



## BRIEFING PAPER

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# Legal Aid: the review of LASPO Part 1

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## Summary

Part 1 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO), along with its secondary legislation, made significant changes to the provision of in England and Wales.

### **Changes to the scope of civil and family legal aid**

LASPO changed the scope of civil and family legal aid. Whereas previously a legal matter was within scope and qualified for legal aid funding unless it was specifically excluded by the *Access to Justice Act 1999*, LASPO reversed this position and listed in Schedule 1 those areas of legal problems that now remained in scope. It also provided for an Exceptional Case Funding (ECF) scheme to provide legal aid in cases where a failure to provide legal aid would be a breach of an individual's rights under the *Human Rights Act 1998* or European Union law. The Coalition Government said its goal was to refocus the scope of legal aid on those who need it most. With legal aid available in fewer areas of law, the volumes of publicly funded cases dropped, and expenditure fell by approximately £90m in civil cases and £160m in family cases.

Those providing evidence to the review told the Ministry of Justice (MoJ) that often those presenting with a legal problem are unlikely to have just one matter of concern and that a hard line between what is in and out of scope leaves people with a solution to only some of their problems. Others submitted that the legal system is not yet sufficiently capable of catering for those without legal representation. The Government also heard that as a result of many solicitors having abandoned legal aid work, there are now 'advice deserts' for certain categories of law, particularly immigration and housing.

In response the MoJ said it would enhance the support offered to litigants in person and would launch a new campaign to improve awareness of how people can access support to help them resolve their issues (ideally before they become legal problems).

### **Changes to the eligibility criteria for civil and family legal aid**

Regulations under LASPO made four changes to the eligibility criteria for civil and family legal aid:

- Applying capital eligibility test to all legal aid applicants;
- Increasing Income Contributions for Contributory Clients;
- Capping the subject matter of dispute (SMOD) disregard at £100,000;
- Removing legal aid in cases with 'borderline' prospects of success.

The Coalition Government said the reforms were designed to target the provision of public funding at those in the greatest financial need; to ensure those who can afford to pay some or all of their legal costs do so; and to reduce unnecessary litigation where the prospects of success are borderline. The review found the changes to eligibility contributed to savings in the cost of the scheme. These were largely down to the application of the capital means test to all applicants for legal aid, which saved an estimated £9m per annum.

During the evidence gathering phase of the review the MoJ was told that the changes have prevented people from accessing legal aid because of difficulties in obtaining the relevant financial evidence to support their applications. The MoJ also heard that the financial eligibility threshold is set at a level that requires many people on low incomes to pay a contribution which they cannot afford while maintaining a socially acceptable

standard of living. The “overwhelming view” expressed by respondents to the review was that LASPO should have fundamentally changed the means testing scheme to align with the cost of current living standards.

In response the MoJ announced it would conduct a further review into the thresholds for legal aid entitlement. It promised that whilst the review is ongoing it would ‘passport’ all applicants in receipt of universal credit through the means test.

### **Fee changes in civil and family legal aid**

Regulations under LASPO reduced fees paid to lawyers in civil and family matters. In addition, the uplifts for some hourly rates were capped or removed and remuneration for pre-permission work on judicial review cases was limited. The Coalition Government saw fees as an area for reducing the overall spend on legal aid. The review estimated that the policies saved a combined £110m in 2017-18.

The MoJ was told that as a result of the fee reductions, young lawyers are no longer attracted to careers in areas of law funded by legal aid. Young Legal Aid Lawyers reported that low remuneration, combined with high levels of tuition fee debt, was a barrier to entry to the profession. Evidence submitted to the review from the third sector reported an increase in demand since LASPO but that charities and advice organisations are unable to ‘fill the gaps’ where legal practitioners are absent.

In response the Government argued that the reduction in the number of legal aid providers (a drop of 32%, varying between the differing areas of civil law) is a consequence of the reduction in the total expenditure on civil legal aid work (25% since 2012-13). It argued that the average income per civil legal aid provider has increased by 11%. It asserted that the market is sustainable at present but accepted that there are areas of civil and family law where it will need to look further at remuneration for legal aid lawyers.

### **Changes to criminal legal aid**

LASPO made a number of changes to criminal legal aid, principally concerning the fees paid to solicitors and barristers, but also some changes to eligibility criteria and the provision of legal aid to prisoners. The review estimated that the fee changes have saved £140m per annum.

During the evidence gathering phase the Bar Council and Law Society told the review that the remuneration changes in criminal law had cumulatively impacted on the sustainability of the criminal legal aid market. In terms of prison law reforms, it was argued that LASPO has simply shifted costs onto other areas of Government, including the Prison and Probation Service and that the cost of this may outweigh that of corresponding legal aid provision. The Joint Committee on Human Rights raised concerns regarding the Government’s reliance on alternative dispute resolution mechanisms for prisoners, which have been described as unsuitable and ineffective. The Howard League for Penal Reform and the Prisoners’ Advice Service both reported significant increases in calls to their advice lines and the Howard League reported the lack of specific legal support available for young prisoners, during and after their prison sentence.

In response the review pointed out that the Government had acknowledged that, for certain matters concerning prison law, prisoners should be supported through legal aid and had made the necessary changes to expand scope. It pointed to increased overall funding on the Advocates’ Graduated Fee Scheme, with a focus on more junior advocates. However it also stated that it believed the time is right for a further, “more holistic review” of criminal legal aid fee schemes.

### **Changes to experts' fees**

Regulations under LASPO (and the *Access to Justice Act 1999* beforehand) also reformed the fees paid to experts in civil, family and criminal proceedings. The Coalition Government's intention was to reduce spending and to ensure consistency. The review estimated that policies have saved the legal aid fund £30m per annum.

The review heard evidence that the new rates of remuneration have made it difficult for lawyers to persuade experts to provide evidence in proceedings funded by legal aid. The MoJ asserted that expert fees must represent value for money, but pointed out that there are processes in place to allow for higher rates in exceptional circumstances.

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

LASPO also replaced the Legal Services Commission (LSC) with the Legal Aid Agency (LAA). Some respondents to the review expressed concern that the position of the Director of Legal Aid Casework is far too close to ministers in terms of decision making. The MoJ replied that changes made under LASPO were made to ensure independence and avoid political interference. It also dismissed concerns that the LAA does not have the LSC's duty to consider access to justice. The MoJ said the duty now rests on the Lord Chancellor.

### **Reaction to the review**

Reaction to the review was mixed. Whilst the Bar Council called the review "a wasted opportunity", the Law Society greeted the PIR as a "shift in the right direction" and Young Legal Aid Lawyers expressed the hope that it would make a turning point in the Government's policy on legal aid. The Justice Committee, meanwhile, warned that the numerous proposals for further reviews and research "risked being seen as 'kicking the can down the road'."

# 1. Background

Since 2013, the provision of legal aid in England and Wales has been governed by Part 1 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* – commonly referred to as LASPO – and by an array of supporting secondary legislation. Part 1 of LASPO replaced the *Access to Justice Act 1999* as the statutory framework for legal aid and made major changes to the scope of legal aid, the eligibility requirements for individuals applying for legal aid, and the level of remuneration payable to lawyers undertaking legally aided work.

For the Coalition Government, LASPO was a response to a “completely unignorable problem of affordability”.<sup>1</sup> It argued that the legal aid system had expanded to a point that was unsustainable. It also tied the need for reform to its response to the recession of the late 2000s and early 2010s. Introducing the bill at Second Reading, Ken Clarke asserted: “In any circumstances our system would need reform; in the country’s current financial crisis reform is imperative.”<sup>2</sup>

The four objectives of the LASPO Part 1 reforms were first set out in the Coalition’s 2010 consultation ‘[Proposals for the Reform of Legal Aid in England and Wales](#)’:

- To discourage unnecessary and adversarial litigation at public expense;
- To target legal aid at those who need it most;
- To make significant savings to the cost of the scheme;
- To deliver better overall value for money for the taxpayer.

The reforms were introduced in two stages. The first tranche of changes, packaged together and labelled ‘Legal Aid Reform’ (LAR), was actually introduced prior to LASPO by secondary legislation under the *Access to Justice Act 1999*. The second tranche of reforms were collectively termed ‘Legal Aid Transformation’ (LAT).

There were two stages of changes: the LAR and LAT reforms

On 30 October 2017 David Lidington, then Lord Chancellor and Secretary of State for Justice, presented the Government’s post-legislative memorandum for LASPO to the Justice Committee<sup>3</sup> and announced that he had asked officials to commence a post-implementation review (PIR) of Part 1 of the Act.<sup>4</sup> Such a review had been promised by the Coalition Government during the passage of the Act in 2011<sup>5</sup> and the Conservative Government reiterated this commitment after its election win in 2015.<sup>6</sup> The aim of the PIR<sup>7</sup> was to

<sup>1</sup> [HC Deb 29 June 2011 c987](#)

<sup>2</sup> *ibid*

<sup>3</sup> [Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum](#), Cm 9486, October 2017

<sup>4</sup> [HCWS 204](#), 30 October 2017

<sup>5</sup> [PBC Deb 19 July 2011 c246-7](#)

<sup>6</sup> See for example [HC Deb 17 October 2016 WO 48968](#)

<sup>7</sup> Ministry of Justice, Post-Implementation Review Terms of Reference, 8 March 2018, available at <<https://www.gov.uk/government/publications/post-implementation-review-of-laspo>> accessed 7 May 2020

assess the impact of the LASPO policies against the objectives set out above and the estimates outlined prior to their introduction in the impact assessments.<sup>8</sup>

Starting in April 2018, the Ministry of Justice (MoJ) held three rounds of consultative group meetings with a range of interested parties. MoJ officials also held a roundtable with members of the senior judiciary and met individual practitioners and smaller groups of interested parties in order to listen to a broad range of views. The MoJ also received evidence submissions from over 80 organisations, carefully chosen to inform the PIR.<sup>9</sup>

The PIR was published on 7 February 2019, alongside a 'Legal Support Action Plan' that set out the approach the MoJ proposed to take in the future.<sup>10</sup>

Sections 2, 3 and 4 of this briefing relate to the changes LASPO made to legal aid in civil and family law proceedings. Section 2 addresses the PIR findings in relation to the scope of legal aid; section 3 summarises the review of changes to the eligibility criteria; and section 4 deals with LASPO's changes to lawyers' fees.

Section 5 summarises the PIR findings in relation to the changes LASPO made to the provision of legal aid in criminal proceedings. Section 6 addresses the impact of LASPO's changes to the fees paid to expert witnesses. Section 7 discusses the review of the operation of the Legal Aid Agency, created by LASPO to replace the Legal Services Commission. Reaction to the PIR is set out in section 8.

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<sup>8</sup> The impact assessments may be accessed at <https://www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information> accessed 7 May 2020

<sup>9</sup> Para 12

<sup>10</sup> Available at <https://www.gov.uk/government/publications/legal-support-action-plan> accessed 7 May 2020

## 2. Changes to the scope of civil and family legal aid

LASPO made changes to the scope of both civil and family legal aid. Chapter 1 of the PIR considered these two areas in turn. It examined the actual impact of the changes against the anticipated impact set out in the relevant impact assessment.<sup>11</sup>

### Box 1: Scope

Scope, in this context, means the type of legal problem or case for which legal aid is generally available. When a matter is in scope, civil and family legal aid meets the cost of legal services (subject to means and merits tests). Prior to LASPO, the scope of civil and family legal aid was governed by the *Access to Justice Act 1999*. A matter was within scope unless specifically excluded by the Act.<sup>12</sup> Under LASPO this approach was reversed: now only those matters specifically listed in the 2012 Act are in scope. The types of legal problems still in scope are set out in Schedule 1 of LASPO.

### 2.1 Civil legal aid

In summary, the changes made by LASPO to the scope of the civil legal aid scheme concerned the following areas of law:

- Actions against the police/ claims against public authorities
- Clinical negligence law
- Immigration law
- Personal injury law
- Education law
- Social welfare law
- Consumer law
- Public law
- Miscellaneous

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<sup>11</sup> The relevant impact assessment may be found at <https://www.justice.gov.uk/downloads/legislation/bills-acts/legal-aid-sentencing/Royal-Assent-IAs-and-EIAs.zip>, Annex A (accessed 7 May 2020). However an adjustment was necessary. The analysis conducted for the impact assessment used the number of civil and family cases closed in 2009-10 as a baseline. It anticipated that the same baseline would be used for the PIR. However, between 2009-10 and the implementation of LASPO in April 2013, there was a substantial decline in the overall volume of cases funded by legal aid. As a result, the estimated policy impacts in the impact assessment were calculated based on data representing a time when legal aid volumes were far higher than they were immediately prior to the reforms taking effect. To take account of this, all analysis in chapter 1 of the PIR of Part 1 was conducted using legal help matter starts and civil representation applications granted against the 2012-13 baseline.

<sup>12</sup> Exceptions included personal injury and damage to property, conveyancing, boundary disputes, defamation or malicious falsehood, the making of wills, trust law and business cases.

## Actions against the police/ claims against public authorities

Prior to LASPO legal aid was available in cases where there was evidence of:

- serious wrong-doing;
- abuse of a position of power; or
- significant breach of human rights.

Additionally, legal aid was available for a wide range of cases that would otherwise have been excluded, for example if there is a significant wider public interest. LASPO removed cases that involved 'serious wrong-doing' and 'significant wider public interest' from the class of cases automatically with the scope of legal aid.

Whilst the total expenditure for these case types was always relatively small, the MoJ found the policy change contributed to the delivery of significant savings to the cost of the legal aid scheme, though not to the extent anticipated by the impact assessment.<sup>13</sup> This was due to the rise in claims for inquests.<sup>14</sup> Nevertheless the MoJ claimed the achievement of some economy as the spend on civil representation fell by £1m.<sup>15</sup>

### Box 2: Legal Help and civil representation

The legal aid scheme, and the PIR, distinguishes between Legal Help and civil representation. Legal Help is a form of civil legal services which includes advice and assistance about a legal problem but does not extend to cover the costs of representation by lawyers nor advocacy in court proceedings.

## Clinical negligence

Prior to LASPO, legal aid was available for both Legal Help and representation in cases where litigants were seeking damages against public or private medical practitioners after having potentially suffered negligent treatment. The Coalition Government took the view that litigants should fund their case through means other than legal aid where they are able to do so. It said that most clinical negligence claims could be funded through alternative funding arrangements such as conditional fee arrangements (CFAs).

### Box 3: Conditional fee arrangements

The conditional fee agreement (CFA) is the most common form of a 'no win, no fee' agreement. Under a CFA the lawyers share with the client the risk of losing the case. If the case is lost, the lawyers will not charge the client for the work done. However if the case is won the lawyers will charge an additional success fee on top of the normal fees. This is intended to compensate the lawyers for the risk of not being paid and for the delays in getting paid. See the Library briefing paper, '[No win, no fee funding arrangements](#)', CBP-7607, 31 May 2016

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<sup>13</sup> Para 201

<sup>14</sup> There is not a separate category for inquests, and providers of legal services generally place inquests into the category that covers the underlying issue in the case (eg actions against the police, or clinical negligence or community care or mental health).

<sup>15</sup> Para 214

The MoJ conceded that in a small number of cases lawyers would be unwilling to use CFAs, however these cases were not seen to represent a high enough proportion of cases to justify keeping clinical negligence cases generally within scope, given the Exceptional Case Funding (ECF) scheme (see page 18 below) was also a potential avenue to funding for these cases. As such, LASPO removed a high proportion of clinical negligence proceedings from the scope of legal aid. As a result, the legal aid spend on representation in clinical negligence cases fell from by 93%, from £20m to £1m.<sup>16</sup>

Before LASPO came into effect there was a shift away from legal aid to CFAs. The MoJ saw this as evidence that providers adjusted their arrangements in anticipation of the Act. The trend has continued post-LASPO. One reason is that in the few very serious cases that remain within the scope of legal aid, lawyers cannot obtain necessary reports from experts at the legal aid rates available.<sup>17</sup>

During the PIR evidence gathering stage, the MoJ was told that one consequence of the LASPO changes was an increase in litigation against the NHS.<sup>18</sup> Whilst emphasising that “picture is complex and a number of factors are at play”, the reasons listed by the PIR included the increased encouragement of personal injury claims generally, the certainty of payment of fees under legal aid, attractive returns to lawyers on pre-LASPO CFAs, the entry into the market of lawyers who did not take cases funded legal aid and the effect of fixed recoverable costs.<sup>19</sup>

In terms of the effectiveness of LASPO, the PIR concluded that this rise in cases indicates that access to justice has not been hampered by removing most clinical negligence cases from the scope of legal aid.<sup>20</sup> However in terms of public spending, the increasing volumes of unsuccessful claims against the NHS could suggest an inefficiency.<sup>21</sup>

### Immigration

LASPO did not remove asylum cases from the scope of legal aid due to the nature of the issues at stake and the particular vulnerability of the client group. Most non-asylum cases were removed from scope. Certain priority areas were retained, due to the importance of the issues at stake, as well as the absence of other routes to fund or resolve them.

The PIR found that, overall, the LASPO changes achieved their objectives of making significant savings<sup>22</sup> in the immigration law category and targeting legal aid at asylum cases, deemed by the Government to be the highest priority. However some told the MoJ that the costs have simply shifted away from the legal aid fund to other parts of

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<sup>16</sup> Para 221

<sup>17</sup> Para 231

<sup>18</sup> Para 222

<sup>19</sup> Para 223

<sup>20</sup> Para 243

<sup>21</sup> Para 244: The PIR stated that more work would be required to ascertain the extent to which Part 1 of LASPO has caused this. It pointed out that the use of CFAs was already on the rise prior to the Act coming into force.

<sup>22</sup> Para 280 – The PIR cited a £15m reduction in spend on immigration matters following the introduction of the scope changes.

government or to local authorities.<sup>23</sup> As a result, the PIR concluded that it was not possible to make a firm conclusion as to whether the LASPO changes represent value for money for the taxpayer. The MoJ promised it would work with colleagues across government to assess the extent of cost transference.<sup>24</sup>

Furthermore, charities and lawyers who work in this area of law believe that protected groups, and vulnerable people more generally, have been adversely impacted by the immigration scope changes.<sup>25</sup> Lawyers warned of a loss of broad legal expertise in all immigration matters as lawyers choose to specialise in the still-in-scope asylum law.<sup>26</sup> They spoke of ‘advice deserts’ – areas of the country where people can no longer find legal advice – and of how people are having to travel long distances to seek help.<sup>27</sup> Other avenues of advice have sprung up, including charities, lawyers offering pro-bono advice and those charging private fees. The PIR heard that people reliant on the latter are at a greater risk of exploitation.<sup>28</sup> Vulnerable people have been left to represent themselves in court, struggling to navigate the complexity of the Immigration Rules and of proceedings such as family reunion applications.

The MoJ took issue with these criticisms. It asserted that a decline in the number of providers covering legal aid cases was to be expected due to the reduced demand following the reduction in scope of legal aid for immigration cases.<sup>29</sup> It emphasised that not having a provider within a local authority area does not mean the local population does not have access to legally aided advice.<sup>30</sup> The PIR pointed out that the Immigration Rules will be simplified<sup>31</sup> and argued that “going to a tribunal is an accessible process that allows individuals to be able to make a successful application without legal representation.”<sup>32</sup>

## Personal injury

Prior to LASPO, legal aid funding was generally not available for personal injury claims. However, some personal injury claims for cases involving a claim against a public authority were still within scope, as well as cases involving the significant wider public interest, abuse of child or vulnerable adult cases, sexual assault cases and claims for victims of trafficking and modern slavery. Following the LASPO scope change, legal aid was limited to personal injury claims when a public authority had either abused its position or powers, or, where it had breached the applicant’s Convention rights, where there was sexual assault, abuse of child or vulnerable adult and any EU cross-border

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<sup>23</sup> Para 281

<sup>24</sup> Para 284

<sup>25</sup> Para 276

<sup>26</sup> Para 289

<sup>27</sup> Para 286-288

<sup>28</sup> Para 290

<sup>29</sup> Para 290

<sup>30</sup> Para 294

<sup>31</sup> Para 304

<sup>32</sup> Para 308

claim. The Coalition Government saw CFAs as an adequate funding model.

Data limitations prevented the PIR from assessing whether the policy was successful in making savings and targeting legal aid at those most in need.<sup>33</sup>

### Education

LASPO removed all education law proceedings from the scope of legal aid except for issues related to special educational needs (SEN) (and discrimination claims, including disability discrimination claims about schools that are heard in the SEND tribunal). In the context of austerity, the Coalition Government deemed legal matters in education to be less of a priority than cases where someone's life or liberty is at stake.<sup>34</sup>

The PIR identified an important need to improve public awareness of where legal aid and support are available.<sup>35</sup>

The PIR deemed the policies to be effective. Whilst the reductions in scope concerning education law did not achieve economy, the MoJ saw the fact that SEN cases now constitute 70% of Legal Help cases within this category<sup>36</sup> as evidence that the policy has successfully targeted legal aid at those it deemed most in need.

The PIR was told that the mandatory telephone gateway for accessing civil legal aid in education cases (see page 16 below) may be challenging for the parents of children with SEN, who are more likely (than the average person) to have SEN issues themselves, as they may find communicating over the telephone more difficult. This may explain the low level of referrals to face-to-face advice.<sup>37</sup> Further criticism was made of the use of the face-to-face advisors as intermediaries for the telephone service providers who actually hold the legal aid contract. This was said to slow the process and make it more confusing and difficult for clients. The MoJ referred to the Legal Support Action Plan, in which it stated that whilst it did not accept that current arrangements necessarily limit access, it would reinstate immediate access to face-to-face advice.<sup>38</sup>

LASPO also removed Legal Help for matters in relation to school exclusion. The PIR heard evidence that the change is having a detrimental impact upon children.<sup>39</sup> The MoJ responded by pointing out how there are fewer exclusions now than a decade ago. It highlighted how a disproportionate number of children affected by a school exclusion have SEN (and whose issues are therefore likely to remain within scope). It also pointed to the independent review of exclusions practice being led by Edward Timpson.

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<sup>33</sup> Para 330. The PIR explained that the very small volumes of cases combined with the wide variation of costs in this category of law made it impossible to quantify the change in expenditure due to LASPO – see para 318.

<sup>34</sup> Para 335

<sup>35</sup> Para 346

<sup>36</sup> Para 344

<sup>37</sup> Para 356

<sup>38</sup> Ministry of Justice, *Legal Support: the Way Ahead*, CP 40, February 2019, p15

<sup>39</sup> Para 359

## Social welfare law

'Social welfare law' encompasses issues relating to housing, debt, welfare benefits and employment. The PIR considered them together as the MoJ had received evidence that these areas can often be interrelated for an individual. Having a problem in one area can often lead to problems in several others.<sup>40</sup> The Coalition Government took the view that local authorities, Trades Unions and charities as Citizens Advice and Shelter could provide adequate support for individuals experiencing such problems.<sup>41</sup>

LASPO removed most housing cases from the scope of legal aid. It kept within scope those cases where there is a risk of homelessness, repossession or eviction, as well as housing disrepair that poses a risk of serious harm to an individual.

LASPO removed most areas of debt law from the scope of the scheme. Legal aid remains available – via the civil legal aid telephone gateway – for three main areas:

- proceedings where, as a result of mortgage arrears, the client's home is at immediate risk of possession;
- proceedings regarding orders for the sale of the home;
- bankruptcy proceedings initiated by creditors where the potential bankrupt estate includes the home of the potential bankrupt or his/her family.

LASPO removed all welfare benefit proceedings from the scope of legal aid for advice and assistance, except for:

- Legal Help for appeals to the Upper Tribunal and Higher Courts, when the case involves a point of law;
- civil representation for appeals relating to council tax reduction schemes, which replaced council tax benefit under the *Welfare Reform Act 2012*.

LASPO removed all employment cases from scope, except those concerning discrimination and victims of trafficking and modern slavery.

Taken together, these changes led to a significant reduction in legal aid spend in social welfare matters, exceeding the estimation made in the impact assessment.<sup>42</sup> In housing cases, legal help spend between 2012-13 and 2017-18 fell from £20m to £9m; expenditure on civil representation fell £25m to £15m.<sup>43</sup> In debt cases legal help expenditure was estimated to have fallen by more than 99%, from £15m to less than £0.25m; civil representation fell from £1m to less than £0.25m.<sup>44</sup> Welfare benefit cases saw a reduction in legal aid expenditure of around £15m per annum.<sup>45</sup> The removal of employment

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<sup>40</sup> Para 364

<sup>41</sup> Paras 366, 376

<sup>42</sup> Para 377

<sup>43</sup> Paras 379-380

<sup>44</sup> Para 382

<sup>45</sup> Para 383

cases from scope saw the estimated spend on both legal help and representation reduced from around £5m to almost zero.<sup>46</sup>

The volume of legal aid cases declined more than anticipated in each area.<sup>47</sup> The extent to which this is a result of LASPO or of other changes across Government and in society was not identified by the PIR.<sup>48</sup>

During the evidence gathering phase, commentators expressed concern about the inability of potential claimants to find a provider for social welfare law cases, even where the cases are in scope. This was particularly prevalent in the housing sector.<sup>49</sup> The MoJ said this was not wholly attributable to LASPO,<sup>50</sup> and repeated that the absence of a provider within a local authority does not mean the local population does not have access to legally aided advice.<sup>51</sup>

The Equalities and Human Rights Commission and others also took issue with the Coalition Government's belief that individuals could represent themselves adequately.<sup>52</sup> The PIR acknowledged that litigants in person require more support and highlighted the £1.45m provided each year to the Litigants in Person Support Strategy.<sup>53</sup> However the MoJ made clear it does not accept that their increased presence prevents the justice system from functioning.<sup>54</sup>

Shelter submitted that where legal aid is still available, it is provided at too late a stage to prevent a person's problems escalating beyond the point of prevention.<sup>55</sup> The Housing Law Practitioners Association and the Law Society agreed, pointing to the absence of early advice covered by Legal Help as a particular cause of problem escalation.<sup>56</sup> The PIR noted the Low Commission's finding that:

"the cutbacks in legal aid for social welfare law and the simultaneous reductions in local authority funding of advice and legal support have destabilised and reduced the advice and legal support sector at a time of increased need. As a result, instead of saving money, the cutbacks are very likely to end up costing more elsewhere in the system."<sup>57</sup>

Nevertheless the MoJ maintained that the financial and economic benefits of early advice are difficult to quantify with accuracy. It stated that further research is needed as to what advice works best, when, and for whom.<sup>58</sup>

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<sup>46</sup> Para 384

<sup>47</sup> Para 386

<sup>48</sup> Para 421

<sup>49</sup> Para 422

<sup>50</sup> Para 427

<sup>51</sup> Para 428

<sup>52</sup> Para 430

<sup>53</sup> Para 432

<sup>54</sup> Para 431

<sup>55</sup> Para 435

<sup>56</sup> Paras 436, 439

<sup>57</sup> Para 440, quoting the Low Commission, 2014, Tackling the advice deficit; p6. Available at <<https://www.lag.org.uk/about-us/policy/the-low-commission-200551>> accessed 7 May 2020

<sup>58</sup> Para 443

Organisations such as the Civil Justice Council argued that by removing various areas of social welfare law from the scope of legal aid, LASPO had prevented providers from offering holistic advice to a client with a cluster of problems.<sup>59</sup> The MoJ acknowledged both the Legal Education Foundation's warning that LASPO has led to a surge in demand for advice with a simultaneous reduction in the advice sector's capacity to meet that demand and its call for a public information campaign to combat the widespread impression that legal aid is almost non-existent.<sup>60</sup> However it did not accept all of these points, asserting that more research is required to identify the most effective solution.<sup>61</sup>

## Consumer law

Prior to LASPO, legal aid provision in this category related to the bringing of civil law actions regarding contracts and their enforcement, in cases such as breach of contract, fraud, personal data issues, consumer credit issues or professional negligence (except medical negligence). Following LASPO, all proceedings related to consumer matters were taken out of scope of legal aid, both for early advice and assistance as well as for representation at court.

The PIR deemed the scope reductions to have been effective in reducing legal aid spend. A lack of data prevented a full assessment of whether the policy represents value for money.<sup>62</sup>

## Public law

LASPO retained public law challenges in scope, apart from certain immigration cases, while adding a requirement for there to be a benefit to the individual, the individual's family or the environment. The immigration cases excluded from scope were:

- judicial reviews on substantially the same issue as a previous judicial review, or a previous appeal which has been unsuccessful within a one-year period prior to bringing the claim;
- judicial reviews challenging removal directions except where there has been a delay of more than one year between the determination of the decision to remove a person and the giving of removal directions.

Following the LASPO changes, the legal aid spend in public law fell by almost 33%.<sup>63</sup> Whilst the scope changes were therefore deemed to have achieved economy, the MoJ recognised that the complexity of isolating the impact of LASPO against a multitude of other variables across Government and wider society prevented an assessment of the policy's overall value for money.<sup>64</sup>

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<sup>59</sup> Para 447

<sup>60</sup> Para 448

<sup>61</sup> Para 450

<sup>62</sup> Paras 465-466

<sup>63</sup> Para 483

<sup>64</sup> Para 486

## Miscellaneous

The PIR grouped a range of other matters not included in the scope of any other category under the heading 'miscellaneous'. Matters specifically removed from scope were:

- appeals to the Upper Tribunal from the General Regulatory Chamber of the First-tier Tribunal;
- cash forfeiture actions under the Proceeds of Crime Act 2002;
- legal advice in relation to a change of name;
- actions relating to contentious probate or land law;
- court actions concerning personal data;
- action under section 14 of the *Trusts of Land and Appointment of Trustees Act 1996*;
- legal advice on will-making.

Some matters left in scope, that were classified as miscellaneous work, were:

- confiscation proceedings under the Proceeds of Crime Act 2002;
- injunctions concerning gang related violence;
- Independent Safeguarding Authority Appeals (care standards);
- Legal Help at Inquests;
- Civil proceedings under the *Protection from Harassment Act 1997*.

The *Anti-Social Behaviour, Crime and Policing Act 2014* (ASBCPA) brought cases which were previously funded under criminal legal aid (Anti-Social Behaviour Orders) into the civil legal aid jurisdiction. As such, these issues are now classified as miscellaneous.

Legal aid expenditure for the miscellaneous category has increased since LASPO, largely due to the change to include ASBCPA injunctions. However the PIR explained how it is difficult to draw conclusions regarding the miscellaneous category due to the diverse range of matters that are grouped within it.

## Civil legal advice telephone gateway

Prior to LASPO, legal advice could be sought via the Community Legal Aid telephone service, which had been in operation since 2004. The CLA telephone gateway aimed to take advantage of technology to provide a simple, straightforward telephone service offering support tailored to the needs of users (eg interpretation services, British Sign Language via webcam, text relay etc). It consists of two tiers – an operator tier and a specialist tier. At the operator tier there is an assessment of the user's eligibility for legal aid and of whether his or her issue is likely to be within the scope of civil legal aid. If users are eligible and if their issue is in scope, they are forwarded to a specialist to receive advice and assistance over the phone. Users requiring face-to-face advice or legal representation are referred to a lawyer. Those ineligible

for legal aid or with legal issues outside the scope of legal aid would be advised on other potential sources of advice.

LASPO made it mandatory for individuals seeking legal advice regarding debt, discrimination and special educational needs to apply for that advice via the CLA telephone gateway first. The Coalition Government believed that the provision of advice over the phone would be better value for money than face-to-face advice.<sup>65</sup>

The impact assessment estimated that specialist advice over the phone cost 50% less than equivalent face-to-face advice. However the PIR was unable to assess this assertion for the three mandatory categories of law as the number of cases referred to face-to-face advisors was too low and it was likely that they were not equivalent to telephone advice cases.<sup>66</sup>

The PIR accepted that the rationale for the mandatory gateway was met only if there are appropriate referrals to face-to-face advisors where it is necessary.<sup>67</sup> It found the low referral rates suggested a need for further consideration of the referral process. It also found a lower than expected uptake of the scheme, which it thought was a result of a lack of awareness.<sup>68</sup>

The PIR referred to the 2014 review of the accessibility and efficacy of the CLA telephone gateway<sup>69</sup> and to its finding that awareness of the service and knowledge of what it offered was low.<sup>70</sup> It also noted the Public Law Project's survey of front-line advice agencies in July 2014 which found that 28% of the agencies surveyed had not made referrals to the telephone gateway because they were unaware of it.<sup>71</sup>

The PIR also acknowledged concerns raised by the Joint Committee on Human Rights and by the Equality and Human Rights Commission that the telephone gateway may not be delivering adequate access to legal advice, particularly in discrimination cases.<sup>72</sup> In response the MoJ pointed out that legal aid certificates awarded under other categories, such as actions against the police, will have covered cases encompassing discrimination issues.

It was also accepted that as calls to the telephone gateway are not free, the cost of accessing the service may be marginally higher under the policy than accessing face to face advice, although the MoJ argued that those seeking advice will no longer have the travel costs incurred from travelling to face to face appointments.<sup>73</sup>

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<sup>65</sup> Para 513

<sup>66</sup> Para 520

<sup>67</sup> Para 525

<sup>68</sup> Para 527

<sup>69</sup> See: <https://www.gov.uk/government/publications/civil-legal-advice-mandatory-gateway-review>

<sup>70</sup> Para 534

<sup>71</sup> *ibid*

<sup>72</sup> Paras 542. Joint Commission on Human Rights, *Enforcing Human Rights*, HC 669, 19 July 2018, available at <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/669.pdf>> accessed 7 May 2020

<sup>73</sup> Para 544

The PIR noted evidence submitted by Dr Marie Burton of Middlesex University that highlighted how vulnerable people are more likely to find it difficult engaging with an advisor over the phone.<sup>74</sup> Her research showed that telephone and face-to-face advisors agreed that face-to-face advice is preferable for those with mental health problems as they communicate more effectively when they can also rely on non-verbal communication.<sup>75</sup> Whilst the telephone gateway offers a variety of adjustments to facilitate calls – the most frequently used being that which allows a third party to call on the user’s behalf – the PIR found there had been a very low uptake.<sup>76</sup>

The PIR found that for those that do access the telephone gateway, the feedback on the service is positive. It said that of those who had received advice from a CLA specialist, 86% would recommend the service and 89% would rate their adviser as good or better.<sup>77</sup> The MoJ saw this as evidence that telephone advice can be useful and effective, but accepted the gateway’s accessibility and awareness needs further consideration.

There is also an impact on the number of legal aid providers in the three mandatory areas. In September 2017 the Legal Aid Agency (LAA) opened its contract tendering process for CLA services, including those provided via the telephone gateway. However in early 2018 it cancelled its procurement process for discrimination and education providers due to a lack of interest from firms who had concerns as to the work’s economic viability. Existing contracts were extended. The PIR warned of a risk that the LAA will not be able to procure contracts effectively in the future from lawyers of the appropriate quality and within a reasonable cost.<sup>78</sup>

### Exceptional case funding

LASPO also introduced a revised Exceptional Case Funding (ECF) scheme. Its purpose is to provide legal aid for cases that do not fall within the scope of civil and family legal aid but where:

- failure to do so would be a breach of the individual’s Convention rights (within the meaning of the *Human Rights Act 1998*);
- failure to do so would be a breach of any rights of the individual to the provision of legal services that are enforceable EU rights; or,
- it is appropriate to provide legal aid, having regard to any risk that failure to do so would be a breach of such rights.<sup>79</sup>

ECF may also be available for advocacy at an inquest into the death of a member of an individual’s family, provided the Director of Legal Aid Casework has made a wider public interest determination in relation to the individual and the inquest. Those applying for legal aid via ECF are still subject to means and merits tests.

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<sup>74</sup> Para 546

<sup>75</sup> *ibid*

<sup>76</sup> Para 547

<sup>77</sup> Para 554

<sup>78</sup> Paras 555-557

<sup>79</sup> Para 564

The most common applications in the ECF scheme relate to family, immigration and inquest proceedings, which collectively cover over 80% of applications.<sup>80</sup>

The MoJ claims that the consistent increase in volume of both overall and successful ECF applications following an initial period of low volumes suggests that the scheme is becoming increasingly successful at targeting legal aid at those who need it most.<sup>81</sup> However stakeholders told the MoJ that the scheme was not as accessible as it could be.<sup>82</sup> The PIR acknowledged that research by the Public Law Project showed that complex form filling and heavy evidence requirements may deter applications, particularly from vulnerable people. It accepted that “[i]ssues with the accessibility of the ECF scheme have hindered the primary objective of ensuring legal aid availability for applicable cases.”<sup>83</sup> The PIR also acknowledged the criticism that the Government is very reluctant to give details of successful applications for ECF; and that a change of approach would increase access to justice.<sup>84</sup> However it concluded that falling rejection and refusal rates since 2014 is evidence that accessibility has improved. It referred to its plans for simplifying the ECF, as set out in the Action Plan.<sup>85</sup>

## 2.2 Private family legal aid

Private family law proceedings can be divided into the following categories:

- Private law children proceedings – includes disputes about divorce or separation, contact and/or residence arrangements for children, prohibited steps orders, domestic child abduction and others;
- Domestic violence – injunctions, occupation orders of the (former) home, committal orders, protection of children from abuse, or other orders for the protection of a person from harm or forced marriages, such as a non-molestation order;
- Financial provision – disputes around the division of financial assets and property on the dissolution of a marriage or civil partnership. This includes disputes about the marital home or other assets;
- Other family proceedings—defended divorce, nullity, civil partnership rights, applications under the *Human Fertilisation and Embryology Act 2008* and various other proceedings.

Prior to LASPO legal aid was available for these proceedings, subject to an individual fulfilling means and merits criteria. Private family law was a major area of expenditure prior to LASPO. In 2012-13, it is estimated that over £190 million on Legal Help and civil (and family) representation in private family law cases.<sup>86</sup> The Coalition Government

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<sup>80</sup> Para 579

<sup>81</sup> Para 576

<sup>82</sup> Paras 586, 588

<sup>83</sup> Para 594

<sup>84</sup> Para 590

<sup>85</sup> Ministry of Justice, *Legal Support: the Way Ahead*, CP 40, February 2019, p14

<sup>86</sup> Para 598

felt that parties' emotional involvement in these matters did not necessarily leave them vulnerable or unable to present their own cases.<sup>87</sup> It was also suggested that if funding was not available, cases may be more likely to be resolved out of court.<sup>88</sup>

Under LASPO private family law proceedings were removed from the scope of legal aid. However, five major exceptions were made where legal aid funding remained available. These were:

- Proceedings in the domestic violence category (e.g. non-molestation and occupation orders);
- Proceedings involving children, financial provision and other family proceedings where domestic violence and/or child abuse could be evidenced against a set of evidence requirements set out in regulations (the 'domestic violence evidence gateway');
- Proceedings in which a judge makes a child party to proceedings;
- Proceedings in connection with orders to prevent international child abduction;
- Proceedings to secure the return of an abducted child, or proceedings involving various cross-border issues under EU and international law.

There was also a later amendment to ensure orders to prevent domestic child abduction remain in scope.

Legal aid for family mediation remains in scope (subject to means testing, although it is non-contributory and the statutory charge does not apply) to facilitate people to resolve their disputes without going to court. This provides funding for three different components:

- Payment for the Mediation Information Assessment Meeting (MIAM);
- Payment for the mediation itself;
- Payment for 'help with family mediation' – legal advice (predominantly for advice on agreements reached) during the mediation process and following the outcome.

Contrary to expectations, the number of MIAMs declined upon the implementation of LASPO.<sup>89</sup> The Family Mediation Council called for the funded link from solicitor to mediation to be reintroduced; without it many individuals are unaware that legal aid is available for mediation.<sup>90</sup> Without first speaking with a solicitor, some enter mediation with unrealistic expectations and so struggle to arrive at a settlement.<sup>91</sup> A number of Resolution family mediators told the PIR that they felt under pressure to mediate in cases where they did not feel it was suitable due to a lack of alternatives for their clients.<sup>92</sup> The low uptake in mediation suggested the reduction of scope for legal aid has led to individuals

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<sup>87</sup> Para 599

<sup>88</sup> Para 600

<sup>89</sup> Para 613

<sup>90</sup> Para 615

<sup>91</sup> Para 618

<sup>92</sup> Ibid

representing themselves in court or not relying on the justice system to resolve their problems.<sup>93</sup> The MoJ accepted that the LASPO policy appeared to have been unsuccessful at targeting legal aid at the intended cohort of cases.

To target legal aid at those most in need, LASPO introduced the domestic violence and child abuse gateway. The PIR listed the changes made post-LASPO to ensure that victims receive the appropriate support<sup>94</sup> and set out the aims of the *Domestic Abuse Bill*.<sup>95</sup> It addressed criticism received during the LASPO consultation that levels of awareness of the evidence required to access legal aid is too low and that people are being misinformed as to their eligibility.<sup>96</sup> In response to submissions as to the difficulties posed by an increase in litigants in person, the MoJ reiterated its view that an increase in the number of litigants in person does not prevent the justice system from functioning. The PIR noted report and survey findings of high levels of vulnerability and a lack of legal knowledge amongst litigants in person<sup>97</sup> and referred to the MoJ's reform programme which aims to make the system easier to understand and navigate.<sup>98</sup>

On the matter of alleged perpetrators of abuse acting as litigants in person, the MoJ acknowledged that judges did not have the power to appoint a lawyer to ask questions on behalf of an alleged abuser. Referring to the 2017 MoJ study of such cases, the PIR noted that judges' confidence in managing such situations varied based on the judge's seniority and experience.<sup>99</sup> It recognised judges' concerns about questions as to their impartiality and the lengthening of proceedings.<sup>100</sup> In response the MoJ referred to the provisions of the *Domestic Abuse Bill* that would prohibit perpetrators of domestic and other forms of abuse from cross-examining their victims in person in the family courts.<sup>101</sup>

Overall, the PIR found the changes to the scope of family legal aid achieved the objective of making significant savings (a reduction of £160m in legal aid spend in this area). However the aim of promoting the use of mediation to discourage adversarial and unnecessary litigation does not appear to have been met.<sup>102</sup>

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<sup>93</sup> Para 623

<sup>94</sup> Paras 637-641, 643

<sup>95</sup> Para 642

<sup>96</sup> Para 648-649

<sup>97</sup> Para 658-660

<sup>98</sup> Para 662

<sup>99</sup> Paras 668-669

<sup>100</sup> Ibid, par 670

<sup>101</sup> Para 671

<sup>102</sup> Para 609

### 3. Changes to the eligibility criteria for civil and family legal aid

When an person applies for legal aid, not only must their matter be in scope of legal aid (or otherwise exceptional and applicable for ECF), they must also satisfy both a merits test and a means test. Broadly speaking, the merits test considers the likelihood of success of the case and whether it justifies the use of publicly funded legal advice and/or representation. The means test considers the applicant's financial situation and whether they qualify for legal aid. Regulations under LASPO made four changes to the civil and family legal aid eligibility criteria:

- Applying capital eligibility test to all legal aid applicants;
- Increasing Income Contributions for Contributory Clients;
- Capping the subject matter of dispute (SMOD) disregard at £100,000;
- Removing legal aid in cases with 'borderline' prospects of success.

#### 3.1 Applying capital eligibility test to all legal aid applicants

The means test, for civil and family matters, has three different facets (although this does not mean that an applicant will be subject to all three):

- gross income;
- disposable income;
- disposable capital.

If any of the tests are failed, funding is refused.

Before LASPO, if a legal aid applicant was in receipt of one or more of these benefits then he or she automatically passed all three tests. This is referred to as 'passporting'. The passporting benefits are:

- Income Support (IS);
- Income-based Jobseeker's Allowance (JSA);
- Income-related Employment and Support Allowance (ESA);
- The guarantee credit element of State Pension Credit; and,
- Universal Credit.

Regulations made under LASPO abolished passporting for the capital test. Therefore all legal aid applicants in civil and family proceedings must undergo capital means testing to access legal aid.

The PIR concluded that this change had met the objective of making significant savings with the application of the capital means test saving

an estimated £9m per year.<sup>103</sup> It also found it had succeeded in targeting legal aid at a smaller cohort of people in most need.<sup>104</sup> However evidence submitted to the review suggested that vulnerable people are no longer accessing legal aid (or are being delayed in their access) due to having to pass another aspect of the eligibility test.<sup>105</sup> The PIR also heard that the self-employed were struggling to provide proof of their income, that applications from students were being rejected due to student loan funds in their accounts and that women subject to domestic violence were not accessing legal aid because they shared the value of the family home (despite no realistic prospect of their accessing this capital).<sup>106</sup>

### 3.2 Increasing Income Contributions for Contributory Clients

Applicants are assessed to determine whether they are financially eligible for legal aid based on their gross and disposable income. Their disposable income is also assessed to determine whether they are liable to pay monthly income contributions towards their legal costs. Applicants assessed as having a disposable monthly income above the set upper limit (£316) are required to make a monthly payment to contribute towards their legal costs over the length of the case. Prior to LASPO, contributions varied up to 20% of the client's disposable income, with clients adjudged to have greater disposable incomes required to contribute a larger proportion. LASPO introduced an increase in contributions, limiting the increase to no more than 30% of a client's disposable income. A smaller increase applied to those with a lower income.

The PIR found that while the change had made savings, these were not as extensive as predicted by the initial impact assessment (£0.4m per year rather than £1m).<sup>107</sup> The Coalition Government had also hoped the change would deter people from bringing speculative claims to court, but evidence submitted to the review raised concerns that the change could deter people with modest incomes from bringing even strong claim to court.<sup>108</sup> The MoJ acknowledged research by Professor Donald Hirsch that found that:

“the means testing of legal aid is set at a level that requires many people on low incomes to make contributions to legal costs that they could not afford while maintaining a socially acceptable standard of living.”<sup>109</sup>

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<sup>103</sup> Para 705

<sup>104</sup> Para 724. The PIR estimated that around 6,500 people (deemed to have sufficient means to fund their own representation) are no longer applying for civil legal aid each year.

<sup>105</sup> Paras 725-727

<sup>106</sup> Para 728

<sup>107</sup> Para 708

<sup>108</sup> Para 730

<sup>109</sup> Para 731. Law Society and Professor Donald Hirsch, 'Priced out of justice? Means testing legal aid and making ends meet', 2018. See Annex 4, p14: available at <<https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/ministry-of-justice-laspo-part-1-post-implementation-review-law-society-response/>> accessed 7 May 2020

The MoJ took issue with this analysis, pointing out that the Minimum Income Standard<sup>110</sup> applied by Professor Hirsch does not have official status and includes expenditure on activities that some may not view as essential, such as the consumption of alcohol and gifts and celebrations.<sup>111</sup>

The PIR also noted further research by the Law Society and a submission by Women's Aid that argued that women were not proceeding with applications and were instead relying on 'litigation loans', turning to McKenzie Friends or opting to represent themselves.<sup>112</sup> In response the MoJ argued that the draft *Domestic Abuse Bill* will enhance the safety of victims of domestic violence. Referring to the 2017 Legal Problem and Resolution Survey, the MoJ also asserted that "as people access legal support and advice in different ways it is possible that some people, although not eligible for legal aid are still accessing the justice system."<sup>113</sup>

### 3.3 Capping the subject matter of dispute (SMOD) disregard at £100,000

Prior to LASPO, when individuals applied for civil legal aid in a case where a property was contested, the assessment of their financial eligibility disregarded the value of the contested assets. Where the legal aid sought would cover 'Controlled Work' and Family Mediation, the entire value of the contested asset was disregarded; in cases where it would cover representation, the amount which could be disregarded was capped at £100,000. Following LASPO, the £100,000 cap now applies to all forms of civil legal services, not just representation. The Coalition Government claimed that the policy would 'ensure that limited legal aid resources are not expended on those who own high value properties but instead are focussed on those most in need'.<sup>114</sup> An post-implementation assessment of the financial impact of the change was not possible as no information on the value of the contested assets in such cases is collected centrally.<sup>115</sup>

### 3.4 Removing legal aid in cases with 'borderline' prospects of success

The eligibility test for legal aid also includes an assessment of the merits of a case. The criteria include a determination of:

- the likelihood that the case will be successful in court (the 'prospects of success test');

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<sup>110</sup> For more information on the Minimum Income Standard, see: Joseph Rowntree Foundation, 'A Minimum Income Standard for the UK 2008-2018: continuity and change', 2 July 2018, available at <<https://www.jrf.org.uk/report/minimum-income-standard-uk-2018>> accessed 7 May 2020

<sup>111</sup> Para 731

<sup>112</sup> Paras 732-733

<sup>113</sup> Para 735

<sup>114</sup> Para 696

<sup>115</sup> Para 697

- whether the potential benefit to be gained from the provision of legal aid justifies the likely costs, such that a reasonable private paying individual would be prepared to start or continue the proceedings (the 'reasonable private paying individual test')
- whether the likely benefits of the proceedings to the applicant and the others justify the likely costs (the proportionality test).

Prior to 27 January 2014, applications that were subject to the prospects of success test had to have, in general, at least a 50% chance of success to receive legal aid funding for full representation. However, there was provision for certain cases with 'borderline' prospects of success to be funded. Regulations made under LASPO changed this, allowing legal aid in borderline cases only where necessary to prevent a breach of the applicant's Convention rights or of any enforceable EU rights to the provision of legal services. Following an ultimately unsuccessful legal challenge,<sup>116</sup> an additional exception was added. In cases with 'borderline' or 'marginal' (45-49%) prospects of success, funding may be allowed if the case is either:

- of overwhelming importance to the individual; or
- of significant wider public interest; or
- the substance of the case relates to a breach of Convention rights.

The policy revisions made in response to the litigation meant that the LASPO aim of significant savings has not been met by this change.<sup>117</sup> Neither has it been effective in discouraging 'unnecessary and adversarial litigation at the public expense'.<sup>118</sup>

Overall, the PIR found that the changes to the eligibility criteria have been successful in targeting legal aid at a smaller cohort of applicants. However the MoJ acknowledged submissions that this cohort is smaller than those individuals believed to be in need.<sup>119</sup> It promised a further review into the thresholds for legal aid entitlement, and their interaction with the wider criteria.<sup>120</sup>

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<sup>116</sup> *IS v The Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464

<sup>117</sup> Para 712

<sup>118</sup> Para 738

<sup>119</sup> Para 721

<sup>120</sup> Para 742

## 4. Fee changes in civil and family legal aid

Lawyers' work in civil and family cases is remunerated at hourly rates or a series of standard fees. These rates and fees vary depending on the type of case, the nature of the work and the venue of proceedings. Through regulations made under LASPO the Coalition Government reduced the fees paid to lawyers in civil and family matters by 10%. Fee enhancements – used to ensure the fees paid reflect factors such as the skill, competence, expertise and speed of the work, and the complexity of the case – were capped. The Coalition Government also sought to limit the instruction of QCs in family proceedings, taking the view that “such an expensive and specialised resource” should only be provided at public expense in complex, novel or exceptional cases which require that level of skill, expertise and experience.<sup>121</sup> A further change, implemented separately, was the limitation on remuneration for work during the pre-permission stage of judicial review.

The PIR concluded that these changes resulted in significant savings, estimated to amount to £110m in 2017-18.<sup>122</sup> This exceeds the expectations as set out in the relevant impact assessments.<sup>123</sup> The policies were also deemed to have been relatively successful in discouraging unnecessary and adversarial litigation at public expense.<sup>124</sup> However the MoJ acknowledged that it is difficult to assess the extent to which certain specific policies achieved these objectives. The removal of the 35% fee uplift in immigration and asylum appeals to the Upper Tribunal was one of a number of changes to immigration policy and appeals procedures.<sup>125</sup> Similarly the limits on judicial review fees for pre-permission work must be assessed in the wider context of changes to judicial review proceedings.<sup>126</sup>

The PIR noted concerns that the changes would dissuade young lawyers from choosing to specialise in publicly funded work. Evidence submitted to the PIR warned that low remuneration, coupled with high tuition fee debt, would serve as a barrier to entry to the profession.<sup>127</sup> Whilst accepting that the number of firms doing legally aided civil work had fallen by 32% overall, the MoJ argued that this was somewhat to be expected given the changes in scope set out in section 2 above.

LASPO's impact on geographical coverage was again raised in relation to fees. The Law Society's submission to the PIR spoke of 'advice deserts' caused by “almost one third of legal aid areas hav[ing] just one and – in some cases – zero law firms who provide housing advice which is available through legal aid.”<sup>128</sup> This was echoed by Refugee Action

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<sup>121</sup> Para 753

<sup>122</sup> Para 789

<sup>123</sup> Para 768. See the LAR and LAT Impact Assessments.

<sup>124</sup> Para 790

<sup>125</sup> Para 793

<sup>126</sup> Para 796

<sup>127</sup> Para 804

<sup>128</sup> Para 818

who warned that since 2005, 56% of firms specialising in immigration and asylum law have left the market, creating geographical gaps in legal aid provision.<sup>129</sup> The PIR was told the sparsity of legal aid providers was a particular problem in much of Wales.<sup>130</sup> In response the MoJ stated that geographical coverage of legal aid is regularly monitored by the Legal Aid Agency and that steps are taken to ensure that any potential gaps in provision are filled.<sup>131</sup> It argued that following the 2018 contracting round for legal aid contracts, there is effective coverage across England and Wales, with the exception of four housing and debt procurement areas and one immigration and asylum area. It denied the lack of provision in these areas was a result of LASPO.<sup>132</sup>

The PIR highlighted two other concerns relating to fee changes. The first was the increased demand on the not-for-profit (NFP) sector. The PIR heard that charities and advice centres are unable to ‘fill the gaps’ due to (a) these gaps being too big, (b) the third sectors’ own reliance on legal aid and (c) the fact other funding streams were drying up as cuts and austerity measures took effect.<sup>133</sup> In 2015 the Law Centres Network reported that one in six of its members had closed. Citizens Advice said its loss of 350 specialist advisors resulted in an 8% drop (approximately 85,500 people) in the number of clients receiving support with complex legal cases in the first three quarters of 2013-14.<sup>134</sup> However the PIR noted that NFP providers mostly work in social welfare and immigration law – areas most impacted by the legal aid scope changes. It argued that as the reduction in the total number of providers (45%) was similar to the reduction in the total value of work, the average income per provider has remained similar to pre-LASPO levels.<sup>135</sup>

The PIR also acknowledged concerns about the impact the fee changes have had on the quality of civil and family legal aid work. It was told that providers feel the need to take on more cases to make up for the fall in fees, risking a system that encourages the provision of insufficient, low-level support to a high volume of clients.<sup>136</sup> In response the MoJ pointed to the Legal Aid Agency peer review statistics, which it said suggests the quality of provision has broadly remained the same.<sup>137</sup>

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<sup>129</sup> Para 819

<sup>130</sup> Para 820

<sup>131</sup> Para 822

<sup>132</sup> *ibid*

<sup>133</sup> Para 823

<sup>134</sup> Para 825. See Citizens Advice Bureau, 2014, *Citizens Advice Submission to the Justice Select Committee inquiry into the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, available at <[https://www.citizensadvice.org.uk/global/migrated\\_documents/corporate/citizens-advice-submission-to-jsc-on-impact-of-laspo-april-2014.pdf](https://www.citizensadvice.org.uk/global/migrated_documents/corporate/citizens-advice-submission-to-jsc-on-impact-of-laspo-april-2014.pdf)> accessed 7 May 2020

<sup>135</sup> Para 826

<sup>136</sup> Para 828

<sup>137</sup> Para 830

## 5. Changes to criminal legal aid

The LASPO reforms to criminal legal focussed mainly on the remuneration of legal aid lawyers. In addition, some matters were removed from scope and there were changes to the eligibility criteria.

The PIR found that, as a whole, the changes to the fees paid to advocates in criminal proceedings had ‘delivered significant savings’ for the legal aid scheme<sup>138</sup> and represented value for money for the taxpayer.<sup>139</sup> The MoJ dismissed concerns that the reforms may not represent value for money over a longer period of time; it asserted that more research is necessary on whether the changes have caused long-term sustainability issues for the provision of legal aid services.<sup>140</sup>

### 5.1 Effect of remuneration changes

The PIR estimated that the fee changes saved £140m per annum, thought there was “some variability between the policies in terms of the magnitude of the savings”.<sup>141</sup>

The PIR addressed this issue in detail as it had heard evidence of an aging workforce and of difficulties in recruiting and retaining lawyers to do legal aid work.<sup>142</sup> It first referred to the finding of the Jeffrey Review that the criminal legal aid ‘market’ is oversupplied<sup>143</sup> and to analysis completed by Otterburn Legal Consulting that it is falling volumes of work that ‘pose the most potent challenge to the financial viability of criminal legal aid’.<sup>144</sup>

The PIR also acknowledged arguments that fee changes have made the practice of criminal law financially unattractive or even unviable. It referred to the Bar Council’s warning that fees for criminal legal aid work are ‘unsustainably low’<sup>145</sup> and the Law Society’s evidence that solicitors are turning away from work funded by criminal legal aid.<sup>146</sup> It quoted evidence submitted by the Criminal Law Solicitors’ Association that those who work in the magistrates’ courts ‘have no time to breathe’ to meet the volume of work needed to sustain income.<sup>147</sup>

#### Box 4: Legal aid provider

A ‘legal aid provider’ may be a large firm with several offices around the jurisdiction, a single office location or a self-employed barrister. The term ‘provider’ was used throughout the PIR to refer collectively to solicitor offices and self-employed barristers.

<sup>138</sup> Para 939

<sup>139</sup> Para 942

<sup>140</sup> Para 943

<sup>141</sup> Para 890

<sup>142</sup> Para 946

<sup>143</sup> Para 947

<sup>144</sup> Para 948

<sup>145</sup> Para 949

<sup>146</sup> Para 950

<sup>147</sup> *ibid*

The PIR cautioned that the reduction in legal aid providers may not wholly be a consequence of law firms or lawyers leaving the market. It pointed out that mergers of firms of solicitors could also reduce numbers.

The PIR looked at the impact of the reforms on providers according to the amount of legal aid work they do. It grouped providers based on their legal aid income in 2012-13 and tracked to see how many were still completing legal aid work in 2017-18. It found the providers that completed a large amount of legally aided criminal work were more likely to still be completing legally aided criminal work following LASPO, compared to those that completed smaller amounts of work.<sup>148</sup>

In terms of attracting future generations of lawyers to undertake legal aid work, the MoJ said more research is required regarding the long-term future for the solicitor and barrister professions.<sup>149</sup> It highlighted how the recent increase in funding of the Advocates Graduated Fee Scheme (by £23m against the 2016-17 spend) was focussed on more junior advocates. It also pointed to its announcement of a fundamental review of all criminal legal aid fee schemes.

The PIR summarised evidence submitted by Young Legal Aid Lawyers (YLAL), the Law Society and the Criminal Bar Association that argued that the LASPO reforms have had the effect of turning future lawyers away from criminal legal aid work. YLAL had told the review that the inability of many criminal lawyers to offer training contracts and pupillages to newly qualified solicitors and barristers created barriers to entry to the professions.<sup>150</sup> The Law Society pointed out that the average age of the criminal duty solicitor is now 47, and in many regions of England and Wales the average age is higher.<sup>151</sup> In its evidence to the review the Criminal Bar Association labelled the situation a 'recruitment and retention crisis', with the best advocates leaving legal aid work for more lucrative careers and only those from privileged backgrounds able to sustain themselves on legal aid rates.<sup>152</sup>

The PIR noted the Justice Committee's warning that 'the current difficulties in recruitment to the Criminal Bar could potentially have a negative impact on future recruitment to, and diversity within, the judiciary – in particular, for judicial office holders in the criminal courts.'<sup>153</sup> It also acknowledged evidence from the Legal Aid Practitioners Group that fee changes have prompted lawyers to apply for judicial posts earlier than was the norm, with the consequence being that 'the void of the next generation of criminal legal aid lawyers is deepening'.<sup>154</sup>

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<sup>148</sup> Para 955

<sup>149</sup> Para 960

<sup>150</sup> Para 961

<sup>151</sup> Para 962

<sup>152</sup> Para 963

<sup>153</sup> Para 964. See Justice Committee, *Review into Criminal Legal Aid, 2017-19*, HC 1069, 26 July 2018, available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/1069/106902.htm>, accessed 7 May 2020

<sup>154</sup> Para 965

In terms of geographic coverage of criminal legal aid provision, the PIR noted the Law Society's warning that in many areas (Dorset, Somerset, Wiltshire, Worcestershire, Mid Wales and West Wales) over 60% of duty solicitors are over 50 years old and that their retirement will create gaps.<sup>155</sup> In response the MoJ argued that the Legal Aid Agency monitors the availability of criminal legal aid provision on an ongoing basis and takes action to ensure there is ongoing availability of criminal legal advice for the public.<sup>156</sup>

## 5.2 Prison law scope changes

The Legal Aid Transformation (LAT) tranche of reforms removed various areas of prison law from the scope of legal aid. Following the *Criminal Legal Aid (General) (Amendment) Regulations 2013*, legal aid became available in the following four areas only:

- Proceedings involving the determination of a criminal charge for the purposes of Article 6(1) of the ECHR;
- All proceedings before the Parole Board, where the Parole Board has the power to direct the individual's release;
- Advice and Assistance in relation to sentence calculation where the date of release or the date of eligibility for consideration by the Parole Board for a direction to be released, is disputed;
- Disciplinary cases where the governor has given permission for legal representation after successful application of the Tarrant principles.<sup>157</sup>

Legal aid for advice and assistance in all treatment matters<sup>158</sup> was removed, as they were deemed to be not of sufficient priority to justify the use of public funds. The Coalition Government said prisoners ought to make use of the internal prison requests and complaints systems, rather than relying on legal aid. Dissatisfied prisoners could refer complaints to the Prisons and Probation Ombudsman or could speak to the local Independent Monitoring Board.

However in April 2017 the Court of Appeal gave its judgment in a legal challenge brought by the Howard League for Penal Reform and the Prisoners' Advice Service.<sup>159</sup> It found the removal of legal aid from three of areas of prison law had led to a system that was inherently unfair, creating an unacceptably high risk of unlawful decision making. These categories were:

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<sup>155</sup> Para 968

<sup>156</sup> Para 969

<sup>157</sup> The Tarrant principles originate from *R v Secretary of State for the Home Department ex parte Tarrant* [1985] 1 QB 251. The court set out six considerations of the conditions under which a prisoner facing internal disciplinary proceedings should be given access to legal representation: (i) the severity of the charge and potential penalty; (ii) any points of law arising; (iii) capacity of the prisoner; (iv) procedural difficulties; (v) speed; and (vi) fairness.

<sup>158</sup> Treatment cases covered a broad remit, such as those concerning prison conditions, discrimination, compassionate release and others.

<sup>159</sup> *The Howard League for Penal Reform and Prisoners' Advice Service v the Lord Chancellor* [2017] EWCA Civ 244

- Pre-tariff review hearings and other advice cases before the Parole Board (involving life or other indeterminate sentenced prisoners where the Parole Board does not have the power to direct release but advises the Secretary of State);
- Category A prisoner reviews;
- Placement in Close Supervision Centres.

Following the judgment, the scope of legal aid was extended to once again cover these three categories. Criminal legal aid funding was also made available for advice and assistance regarding a prisoner's placement in a separation centre within a prison.

Further alterations were made in June 2018. Criminal legal aid funding was extended to restricted status prisoner reviews in recognition of the close similarities in the regimes governing the detention of Category A and restricted status prisoners. Legal aid was also made available for the review of a young offender's Category A or restricted status.

In addition, during the legal challenge brought by the Howard League for Penal Reform and Prisoners' Advice Service, the then Lord Chancellor accepted that exceptional case funding would, in principle, be available as a 'safety net' for limited areas of prison law, subject to the various tests. These categories of prison law were:

- Applications for places on mother and baby units (accepted in October 2015);
- Licence conditions (accepted in October 2015);
- Resettlement cases concerning a prisoner's accommodation or case following release which engage Article 8 of the ECHR (accepted in April 2016);
- Decisions concerning segregation (accepted in December 2016).

### 5.3 Eligibility changes

Prior to the LAT reforms, all defendants in Crown Court proceedings were eligible for legal aid. The sole purpose of means testing ahead of Crown Court trial was to determine the level of contribution required by the defendant, if any at all. The LAT reforms introduced an upper eligibility threshold for the first time. Any defendant with a disposable household income of £37,500 or more would now be ineligible for legal aid. The Coalition Government took the view that the taxpayer should no longer routinely fund legal aid costs for people who can afford to pay for their own defence. Those whose income was above the threshold but could not in fact afford to pay for the cost of their case privately could apply for a hardship review in order to access legal aid.

The LAR and LAT reforms also changed the ability of an acquitted defendant to recoup the costs of their representation. Before LAR, acquitted defendants who paid privately for legal costs were entitled to be refunded these costs out of 'central funds' following a defendant's costs order (DCO). The LAR reforms removed this entitlement. As the subsequent LAT reforms resulted in there being a group of people

ineligible for criminal legal aid, a further change was made to the rules on acquitted defendants recouping their costs. After LAT, acquitted defendants who paid privately for representation after applying for and being refused legal aid were again entitled to a DCO, but this was capped at legal aid rates (thus only going some way to meet the costs of their lawyers' private fees). Acquitted defendants who paid privately rather than apply for legal aid continued to be ineligible for a DCO.

The PIR found the measures relating to DCOs to have been effective in reducing expenditure, though acknowledged data limitations.<sup>160</sup> It pointed out that central funds expenditure had fallen by £53m since 2011-12 – from £101m to £48m.<sup>161</sup> It claimed the policy was successful in targeting legal aid at those most in need of it.<sup>162</sup>

The PIR also saw the introduction of the £37,500 disposable income threshold for criminal legal aid as a success.<sup>163</sup> It asserted that the introduction of the threshold has not significantly impacted on the volume of Crown Court defendants representing themselves.<sup>164</sup> It also pointed to the relatively high proportion of applications for a hardship review that were successful (69%) and affirmed that defendants denied legal aid can make fresh applications should their circumstances change.<sup>165</sup> However the PIR decided that further consideration is required to ensure that the means test serves to fairly allocate legal aid.<sup>166</sup>

The PIR recognised the disposable income threshold had created a perception of inequality for acquitted defendants who paid privately.<sup>167</sup> It referred to submissions made during the evidence gathering phase that the shortfall between a DCO capped at legal aid rates and the full cost of an acquitted defendant's private fees amounted to an "innocence tax".<sup>168</sup> It noted the claim made by Nigel Evans MP that he had lost £130,000 after funding his successful defence against charges of rape and sexual assault.<sup>169</sup> The PIR concluded that further consideration is required to determine the most effective method of testing an individual's suitability for publicly funded representation.<sup>170</sup>

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<sup>160</sup> Para 1051

<sup>161</sup> Para 1044

<sup>162</sup> Para 1056

<sup>163</sup> Para 1057

<sup>164</sup> Para 1061

<sup>165</sup> Para 1063

<sup>166</sup> Para 1070

<sup>167</sup> Para 1057

<sup>168</sup> Para 1071

<sup>169</sup> Para 1074

<sup>170</sup> Para 1075

## 6. Changes to experts' fees

The Legal Aid Agency does not contract directly with expert witnesses. Instead, expert witnesses contract with solicitors and the costs incurred by the solicitors for engaging expert evidence are included in the bill they present to the LAA for disbursements (alongside travel costs and the other 'out of pocket' expenses of the case). Solicitors can claim payments on account for all expert fees.

The LAR reforms codified guideline hourly expert rates and fees and reduced them by 10%. These rates apply to civil, family and criminal cases, and can only be exceeded in exceptional circumstances (such as when the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence) by seeking prior authority from the LAA.<sup>171</sup>

The LAT reforms reduced the fees paid to most experts by 20%, with the following exceptions:

- Neurologists, neuroradiologists and neonatologists in clinical negligence cases;
- Surveyors in housing disrepair cases;
- Interpreters.

The PIR deemed these changes to have met the LASPO objective of making significant savings to the cost of the scheme. It estimated that they have saved £30m per annum, in keeping with the combined savings estimated in the LAR and LAT IAs.<sup>172</sup>

The PIR pointed out that this reduction in the total spend on experts is driven in part by the changing case mix that has occurred in civil and family legal aid. It explained that the largest declines in expert spend have been in the areas of law where the scope for legal aid was largely reduced. Moreover, the use of experts also dropped in family cases due to the family law reforms of 2014.<sup>173</sup>

The PIR was unable to come to a firm conclusion as to the efficiency of these changes. Because expert witnesses contract with solicitors, who are in turn reimbursed by the LAA, there is a shortage of centrally held empirical evidence regarding the availability and timeliness of expert witnesses.<sup>174</sup>

The PIR highlighted academic studies and reports by the Bar Council and Resolution that claimed the fee reductions have led to an inefficiently low level of expert advice.<sup>175</sup> These warned that experts are unwilling to supply advice at the new legal aid rates. The PIR also quoted Sir Andrew McFarlane, President of the High Court Family Division, who said that

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<sup>171</sup> The rates are now set out in the *Civil Legal Aid (Remuneration) Regulations 2013*, as amended, and the *Criminal Legal Aid (Remuneration) Regulations 2013*, as amended.

<sup>172</sup> Para 1086

<sup>173</sup> Para 1090

<sup>174</sup> Para 1097

<sup>175</sup> Para 1098

courts need access to high-quality expertise to determine a child's future. He said that the 'acute problem' in finding experts may have been exacerbated by changes to legal aid fees.<sup>176</sup> The PIR also acknowledged the Bond Solon 2017 survey of expert witnesses, which indicated that 69% of its sample would not continue to provide expert evidence if rates were reduced further.<sup>177</sup> It quoted from the evidence provided by the Association of Personal Injury lawyers:

The rates allowed for expert fees remain a very real issue in legal aid cases. The hourly rate for an obstetrician to write a report in a legal aid case is £135, and for a midwife, it is £90. Unless an expert is prepared to write a report for that fee, as the solicitor already has an existing relationship with them and will provide other work to them for a reasonable rate, it is unlikely that the report will be of high quality.<sup>178</sup>

The MoJ defended the reductions, asserting that in order to ensure value for money the fees payable to experts under legal aid needed to be aligned more closely with those paid elsewhere.<sup>179</sup> It argued that variation in the rates paid shows that it already recognises that in some specific areas, in order to secure the necessary expertise a higher rate must be paid.<sup>180</sup> It also pointed out that solicitors can apply for higher expert fees under exceptional circumstances, such as when there is a significant concern of lack of expert supply.<sup>181</sup>

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<sup>176</sup> Para 1099

<sup>177</sup> *ibid*

<sup>178</sup> Para 1100

<sup>179</sup> Para 1103

<sup>180</sup> Para 1104

<sup>181</sup> Para 1105

## 7. The creation of the Legal Aid Agency

The Legal Aid Agency was created to replace the Legal Services Commission (LSC). Under the *Access to Justice Act 1999*, responsibilities and powers for the administration of legal aid had been divided between the LSC and the Lord Chancellor. The Coalition Government believed the LSC to be insufficiently accountable. As an executive non-departmental public body, it operated at arm's length from the ministers who remained accountable for its performance. Sir Ian Magee's review of the delivery and governance of the legal aid system, commissioned by the Coalition Government, highlighted "insufficiently robust" governance arrangements between the MoJ and LSC and a lack of clarity in the division of functions. As part of the LAR package of reforms it was announced that the LSC would be replaced by a new executive agency of the MoJ, the Legal Aid Agency (LAA).

The relevant impact assessment outlined the objectives for the creation of the LAA. These objectives were:

- Budgetary objectives, which included tightening financial control of the legal aid budget;
- Objectives relating to boundaries between the Ministry of Justice and the LAA, including ensuring that case-by-case funding decisions remained at arm's length from ministers and that accountability for policy decisions would be improved.<sup>182</sup>

LASPO also provided for the creation of a new statutory office holder, the Director of Legal Aid Casework (DLAC). The DLAC is a civil servant designated by the Lord Chancellor who has responsibility for making determinations on legal aid in individual cases.

During the evidence gathering stage of the PIR, the MoJ heard criticism that the DLAC is too close to ministers.<sup>183</sup> The PIR noted the findings of the final report of the Bach Commission, published in September 2017, which stated that the LAA's closer relationship to Government has led to the "blurring of boundaries between Whitehall and the administration of the legal aid scheme".<sup>184</sup> In response the MoJ argued that the LAA is accountable to Parliament, giving the examples of when the LAA CEO appeared before the Public Accounts Committee in 2015 and wrote to the Justice Committee in 2018.<sup>185</sup>

In terms of the LAA's relationship with providers of legal services, a number of concerns were raised regarding its decision-making processes. For example, the Civil Justice Council highlighted the high level of successful appeals against LAA decisions on granting legal aid funding (acknowledged by the MoJ but with the caveat that applicants

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<sup>182</sup> Para 1114

<sup>183</sup> Para 1118

<sup>184</sup> *ibid*

<sup>185</sup> Para 1119

provided more information at the appeal stage than they had in the initial application).<sup>186</sup>

The PIR also pointed to the DLAC's annual report for 2017-18 which stated that 100% of applications for criminal legal aid were processed in two working days, 97% of applications for civil legal aid were processed in 15 working days (except in the most complex cases) and 98% of complete, accurate bills were paid in 20 working days.<sup>187</sup>

One other significant difference between the LAA and its predecessor was raised with the MoJ: the loss of the duty on the LSC to consider access to justice. The PIR quoted a representative from the Legal Aid Practitioners Group:

“the role of the LAA is that of an operational deliverer. The LSC had a remit to deliver access to justice. The body providing the legal aid should have an obligation to provide [access to justice]. People are not aware of when legal aid is available.”<sup>188</sup>

In response the MoJ argued that it is important to note that the duty to maintain access to justice remains and rests with the Lord Chancellor.<sup>189</sup>

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<sup>186</sup> Para 1131

<sup>187</sup> Para 1135. Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2017-18*, HC 1139, July 2018, p 7, available at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/718467/dlac-annual-report-2017-18.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718467/dlac-annual-report-2017-18.pdf)> accessed 7 May 2020

<sup>188</sup> Para 1136

<sup>189</sup> Para 1137

## 8. Reaction to the review

### 8.1 Justice Committee

Bob Neill, chair of the Justice Committee, described the publication of the review as “a critical moment in the future of legal support in the justice system” and “well overdue”.<sup>190</sup> He reiterated the Committee’s insistence on the need for early intervention to help people as soon as possible after they encounter legal problems. Whilst he welcomed some of the proposals in the PIR and action plan, he warned that the numerous proposals for further reviews and research “risked being seen as ‘kicking the can down the road’.”

Mr Neill cautioned that the Committee wanted clarity on what the MoJ meant by references in the PIR to ‘legal support’; he felt this term suggested “a hand-holding approach rather than providing actual legal advice.” He also reminded the MoJ that raising awareness about access to justice is not enough in itself: “we have heard there’s already a desperate lack of capacity in advice centres so in this case it’s hard to see how simply ‘raising awareness’ will help.”

### 8.2 Bar Council

The Bar Council expressed disappointment with the PIR. It claimed the review failed to address the five priorities it had identified as crucial to ‘reverse the decline in legal aid provision over almost six years’:

- A reversal of the “innocence tax” in criminal courts;
- The reintroduction of legal aid in family proceedings for respondents facing allegations of domestic abuse and in private law children proceedings;
- The re-introduction of a legal help scheme in welfare benefit cases;
- A relaxation of the exceptional case funding criteria for coroners’ inquests where the death has occurred in the care of the state and the state is providing representation for one or more interested person; and
- Introduction of a simplified and more generous means testing calculation for legal aid.<sup>191</sup>

Richard Atkins QC, Chair of the Bar Council, described the PIR as a “wasted opportunity” offering “little of substance to ease the impact of LASPO on vulnerable individuals seeking justice.”<sup>192</sup>

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<sup>190</sup> Justice Committee press release, ‘Chair comments on MoJ LASPO review’, 7 February 2019, available at <<https://committees.parliament.uk/committee/102/justice-committee/news/138031/chair-comments-on-moj-laspo-review/>> accessed 7 May 2020

<sup>191</sup> Bar Council press release, ‘LASPO Review: Bar Council reaction’, 7 February 2019, available at <<https://www.barcouncil.org.uk/resource/laspo-review--bar-council-reaction.html>> accessed 7 May 2020

<sup>192</sup> *ibid*

## 8.3 Law Society

The Law Society, on the other hand, greeted the PIR as a 'shift in the right direction'. Its president Christina Blacklaws said:

This post-implementation evaluation is long-awaited and comprehensive and represents the first time in over twenty years that we have seen wide-ranging government proposals to improve the system rather than to make further cuts.

[...]

Successive governments have restricted access to justice and the most severe constraints were implemented in April 2013 when - as part of the LASPO reforms - hundreds of thousands of people became ineligible for legal aid. The sweeping cuts have had a detrimental impact on wider society. They have led to growing numbers of people representing themselves in court and increased pressure on wider public services.

[...]

The proposals reflect a considerable number of the recommendations we put forward. The Ministry has accepted the case for changes in relation to the legal aid means test, exceptional case funding and early legal advice, and has committed to further work as to what those changes should look like. There are also to be specific changes immediately in relation to migrant children, special guardianship orders and the telephone gateway for discrimination, debt and special educational needs. There is much to be welcomed.<sup>193</sup>

Ms Blacklaws urged the government to amend the means test thresholds, asserting that current levels prevent those in poverty from accessing justice. She also warned that the medium-term viability of the legal aid system was dependent on the improvement of solicitors' remuneration rates.

## 8.4 Young Legal Aid Lawyers

Young Legal Aid Lawyers, a group of barristers and solicitors committed to practising in areas of law that have traditionally been publicly funded, also welcomed the PIR. Its submission to the review, and its views on the future provision of legal aid work, was referred to by the MoJ throughout the PIR. YLAL expressed its hope that the review would "mark a turning point in the government's policy on legal aid."<sup>194</sup> It highlighted the MoJ's commitment to reinstate access to face-to-face advice in relation to debt, discrimination and special educational needs by removing the mandatory telephone gateway for these areas.

Like the Justice Committee, YLAL's response to the PIR stressed the importance of early access to legal advice. YLAL welcomed the MoJ's promise to run a pilot scheme to assess the impact of early legal advice

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<sup>193</sup> Law Society press release, 'Crucial government review signals reduction in hurdles to accessing everyday justice', 7 February 2019, available at <<https://www.lawsociety.org.uk/news/press-releases/crucial-government-review-signals-reduction>> accessed 7 May 2020

<sup>194</sup> Young Legal Aid Lawyers press release, 'Statement on LASPO review', 7 February 2019, available at <<http://www.younglegalaidlawyers.org/LASPO-Feb19>> accessed 7 May 2020

and the cost savings that early advice can bring to other parts of the state.

## 8.5 Legal Aid Action Group

In his detailed response to the PIR, Steve Hynes, the former director of the Legal Action Group (LAG), studied the review's analysis of how LASPO reduced the scope of civil legal aid.<sup>195</sup> Starting with the LASPO impact assessments on the likely effects of the proposed scope changes, he took issue with the MoJ's adoption of figures from 2012/13 as a baseline. LAG had previously argued that the decline in the number of legal aid cases started with the publication in November 2010 of the proposals that would shape LASPO's provisions and Mr Hynes maintained that the MoJ use of figures from a later year was misleading.

Mr Hynes argued there was a further methodological issue with the PIR, namely that the MoJ is unaware of the scale of the demand for legal advice. He said that no large-scale research had been conducted on demand since the Legal Services Research Centre was abolished in April 2013:

By not having this, the MoJ is acting like the captain of a warship scanning the horizon for the enemy through the wrong end of a telescope: the scale of the problem looks much smaller and more distant than it actually is.<sup>196</sup>

Mr Hynes concluded that the changes to the scope of civil legal aid resulted in a total net increase of 6% against predicted savings, which he again stressed were based on 'shifting of the statistical goalposts'.<sup>197</sup>

Addressing the changes to criminal legal aid, Mr Hynes noted the absence of any detailed discussion in the PIR of the long-running dispute between the MoJ and criminal lawyers over the LAT changes that ended with the government abandoning plans for 'dual contracting' and a further reduction of solicitors' fees.<sup>198</sup> He said the PIR 'rather skirts around what I would argue is the main difference between the civil and criminal schemes: the ability of providers to fight off changes to the system.'<sup>199</sup> Referring to the further review of fees paid for criminal legal aid work due to be completed sometime this year, Mr Hynes suggested that the mood amongst practitioners is such that the situation may well become critical before its results are published.<sup>200</sup>

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<sup>195</sup> *Legal Action*, 'LASPO review: revealing the damage', February 2019, available at <<https://www.lag.org.uk/article/206068/laspo-review--revealing-the-damage>> accessed 7 May 2020

<sup>196</sup> *ibid*

<sup>197</sup> *ibid*

<sup>198</sup> See the Library briefing paper '[Changes to criminal legal aid](#)', SN06628, 12 May 2016

<sup>199</sup> *Legal Action*, 'LASPO review: effects on the profession', March 2019, available at <<https://www.lag.org.uk/?id=206168&fromsearch=true#iosfirsthighlight>> accessed 7 May 2020

<sup>200</sup> *ibid*

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