (or possibly, help by telephone, Skype or video-link) from another human being. A research study of 24 such people, conducted on behalf of Shelter during 2015, gives a vivid picture of people who can manage for a bit of the way on their own, but who then need help from a qualified adviser.

Shelter wrote:

Research undertaken for Shelter, by TNS BMRB,¹⁹⁹ helped us better understand the different roles played by face-to-face, telephone and online advice services play in getting people the help they need. We found that individual needs are complex and the context of people's lives is critical for understanding the role that digital can play in housing advice and support and, just as importantly, where it can't.

Three factors are key in determining what help people need – the severity or urgency of the housing problem; their personal, emotional and practical circumstances, such as mental or physical health problems, relationship difficulties, young children; and whether they have the skills, knowledge and confidence to tackle the problem they are facing.

A multi-channel strategy is needed to address everyone's needs. The research clearly showed that person-to-person services are vital for people with more severe and urgent problems. However, developing digital services can help people to resolve their housing problems before they reach crisis point and help people build their confidence around housing rights and responsibilities, increasing their capacity to resolve issues themselves.

Courts and tribunals

So far as the courts and tribunals are concerned, the Annex to this Chapter contains an extract from the Lord Chief Justice's Annual Report, published in July 2017, which shows the great progress that is now being made in our courts and tribunals.

Digitisation has now reached the stage at which all pleadings and other documents needed for litigation by professional court users in the Rolls Building have to be filed electronically through the CE-File Process.²⁰⁰

In the Crown Court documents have to be filed electronically through the Crown Court Digital Case System (DCS), which is working well. A "Better Case Management" Newsletter in June 2016 described what had by then been achieved:²⁰¹

¹⁹⁹Accessed September 2017:

https://england.shelter.org.uk/professional_resources/policy_and_research/policy_library/policy_library_folder/report_d_own_the_line

²⁰⁰ <https://efile.cefile-app.com/login>

²⁰¹ By that time there were over 43,000 "cases" on the DCS, with about 5.8 million pages filed on the system. There were over 16,000 registered users, most of whom were external prosecutors and defence practitioners.

- *The national roll out of the DCS is now complete.*
- *Wi-Fi has been installed in every Crown Court, thereby enabling digital access to the documents in the case by the judge, the court clerk and other members of HMCTS staff, the defence, the prosecution and probation.*
- *It is now possible to upload relevant information onto the DCS. All those authorised to access the relevant electronic file can now read and annotate the papers privately, and any of the materials can be presented in court directly from a laptop or other mobile device.*
- *Navigation of the bundle is simplified and bookmarks and notes can be created which allow users to highlight any part of the evidence; prepare submissions, speeches, questioning and the summing up; access the documents via embedded links; and control the level of privacy to be applied to notes or annotations.*

Almost inevitably there have been some early difficulties that have needed to be resolved, but the overall experience of this new system appears to have been, thus far, very positive.

Judges, court staff and practitioners are, from the reports we have received, greatly appreciating the benefits of the DCS, the most obvious of which are:

- *The dramatic reduction in the number of paper documents now used in cases, thereby avoiding the vast and unnecessary quantities of printing and photocopying, and ending the frequent searches for lost files or documents and their expensive transportation and storage;*
- *The standardisation of the format of the case file and the common storage site in ‘the cloud’ ensures everyone involved in the case has access to the same documents (save for private material, as dealt with below) which can be accessed instantly; the date of service for each document or piece of evidence is immediately apparent; and there is a justified high level of confidence that the papers in the case are securely stored;*
- *The administration of cases has been made far more efficient;*
- *The papers for the judiciary no longer need to be prepared in the old, time-consuming way;*
- *The DCS, together with BCM,²⁰² has enabled greater engagement between the parties, thereby reducing the number and the length of hearings, together with applications for adjournments;*
- *There is much improved preparation in advance of the PTPH,²⁰³ especially following the introduction of the editable ONLINE PTPH form; and*
- *A reduction in correspondence, complaints and enquiries.*

The new online court

In the general civil courts Lord Justice Briggs’ concept of an online court this autumn will see the first pilot project of what will be a series of carefully controlled experiments which will test different

²⁰² Better Case Management.

²⁰³ Plea and Trial Preparation Hearing.

features of his vision of an online court. It will be limited at first to civil claims for up to £10,000, with up to 2,000 such cases going through the first stage of the system, by invitation only, during the project's pilot 6-month phase. The initial project will last for just over two years. A set of rules has been approved for this experiment, for which use of the digital system will be compulsory. But it will be "assisted digital" in the sense that "face to face" help will be provided for those who cannot cope on their own.

The Master of the Rolls has described this first stage in these terms:²⁰⁴

[It] will cover the pre-issue stage of litigation. In some ways this will cover the same ground as the Pre-Action Protocols. It will, however, go wider than that. It will assist individuals to find the right sources of legal advice and help in order to enable them to consider whether they have a viable legal dispute, or whether a more appropriate means of complaint or redress is available, such as a relevant Ombudsman scheme. Assuming there is a viable dispute it will, and this will be carried out via a broadly automated online process, enable claimants to identify the nature of their claim and submit relevant documents, such as the claim form, online. It will equally help them to particularise their claims. This will be done through the use of standardised online processes.

The first stage of the process will therefore see the Online Solutions Court expand our ability to secure access to justice in two ways. First, it will help individuals identify the nature of their problem. The very essence of securing access is to secure an understanding of the legal framework. Such understanding will enable those individuals who have not yet reached the stage where a legal action has arisen to take steps to avoid that point being reached. It will secure access to preventive justice. Secondly, it will help other individuals to identify the alternatives to litigation. If the alternative identified is an Ombudsman scheme, it will help enhance two forms of justice: justice for the individual in the form of resolution under the scheme; and justice for others through the Ombudsman's ability to promote systemic improvement – so that other individuals in the future are not put into the same position. In that way, this also is a form of preventive justice, made accessible to all through the changes it makes. I think that no one can suggest that it is not a core function of government to promote access to justice in this way.

The next initiative will be an experiment with case-management software in an immigration tribunal. HMCTS is currently working with partners from Microsoft to build a prototype for a fully virtual hearing, which will be tested in October 2017 in the Immigration and Asylum Chamber with judges, HMCTS staff, the legal profession and Home Office presenting Officers.

On 14 September 2017, it was announced²⁰⁵ that a new project (known as the Public Law Reform Project) was due to start in October 2017 whose purpose was to digitise the "evidence management" component of public law family litigation, building on the results of earlier pilot projects. It is hoped that following a pilot experiment early in 2018 the first release of this solution

²⁰⁴ Sir Terence Etherton (2017), in his *Lord Slynn of Hadley Memorial Lecture*. Accessed September 2017: <https://www.judiciary.gov.uk/announcements/the-lord-slynn-memorial-lecture-by-sir-terence-etherton-master-of-the-rolls-the-civil-court-of-the-future/>

²⁰⁵ HMCTS (2017). *Brief: E-working in the family jurisdiction*. Accessed September 2017: <https://www.judiciary.gov.uk/wp-content/uploads/2017/09/e-working-in-the-family-jurisdiction-brief-20170914.pdf>

will be available next spring. It was also announced that the new Divorce Online project was progressing well, with a new digital application for personal applicants currently being piloted.

Stages 2 and 3 of the Briggs concept – the involvement of a court-based case-worker²⁰⁶ and the ultimate disposal of cases not disposed of earlier (adjudication by a judge, whether in a traditional courtroom, by video-link, by telephone or on the papers) are still very much in the future.

The absence of a strategic approach to the provision of information about legal matters

Outside the formal court system, where judges, court administrators and technical staff are working closely together as part of the new £700 million Government initiative, what is lacking at the moment is any strategy to ensure that members of the public and their advisers will know where to access relevant information of a consistent high quality and that any gaps in provision can be filled in a sensibly co-ordinated way. There are a lot of interesting initiatives being taken quite independently of one another, and different players in the market place are developing solutions in the absence of any over-arching strategy.

Professor Susskind (for many years the IT adviser to the Lord Chief Justice) told the Commission in March 2016 that the kinds of system he had in mind were not rocket science. He drew our attention to the consumer website www.resolver.co.uk, which provides an intuitive, easy to use, jargon-free way to complain about the problems consumers have with their suppliers. He said that future solutions should be designed by non-lawyers, since it will be non-lawyers who will be making use of them. The Ugandan barefoot lawyering site at <https://barefootlaw.org/> is accessible by tablet, and something like this should be developed in this country. Lisa Wintersteiger, of Law for Life, spoke to much the same effect.

The online court hackathon

In July 2017 the first 24-hour Online Courts Hackathon took place. An explanatory memorandum stated:

While the government is leading the transformation (and is investing around £1 billion in modernising the courts), it is recognised that the design of the online courts would benefit from the input of the wider communities of lawyers, court users, law students, and technologists.

The idea of the Hackathon is to bring these communities together over a 24-hour period and in a friendly and yet competitive spirit, to invite teams to come up with designs, solutions, systems, and technologies for various parts of the online court. Participants will be invited to design various tools to support online courts – for example, tools to help litigants structure their legal arguments, organise their documents, negotiate settlements without advisers, improve access to legal advice as well as systems that will promote open justice and even machine learning solutions that will help analyse all the data generated by the online courts. Prizes will be awarded for the best ideas. Pizzas and coffee will be consumed in great quantities while the teams work through the night.”

The fact that this weekend event was organised by Legal Geek and the Society for Computers & Law in conjunction with the Judiciary and HM Courts & Tribunals Service (HMCTS) is a testament to the

²⁰⁶ This will be a court administrator exercising judicial functions under the supervision of the judiciary, quite independently of government, who will promote the best resolution method for each case – mediation, online Alternative Dispute Resolution, early neutral evaluation, probably carried out by a district judge, or proceeding direct to a full trial.

way in which collaborative ways of working are now being developed in an unprecedented way. Two newish High Court judges formed part of the panel of five who picked the eventual winners, and the Lord Chief Justice himself presented the awards on the Sunday morning, in the presence of the Head of HMCTS. The overall winner was a joint item from Wavelength Law and The Law Society which produced a concept called COLIN (the Courts On Line help agent), which went from a diagnosis of a chest complaint at a doctor's surgery through each stage of a possible claim against a landlord, using "pathfinder" technology and voice interaction:

"What can COLIN do?

*Colin can guide the user through the complexities of legal issues as if talking to a knowledgeable fiend, capture the whole story as relevant to the user, distil relevant parts for required steps in the process, and bundle the entire history in chronological order ready for professional input or an online court."*²⁰⁷

Simple diagnostic tools and dropdown menus

Most legal aid expenditure, Professor Susskind said, is generated within 18 main problem areas. The strategic planning he favours will demand the development of simple diagnostic tools and dropdown menus to explain things simply to those who have encountered a problem in one of these areas.

Professor Roger Smith, for his part, told the commission about the Justice Education Society's public legal education website in British Columbia²⁰⁸, and how a court in California had acquired from them a program called "Families Change".²⁰⁹ This helps people through a divorce and describes, among other things, the problems that affect children after their parents separate. It gives a representation of a village where a visitor walks about and obtain practical information about different issues concerned with relationship breakdown in different parts of the village.

The passage on parental responsibilities, for instance, reads:

The separation or divorce can be so overwhelming for some parents – the loss of a spousal relationship, money worries, moving households, and other details – that they lose sight of their obligations to their children. Being aware of your parental responsibilities at this time will help you handle many decisions involving your children.

our parental responsibilities are to:

- *Take care of your children and keep them safe, even though one of you lives apart from the family.*
- *Make sure that the children spend time with each parent, as well as other people who are important to them.*
- *Listen to what your children have to say, even if you can't always do what they want you to.*
- *Answer the children's questions about money, where they are going to live, and so on, when they ask.*
- *Talk to the other parent with respect in front of the children.*
- *Talk to the other parent about the things that involve the children.*

²⁰⁷ See C & L, the Journal of the Society for Computers & Law, August/September 2017.

²⁰⁸ Accessed September 2017: <http://www.justiceeducation.ca/>

²⁰⁹ Accessed September 2017: <http://www.familieschange.ca.gov/>

It is easy to see how useful it will be for English family lawyers to refer their clients to a website like this, if they are up to using the web, thus limiting the cost to the state of “face to face” advice for the first hour or so. Comparable advice is available on the site for both children and teenagers.

In this country there has been an enormous increase in the number of people accessing the two leading sites that contain generalist advice of a legal nature. In 2015-16 Citizens Advice received 36 million visits (55 million page views) to their website at <https://www.citizensadvice.org.uk/> and the website of AdviceNow at www.advicenow.org.uk/, which is now administered by Law for Life, was accessed by 931,000 users during the same period. Its curated information service brings together 1,600 pieces of public legal information from over 250 UK websites.

For “Benefit appeals”, for instance, AdviceNow has prepared three down-loadable guides on different types of appeal, together with a link to an admirable “PIP Mandatory Reconsideration Request Letter Tool” which it developed recently with the help of grant-funding and which attracted 70,000 visitors quite quickly. This part of the site also includes, with links, a list of “Top Picks - A quality controlled selection of all the best legal information from a wide range of providers hand picked from the best websites by Advicenow”. The ten links include a number to different parts of the Citizens Advice site, and other links to sites run by Disability Rights UK, Shelter and a national charity called *Turn2Us*.

More recently a charity called *Lasa*²¹⁰ has been producing sites containing practical information about the benefits appeal system which also includes references to relevant judgments of the Upper Tribunal. It has received grant aid from the Law Society Charity and the Legal Education Foundation for the pioneering work it has been doing. Their site at www.pipinfo.net, for instance, states:

Choose from the options above for details of regulations and case law relating to personal independence payment. You can search by activity, issue or health condition to find out more about the legal framework and how the Upper Tribunal has interpreted the law.

We hope that pipinfo will help advisers in assisting people to make a new claim for personal independence payment, and in challenging decisions to refuse, or award a lower rate of, the benefit.

*Like pipinfo? See also our work capability assessment tool [wcainfo.net](http://www.wcainfo.net), part of our [family of web tools](#).*²¹¹

Another strand in any future strategy must be a greater willingness of advice organisations to collaborate – perhaps by joint tenders - when they have common aims but different skills. Some of the papers in this Appendix²¹² and in Appendix 4²¹³ show the different small-scale initiatives now taking place, particularly when local offices of Citizens Advice are working harmoniously in collaboration with the local law centre, but a lot more needs to be done to avoid the dilemma faced

²¹⁰ Its website states: “Established in 1984, we’re dedicated to supporting organisations in their use of technology and the delivery of social welfare law advice to the disadvantaged communities they serve.”

²¹¹ Accessed September 2017: <http://www.lasa.org.uk/webtools>

²¹² See Chapters 15 and 16.

²¹³ See the evidence of the Advice Services Alliance. “*Referral Systems- some partnerships have successfully developed referral systems based on inter organisations protocols and possibly including data sharing through IT or web based systems. Key feature of success is the relationship between the organisations, the element of trust that will pick up referral and give a good quality service. Some referrals work well for the organisations but deliver a poor client experience. The human relationships and human agency are the key factors.*”

by too many people today who go from adviser to adviser before they discover the one that is able to provide for their particular needs. On the one hand an initiative in Coventry shows what can be done along these lines²¹⁴, and on the other hand Lindsey Poole of the Advice Services Alliance counselled against the development of enforced collaboration between agencies that do not know how to work harmoniously together. There is a very important role for applied technology to play in assembling the essential features for the client's problem and directing them to the appropriate advice agency for further help (whether face-to-face, online, or by telephone or video etc).

This short paper inevitably only provides a snapshot of what is going on in a very rapidly moving scene. Annex 7²¹⁵ of the first Low Commission report in 2014 provided a useful, but not comprehensive, list of websites and telephone lines that were providing information and advice about social welfare problems, and the list would be much longer and fuller today. This only serves to accentuate the problems facing the member of the public searching for the information and advice they really need.

ANNEX

Extract from the Lord Chief Justice's annual report, 2017

Digitisation and technology

Crime

The Crown Courts now operate the Digital Case System for all CPS prosecutions and rapid progress is being made on extending the system to all prosecutions. This has meant that the management of cases takes place without the need for paper; pre-trial applications and directions are made online. Many trials proceed without paper; there has been rapid progress in providing ancillary digital facilities such as Clickshare which enables advocates to display documents and photographs from their own computers.

Digitisation has not yet reached the Court of Appeal (Criminal Division); the huge progress that has been made in the Crown Court can be seen in the contrast with the Court of Appeal when that court sits outside the Royal Courts of Justice.

Digital Mark Up²¹⁶ has been introduced and, after rigorous testing, rolled out across the Magistrates' Courts. Automated Track Case Management for Transport for London has also been introduced to enable the Single Justice Procedure to operate from receipt of a case through to a decision; it also provides data for subsequent fine and fee collection and enforcement.

²¹⁴ "At Coventry, they have a protocol to identify the point at which people should be signposted towards the law centre. They have developed software which can be used by any advice centre in Coventry. The client's case is added, and through a triage system all the details are fed into the system. The local authority has funded someone to monitor the service. He/she sees that a case will be taken on by a lawyer within 24 hours, and the lawyer who receives the reference then has to account for what has happened. Other agencies can then see what has happened. They are using a similar model in Avon and Bristol."

²¹⁵ Accessed September 2017: https://www.lowcommission.org.uk/dyn/1401712385512/LCR_Annex07.pdf

²¹⁶ An in-court programme which enables Legal Advisers and Court Associates to record the results of cases.

Progress is being made with the development of the Common Platform Programme which will link all the paperwork in each stage of a criminal case from arrest by the police and consideration by the CPS to the involvement of the courts and the defence.

Civil, Family and Tribunals

The major decision made during the year was that the same single process would operate across all civil, family and tribunals cases, supported by a single set of new rules designed specifically for the process.

Projects are now building component parts which, when put together, will form the same single process.

These include:

- Social Security and Child Support Tribunal – parties will be able to resolve their disputes online using a digital end to end service where parties and judges will be able to view evidence online through a Continuous Online Hearing. A digital case file will allow users to track and monitor their case through “Track My Appeal” and access reliable signposting and guidance. Parties will be able to see the grounds of a dispute and further evidence through digital evidence sharing.
- Apply for a Divorce – applicants will be able to process an undefended divorce online from their home, with additional features added in time, including payments and uploading documents.
- Apply for Probate – an online service for people applying for grants of probate.
- Tax Online Project – this project enables appeals to be lodged with the First-Tier Tax Tribunal online.
- Civil Money Claims – this online service will enable parties to resolve money claims online using a largely automated system for claims under £25k and streamlined digital pathway for all other civil money claims.