



## ACCESS DENIED?

**LASPO four years on:  
a Law Society review**

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JUNE 2017

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## FOREWORD BY THE PRESIDENT

It is now five years since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) became law, and four years since its measures came into force.

LASPO was an ambitious piece of legislation, overhauling the legal aid system alongside a range of other reforms to the justice system. Many of the changes were controversial, and generated often heated opposition from social justice organisations and the legal sector, including the Law Society.

The Government has said that the reforms would take 3-5 years to become established and stable, so this is the perfect time to look back on the Act and assess its impact.

This report assesses the changes introduced to legal aid under the Act.

It will come as no surprise that, overall, our conclusions regarding the changes to legal aid are not positive. As part of its review, we believe the government needs to consider three areas of concern, which we have highlighted in our conclusions:

- access to justice;
- the impact on the wider justice system; and
- knock-on costs for the public purse.

If these issues are not addressed, we fear that they will worsen and generate additional problems for the future.

Starting first with access to justice, throughout the passage of LASPO, the Law Society argued time and again that the bill would have a corrosive impact on access to justice. The evidence now available shows that our fears were justified.

Large numbers of people, including children and those on low incomes, are now excluded from whole areas of free or subsidised legal advice – valuable advice which they cannot realistically be expected to afford themselves.

Changes to the means test have been counter-intuitive, meaning some of those who are on benefits are perversely deemed able to pay for their own advice.

And for the few who are still eligible, availability of legal aid is drying up, resulting in legal aid deserts where advice is either non-existent or minimal.

Arguments about the access to justice implications of LASPO have been well made across the legal sector and beyond. However, it is clear that the Act has had a wider impact, increasing pressure on the justice system as a whole.

The dramatic increase of litigants in person – people who represent themselves in court – following LASPO has created a severe strain on the court system. Often forced to represent themselves due to a lack of legal aid, litigants in person can struggle to understand court procedures and their legal entitlements, and cases involving them take longer to resolve.

This doesn't just create bad outcomes for the litigant, but it can be a huge burden on court finances and resources – and ultimately the public purse.

The reduction of free or subsidised legal advice can also increase the burden on public services. A lack of early legal advice can cause relatively minor problems to escalate, creating health, social and financial problems, and put pressure on public services.

To use an example, in housing law legal aid is still available to defend possession proceedings – but only where loss of a home is imminent. Free, and early, legal advice could address the issue before getting to this stage.

This situation is not sustainable. We welcomed the previous government’s announcement of a review into LASPO, and we hope that this opportunity to address some of the adverse consequences of the Act is taken.

We also welcomed moves by the last government to update the wider justice system through its court modernisation programme – although we would stress that solicitors must still play a key role in any modernised system, to ensure that the full benefits of more efficient processes can be realised and that access to justice is not further undermined.

A number of areas for reform have been suggested in this report, from Exceptional Case Funding to improved promotion of available services, and particularly early advice.

We look forward to working with the government to ensure the legal aid system is effective, efficient and provides justice for those who most need it.



**Robert Bourns**

President of the Law Society of England and Wales

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## INTRODUCTION

Four years ago, the then government implemented the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

The reforms set out in Part 1 of the Act made the most significant changes to legal aid since its introduction. LASPO introduced changes to the scope, eligibility and the rates paid for work, and resulted in significant cuts to legal aid spend.

The government argued that this was necessary given the state of the economy and public expenditure. The Law Society vocally opposed many of these changes. We saw them as damaging to the very foundation of our justice system. We made a case for the need for lawyers in the justice system, and of the need for legal aid to ensure that people are able to get legal help when they need it.

We continue to make these arguments.

The previous government announced that it would undertake a review of both Parts 1 and 2 of LASPO, and would submit a post-legislative memorandum to the Justice Select Committee setting out the wider changes which have affected the legal aid scheme.

This document gives an overview of the Law Society's key areas of concern regarding the impact of changes to civil legal aid, introduced in Part 1 of the Act.

We focus on four key consequences of the legislation:

- 1. Legal aid is no longer available for those who need it**
- 2. Those eligible for legal aid find it hard to access it**
- 3. Wide gaps in provision are not being addressed**
- 4. LASPO has had a wider and detrimental impact on the state and society**



## 1. LEGAL AID IS NO LONGER AVAILABLE FOR THOSE WHO NEED IT

Legal aid is a vital part of a fair and functioning justice system. It makes sure that a person's access to justice does not depend on their ability to pay, and that those who need access to the courts to settle their disputes are assured of that right.

Until 2012, legal aid was available for almost all areas of law, subject to specified exceptions. LASPO Part 1 changed the system, transforming it overnight to a system focusing on a much smaller and more specific list of legal areas which are eligible (or in scope) for legal aid.

Areas removed from scope included private family law, such as divorce and custody battles; most clinical negligence cases; most employment law, non-asylum immigration law, where the person is not detained; some debt and housing cases, and most welfare benefit issues.

In legal areas that are now no longer in scope, people now have a stark choice: to pay for their own legal advice, represent themselves, or be excluded from the justice system altogether.

The government stated that under this new system, legal aid would be targeted at those most in need.<sup>1</sup> In reality, the government's reforms have resulted in vulnerable groups finding themselves excluded from free legal advice. Often, this is because the level of need arises from the nature of the client, rather than the category of law involved. Those now excluded include children, those with mental health issues, and people with low levels of literacy and numeracy. As

a result of changes to the means test, there are now many people on low incomes who find they are not financially eligible for legal aid or cannot afford to pay the required contributions.

### Children are adversely affected

LASPO has, both directly and indirectly, had a negative impact on children and has resulted in increased difficulty for children and their representatives to access legal advice and representation, despite government assurances during the passage of LASPO that children would be protected. Lord McNally, the then Minister of State for justice, stated:

*"As far as possible, our intention is that, where children are involved, legal aid will still be provided."*<sup>2</sup>

This has not happened. Alongside the passage of the Bill, Ministry of Justice data released under a Freedom of Information request estimated that 75,000 children and young people (including 6,000 children under 18) would lose entitlement to legal aid each year as a result of LASPO.<sup>3</sup>

This situation was condemned by the Joint Committee on Human Rights in March 2015, which concluded that the reforms to civil legal aid were not working, and called on *'...a new government of whatever make-up to look again at these reforms and to undo some of the harm they have caused to children.'*<sup>4</sup> To date, the negative impact on children has not been addressed by the government.

1 Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales*, (November 2010)

2 Official Report, 7/7/11; col. 343 – Parliamentary Question: [www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110621/debtext/110621-0001.htm](http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110621/debtext/110621-0001.htm)

3 Figures supplied to JustRights by MOJ on 10/10/11 in response to a Freedom of Information request: [http://justrights.org.uk/sites/default/files/Legal\\_Aid\\_-\\_Child\\_Protection\\_Implications\\_sept\\_2013\\_FINAL.pdf](http://justrights.org.uk/sites/default/files/Legal_Aid_-_Child_Protection_Implications_sept_2013_FINAL.pdf)

4 JCHR: *The UK's Compliance with the UN Convention on the Rights of the Child*, (March 2015) paragraph 118

## a) Children are directly affected by LASPO

For lone children, the impact of LASPO is direct. Those affected by a lack of legal aid provision include:

- children living in unofficial private fostering arrangements, often under the ‘care’ of exploitative adults
- children in cross border adoption arrangements
- children who have been trafficked, but are not officially recognised as such
- children with unresolved immigration issues following the death of a parent or family break up
- stateless children born in the UK without having their status regularised.<sup>5</sup>

Migrant children are clearly disproportionately affected, primarily due to LASPO abolishing legal aid for most non-asylum immigration issues. The Children’s Society puts the number of children affected as 3,600 currently in local authority care, and 9,000 to 12,000 living in private fostering arrangements.

Their lack of access to legal aid means that these children would, in theory, be forced to represent themselves. As highlighted by the children’s charity, Coram, for children who have been trafficked or otherwise separated from their families *‘representing themselves is often not possible due to [their] young age, language barriers and significant vulnerabilities, and the extreme complexity of immigration law and the immigration rules’*. Coram has also explained that, where it has been able to identify the legal issues in a case, the child involved was unable to act on that advice.<sup>6</sup>

Under Article 6 of the European Convention on Human Rights (ECHR), children – like all of us – have the right to a fair trial. The denial of legal aid risks breaching this right. Children are not able to represent themselves in courts as they cannot be expected to have the skills or knowledge needed to navigate the system unaided or to make points of law.

Exceptional case funding, which we discuss further in section 3, was introduced as part of LASPO for those instances when a failure to provide legal services would be in breach of an individual’s Convention rights, or other enforceable EU rights relating to provision of legal services.<sup>7</sup>

We believe that the government should update the guidance for exceptional case funding to reflect the fact that without legal advice, children are likely to be subject to a breach of their rights under ECHR.

### Recommendation 1:

The government should update exceptional case funding guidance to reflect the right of children to access legal aid.

<sup>5</sup> From The Children’s Society: *Cut off From Justice – The impact of excluding separated migrant children from legal aid* (June 2015) [http://www.childrensociety.org.uk/sites/default/files/LegalAid\\_Full\\_0.pdf](http://www.childrensociety.org.uk/sites/default/files/LegalAid_Full_0.pdf)

<sup>6</sup> House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012*, (Eighth Report of Session 2014-15) paragraph 57 <https://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31106.htm#a12>

<sup>7</sup> Legal Aid, *Sentencing and Punishment of Offenders Act 2012* <http://www.legislation.gov.uk/ukpga/2012/10/enacted>

## b) Children are indirectly affected by LASPO

Private family law cases were placed outside the scope of legal aid, except where there is clear evidence of domestic abuse or child abuse. In this instance, children and young people are most likely to be affected indirectly as dependants of parties involved in litigation.

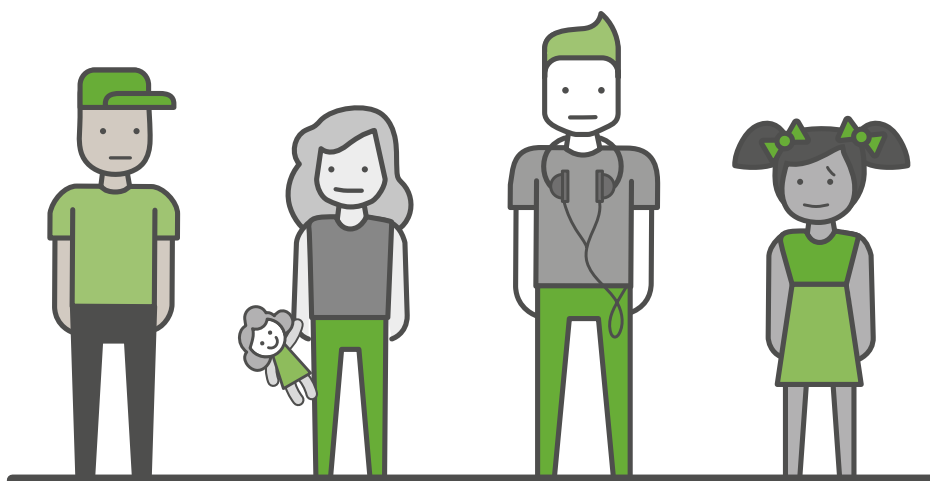
These cases involve fundamental issues affecting the lives of children:

- who they will live with
- who will have parental responsibility for them
- whether they will have contact with both parents and/or other family members
- their financial support and standard of living.

All these issues can have a major impact on a child's life. If financial support is not agreed, a child might spend the rest of their life in poverty. If contact arrangements are not resolved, they might grow up never having contact with one or both parents.

The Joint Committee on Human Rights noted that there has been a reduction of more than two thirds in the number of children granted legal aid where their parents have divorced or separated.<sup>8</sup>

The National Audit Office report on civil legal aid changes found a 22% rise in the number of private family law cases involving children where neither party was represented and a corresponding fall in those where both were represented.<sup>9 10</sup> This means that both parents would be representing themselves, and, as we explain in more detail in section 4, litigants in person often struggle to understand their legal entitlements and the complexities of court procedures. This can directly affect the likelihood of a positive outcome for the children involved.



8 JCHR: *The UK's Compliance with the UN Convention on the Rights of the Child*, (March 2015) paragraph 105 <https://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/144/144.pdf>

9 National Audit Office, *Implementing reforms to civil legal aid HC 784* Session 2014–15 20 November 2014, paragraph 1.27

10 JCHR: *The UK's Compliance with the UN Convention on the Rights of the Child*, (March 2015) paragraph 105 <https://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/144/144.pdf>



## Special Guardianship Orders

Of particular concern to the Law Society are the restrictions on legal aid funding for Special Guardianship Orders (SGOs). SGOs appoint an individual to be a child's 'special guardian' in the event that their birth parents are unable to care for them; applications are usually made by a friend or family member.

There are currently a number of problems regarding SGOs, which have resulted from LASPO:

- If a child is subject to an SGO, and a local authority has not started care proceedings, their parents are not entitled to legal aid to fight the order. Therefore, parents may find themselves in a situation where they have to defend an application to have their children removed, without access to legal advice.
- If an individual, such as a grandparent, is making an application to become a 'special guardian', and the local authority has not started care proceedings, the individual is only entitled to legal aid in the cases of domestic violence or child protection, provided the evidence and means test

requirements are met. Grandparents or relatives not meeting these requirements will have to find a way to pay legal fees or become a litigant in person.

- If care proceedings have started, both the parents and the individual making the application are eligible for legal aid. The individual making the application is subject to a means test, whereas the parent is not. The means test is extremely stringent and bureaucratic, and potentially locks out many individuals on lower incomes from legal aid.

In all these cases, access to legal aid, to ensure all involved receive advice and representation, is vital in terms of the protection of the child.

### Recommendation 2:

The government should reinstate legal aid for parties involved in Special Guardianship Order applications.

## c) The financial impact

Research has shown that a typical young person with a civil legal problem costs local health services, housing services and social services around £13,000 if they cannot receive early advice.<sup>11</sup>

In addition, there are proven links between young people's unresolved civil legal problems and their increased likelihood of criminal offending.

A report commissioned by the Low Commission, providing a cost benefit analysis of social welfare law advice, illustrates the significant impact of unresolved social welfare problems on young people's lives.<sup>12</sup> A report by Youth Access (2011), the largest provider of advice and counselling services to young people, outlines how social welfare problems disproportionately affect disadvantaged young adults, resulting in substantial costs to wider society.<sup>13</sup>

One estimate<sup>14</sup> puts the cost of unresolved social welfare issues in young adults aged between 16 and 24 at £1 billion a year. Young adults are also more likely to need advice when they have problems, because they have less life experience, so their problems have greater impact; receiving advice has been shown to result in better outcomes.<sup>15</sup>

Coram Children's Centre has estimated the cost of bringing legal aid back in to scope for children and young people as:

- Where the recipient of civil legal aid is a child under 18: c. £7 million a year.

- Where the recipient of civil legal aid is a young adult aged 18 to 24 who is a care leaver, has a disability or is 'otherwise vulnerable': c. £4 million a year.<sup>16</sup>

According to the government's own estimates during the passage of LASPO, ensuring that all children under 18 have access to civil legal aid would cost £5-6 million.<sup>17</sup>

### The civil legal aid income cap and capital means test

There are a number of financial considerations that are taken into account when determining an individual's eligibility for legal aid. These include the civil legal aid gross income cap, and a capital means test, the latter of which became more stringent under LASPO.

While we acknowledge the need for financial criteria when determining who should be eligible for legal aid, the current requirements are too stringent and are not aligned with other means testing, resulting in vulnerable individuals, or those on a low income, being denied access to legal advice.

Until LASPO was introduced in 2013, the maximum gross income cap for financial eligibility for civil legal aid, and all thresholds and allowances within the system, were regularly up-rated to take inflation into account. Since 2013 there has been no such increase. This means that the income cap, (which is currently £2,657 a month for a family which includes up to four dependent children) has reduced in real terms, as have all the fixed allowances for expenditure which the means test takes into account.<sup>18</sup>

11 Balmer, N.J. and Pleasence, P. (2012) *The Legal Problems and Mental Health Needs of Youth Advice Service Users*. Youth Access

12 LegalAction Low Commission evidence review, *The business case for social welfare advice services An evidence review – lay summary* Professor Graham Cookson and Dr Freda Mold1 University of Surrey July/August 2014 <http://www.lowcommission.org.uk/dyn/1405934416347/LowCommissionPullout.pdf>

13 James Kenrick, *The outcomes & impact of youth advice – the evidence: key research evidence on the difference made to young people's lives by social welfare advice services*, Youth Access, 2011, available at: <http://baringfoundation.org.uk/wp-content/uploads/2011/11/YouthAccessValue.pdf>

14 As above – see note 14, pages 7 and 17

15 James Kenrick, *Young people's access to advice – the evidence: key research evidence on young people's access to advice on social welfare issues*, Youth Access, 2009, available at: [http://www.justrights.org.uk/sites/default/files/Youth%20Access%20-%20YPs\\_Access\\_to\\_Advice\\_colour.pdf](http://www.justrights.org.uk/sites/default/files/Youth%20Access%20-%20YPs_Access_to_Advice_colour.pdf)

16 Supplementary written evidence from Coram Children's Legal Centre (LAS 101) to the Justice Select Committee [http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/16069.html#\\_ftn4](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/16069.html#_ftn4)

17 Revised estimate provided by the Ministry of Justice on 11 April 2012 following the government's concessions in the Lords

18 The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, <http://www.legislation.gov.uk/uksi/2013/480/contents/made>

This has created a barrier to legal aid for those on ever-more-modest incomes, who are caught in a trap where they do not financially qualify for legal aid but still cannot afford to pay privately for legal advice and representation. Those who do still qualify for legal aid find they have to pay higher contributions in real terms than they would have done, with an increased risk that such contributions are unaffordable, so that the offer of legal aid has to be turned down.

Before LASPO, anyone who received means-tested welfare benefits would automatically qualify for legal aid in financial terms. LASPO introduced a new capital means test which is more stringent than the capital eligibility rules for means-tested benefits. Anyone with more than £8,000 in capital will not be eligible for legal aid despite the fact that the upper limit for benefits is double that, at £16,000.<sup>19</sup> As a result, many people on very low incomes but with a small amount of capital cannot obtain legal aid.

The legal aid means test also includes equity in a home: means testing for benefits does not. There are a number of issues with how such equity is assessed as part of the legal aid means test:

- The legal aid means test only excludes the first £100,000 of equity, and only allows £100,000 of mortgage debt.<sup>20</sup> This means that if you have a home worth £180,000 and a mortgage of £70,000, you are financially ineligible for legal aid even if you are on means-tested benefits.<sup>21</sup>
- The means test is particularly unfair on those living in homes with negative equity. If an individual's home is worth £220,000 and their mortgage is £250,000, the legal aid means test will assess them as having £20,000 worth of available capital

after all allowances have been applied, making them ineligible for legal aid.<sup>22</sup>

This rule also increases the administrative burden, as all means-tested benefits claimants must be additionally means-tested for capital, whereas previously that was not necessary.

These fixed allowances include artificially capped figures for expenses such as rent and work-related costs, such as rail fares for commuting. If an individual's actual expenses are above these caps, these will be treated as if the higher sums you have to pay are part of your disposable income. For example, for a person with no dependants, the maximum amount deductible for housing costs is £545 per month.<sup>23</sup> In high-cost areas such as London, the actual costs are likely to be significantly more. This exacerbates the problem mentioned above that the contributions people are asked to pay are often unaffordable, so that even if they are eligible for, and are offered, legal aid they cannot afford to accept it.

### Recommendation 3:

The civil legal aid means test should be reviewed and routinely up-rated to reflect current levels of inflation and changes in the cost of living.

### Recommendation 4:

The capital means test for civil legal aid should be scrapped for those on means-tested welfare benefits.

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> To explain this example further, this means that you have equity in your home of £110,000. £100,000 of this is disregarded, and you are treated as having capital of £10,000, which is above the limit of £8,000 to qualify for legal aid

<sup>22</sup> This is because the legal aid means test will only discount £100,000 of your mortgage and will treat you as having an asset worth £120,000, of which only £100,000 is disregarded

<sup>23</sup> Ibid

## 2. THOSE ELIGIBLE FOR LEGAL AID FIND IT HARD TO ACCESS IT

The problems do not stop with the reduced scope of legal aid. Even those who are eligible find it hard to work out if they are entitled to legal aid or how to access it.

In some areas of the country, there is simply not enough advice and support available for those who need it. In addition, for some areas still in scope, such as domestic violence, process-driven conditions have been put in place which make it hard, and sometimes impossible, for individuals to access legal advice.

For some areas still in scope, initial free legal advice is now only available by telephone through the government's Mandatory Telephone Gateway. However, this has been underused, and it has been argued by many organisations that this has created a barrier to face-to-face advice for clients for whom telephone advice provision is not appropriate. Victims of serious domestic abuse, for example, are unlikely to enjoy unfettered access to the phone.

### LASPO has created legal aid deserts for housing advice

Data from the Legal Aid Agency shows a number of areas of the country have little or no provision of legal aid advice – otherwise known as legal aid deserts.

A desert is an area where advice is not available through legal aid or where there is only one provider locally. This means that people will face difficulty, and might be prevented from accessing the advice they need.

Government data provided to the Law Society shows that large areas of the country have little or no provision of housing legal aid advice:

- Almost a third of the legal aid areas in England and Wales have one or no local legal aid housing advice providers.
- Neither Shropshire nor Suffolk have any housing legal aid advice provider.
- Other areas, including Kingston upon Hull and Surrey, had no provider for a number of months, until the Legal Aid Agency took remedial action.

Having only a single provider in a legal aid area is a major problem for housing advice provision for the following reasons:

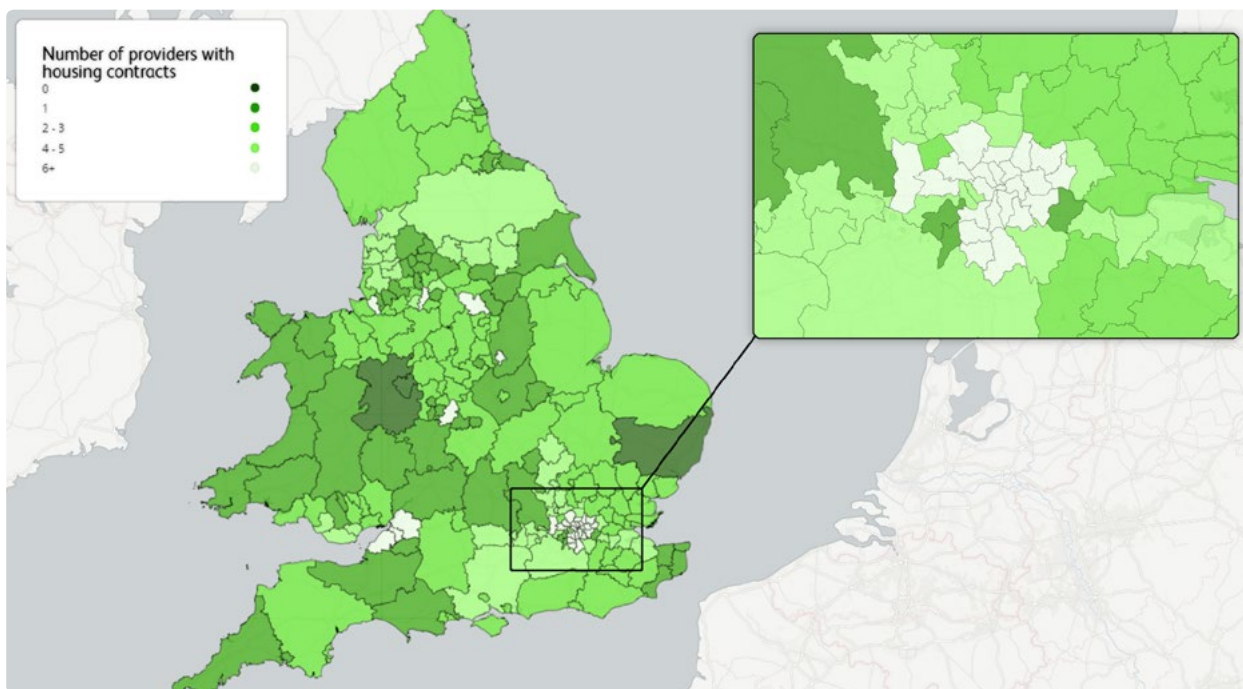
- Families on low incomes cannot afford to travel to see the one provider that might be located many miles away from where they live. This means they are unable to seek essential legal advice, even in the most extreme cases, such as homelessness.
- One firm in a large area might not have capacity to provide advice to all those who need it.

- People who need legal aid advice for housing issues often need that advice urgently, and cannot go onto a waiting list.
- Conflicts of interest can arise because one law firm cannot represent both a tenant and their landlord. A conflict can also arise if the firm has been acting for the landlord on another issue, such as a family matter. This would mean the firm would not be able to act for the tenant.

As the experiences of Kingston upon Hull and Surrey demonstrate, if you have only one provider in an area, issues can reach crisis point if that one provider stops offering legal aid or ceases trading. Over the past 15 months, six areas saw their single provider disappear, resulting in the LAA having to take emergency action to ensure that services were restored. This is not sustainable.

The volume of legally-aided housing cases halved between July to September 2012 and July to September 2013. With changes to scope, some reduction in case volume was to be expected, at least in the short term. However, the dramatic drop in cases has continued, with the last quarter of 2015-2016 seeing a 17% decrease compared to the same quarter in the previous year.<sup>24</sup>

**Current number of providers with housing contracts – heat map**



© OpenStreetMap contributors, © CARTO

Source: Data obtained from the Legal Aid Agency (LAA) and the Ministry of Justice (MOJ), 2016

<sup>24</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/533178/legal-aid-statistics-england-and-wales-bulletin-jan-to-mar\\_16.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/533178/legal-aid-statistics-england-and-wales-bulletin-jan-to-mar_16.pdf) p32

In a sustainable market, four years after a change like LASPO, case volumes should have stabilised, particularly given the growing need for housing advice. The most recent governmental homelessness statistics (DCLG, December 2016) show that the total number of households in temporary accommodation on 30 September 2016 was 74,630, up 9% on a year earlier, and up 55% on the low of 48,010 on 31 December 2010.<sup>25</sup>

A particular concern is that legal aid services are provided by small businesses and charities which need to be economically viable to survive. The fees paid for legal aid have not been increased in line with inflation since 1998-99, which equates to a 34% real-terms reduction. As part of LASPO, the MoJ reduced the fees paid to legal aid providers by 10%, without carrying out a study of the sustainability of the market on those reduced fee levels.

### Recommendation 5:

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The government should commission an independent review into the sustainability of the civil legal aid system which particularly focuses on economic viability for service providers as well as a focus on local need and demand.

### Recommendation 6:

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The government should commission a second provider of housing advice in areas that currently only have a single provider.

### Recommendation 7:

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The availability of legal aid should be more effectively advertised to ensure that people know what areas of law are in-scope for legal aid.

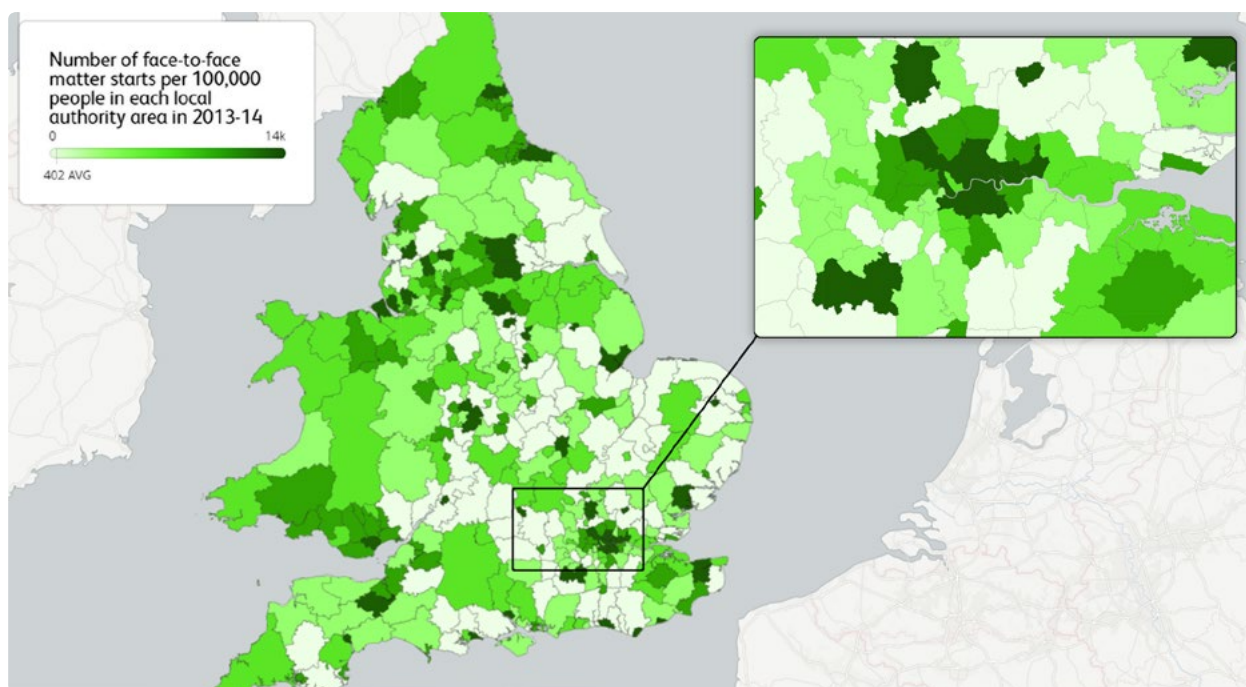
<sup>25</sup> <https://www.gov.uk/government/statistics/statutory-homelessness-and-homelessness-prevention-and-relief-england-october-to-december-2016>



## Other legal aid deserts

In addition to housing advice deserts, data indicates that there are an increasing number of advice deserts in other areas of law. A report by the National Audit Office issued in November 2014 found that in 2013-14 there were 14 local authorities where no legal aid funded work was started. Legal aid providers in a further 39 local authorities started fewer than 49 pieces of legal aid work per 100,000 people.<sup>26</sup>

### Number of face-to-face matter starts 2013-14 – heat map



Source: Report: 'Implementing reforms to civil legal aid', pg. 36 (National Audit Office, 2014)  
<https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>

<sup>26</sup> National Audit Office, *Implementing reforms to civil legal aid* HC 784 Session 2014–15 20 November 2014

## Domestic Violence Gateway

LASPO removed legal aid funding for all private law family cases (that is those cases involving divorce, child contact and finances) apart from where there is evidence of domestic violence or child abuse. The government committed to ensuring that victims of abuse would continue to get legal aid.

As part of LASPO, the government introduced an evidence test for domestic violence funding through the legal aid scheme. In order for those who had experienced or were experiencing domestic violence to get legal aid, they would have to provide evidence obtained within a two year time limit to prove that they had suffered from abuse.

Research from Rights of Women demonstrated that the Gateway excludes a number of victims of domestic violence from accessing legal aid funding to which they are entitled.<sup>27</sup> At the time the research was undertaken, approximately 40% of women who had experienced or were experiencing domestic violence could not produce any of the prescribed forms of evidence.<sup>28</sup>

As a result of legal challenge, undertaken by Rights of Women, and supported by the Law Society, the last government undertook a review of the regulations for family law legal aid and the impact of the domestic violence evidence requirements. This review has been undertaken in close partnership with a number of stakeholders, including The Law Society, Rights of Women and Resolution, and we welcome this joint working.

The last government committed to make it easier for survivors of domestic abuse to access legal aid. We welcomed this commitment and hope the new government takes this forward.

While this review took place, the government introduced interim regulations covering the two areas of concerns highlighted in the legal action:

- **Time limit** – the government increased the evidence time limit from two to five years.
- **Financial abuse** – the Legal Aid Agency (LAA) was given discretion when considering a range of evidence of financial abuse not currently set out in the list of evidence. New guidance includes an evidence checklist with examples such as bank statements, communications with the perpetrator (texts or emails), a letter from a domestic violence support service or a narrative statement from the survivor.

We look forward to working with the new government to achieve further progress in this area.

### Recommendation 8:

Solicitors, and other advisers approved under the legal aid contract, should have delegated powers to confirm that a client is a victim of domestic violence.

### Recommendation 9:

The new government should implement the previous government's proposed change that frontline domestic violence support organisations should be able to confirm that an individual is a victim of domestic violence.

### Recommendation 10:

The new government should implement the previous government's proposed change that the ability to apply for legal aid under the Domestic Violence Gateway should not be subject to any time limit from the date of the last incident of violence.

<sup>27</sup> Rights of Women, *Evidencing domestic violence: nearly 3 years on*, December 2015  
<http://rightsofwomen.org.uk/wp-content/uploads/2014/09/Evidencing-domestic-violence-V.pdf>

<sup>28</sup> Rights of Women, *Evidencing domestic violence: reviewing the amended regulations*  
<http://rightsofwomen.org.uk/wp-content/uploads/2014/12/Evidencing-domestic-violence-IV.pdf>



## Telephone Gateway

As part of LASPO, the government decided that for a number of areas, initial legal advice should be delivered by telephone. These areas are debt, special educational needs, and discrimination law. However, the Mandatory Telephone Gateway has been underused for a variety of reasons; people are not accessing legal advice for these areas where legal aid is available.

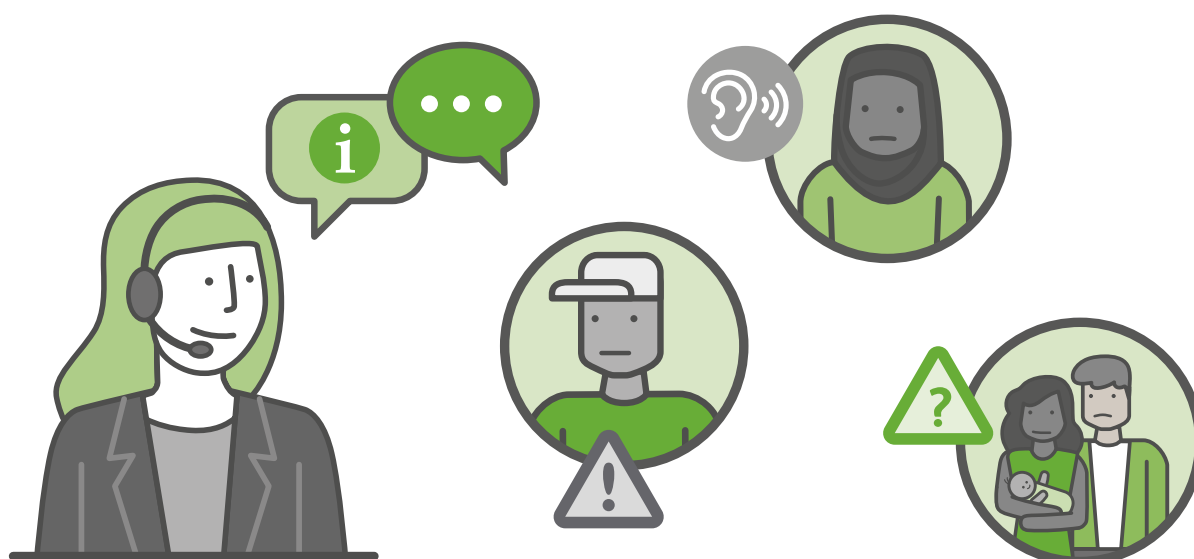
As part of this system, all initial legally aided inquiries for discrimination, education and debt must be made via the LAA's Civil Legal Advice (CLA) telephone advice service. Clients under 18, detained clients and urgent cases are exempt from this process.

A telephone operator conducts an initial assessment of the case and financial eligibility for legal aid. If this assessment concludes there is a legal issue that merits further consideration, the client can be referred to a specialist legal adviser who holds a telephone advice contract with the LAA.

The Law Society supported the availability of telephone advice as one option for clients, but has expressed concerns about the mandatory nature of the Gateway. This has created a barrier to face-to-face advice for the many clients for whom telephone advice provision is not appropriate. This includes people who might struggle to communicate by telephone, such as those with poor English language skills and some physical or mental health problems.

We are also concerned about the low numbers of Gateway callers who are actually referred to specialist advisers, which have seen an overall decline since the advent of LASPO.

A survey conducted by the MoJ in 2014, after one year of operation of the Gateway, found that while the provision of a remote service was convenient for some clients, the service had been underused in relation to predicted take up, and that clients should be given a clearer explanation of what to expect from the service.<sup>29 30</sup> It also reported that those using the Telephone Gateway thought there should be more flexibility to refer people for face-to-face advice, particularly those with disabilities.



<sup>29</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384307/cla-gateway-research-summary.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384307/cla-gateway-research-summary.pdf)

<sup>30</sup> MoJ (2014) *Civil Legal Advice Mandatory Gateway – Overarching research summary*

A report by the Public Law Project expressed serious concerns about the operation of the Mandatory Gateway.<sup>31</sup> The report points out that two out of the three Gateway categories account for the largest decreases in the number of Legal Help matter starts, there being a 50% fall in debt matters and a 58% fall in calls about discrimination. According to the research, referrals to face-to-face advice are a fraction of the expected numbers, just 0.2% (compared to a projected 10%) for discrimination and 0% (compared to a projected 10%) for those with special educational needs.<sup>32</sup> The report also cites evidence that the Gateway telephone operators are working from scripts and many do not have sufficient understanding of the issues to determine when they should make referrals to specialist advisers.<sup>33</sup>

The Justice Select Committee has heard evidence from a range of witnesses indicating that the low usage of the Gateway is at least partly due to lack of awareness of its existence.<sup>34</sup> The committee concluded that 'failing to provide adequate public information on the Civil Legal Advice Telephone Gateway is one of the primary reasons why the Gateway is underused', and goes on to recommend 'that the Ministry of Justice undertake an immediate campaign of public information on accessing the Gateway for debt advice, as well as for the other areas of law it covers.'<sup>35</sup>

### Recommendation 11:

The government should remove the requirement for debt, special educational needs and discrimination law to be accessed via the Telephone Gateway. The telephone service should be retained as an option for clients who choose to use it.

### Recommendation 12:

The government should reinstate immediately available access to face-to-face advice for debt, special educational needs and discrimination law.

### Recommendation 13:

The Civil Legal Aid telephone advice line should be promoted more widely, for example by including details with education, health and care plan assessment decisions.

### Recommendation 14:

The government should commission an independent review of the operator service to establish the reasons for the low levels of referrals to specialist advice.

31 Public Law Project: 'Keys to the Gateway' (March 2015) <http://www.publiclawproject.org.uk/data/resources/199/Keys-to-the-Gateway-An-Independent-Review-of-the-Mandatory-CLA-Gateway.pdf>

32 *ibid*, paragraphs 1.14 and 1.15

33 *ibid* paragraph 1.16

34 <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31102.htm>

35 Justice Select Committee (2015) *op cit*, paragraphs 26-27

### 3. WIDE GAPS IN PROVISION ARE NOT BEING ADDRESSED

Reducing the scope of legal aid through LASPO opened up a number of gaps in the provision of legal advice.

Despite this, throughout the passage of LASPO, the government expressed confidence that cuts to early advice in family law would be offset by increased uptake in the use of mediation, and that those whose fundamental rights were at risk as a result of legal aid changes would be protected through Exceptional Case Funding (ECF).

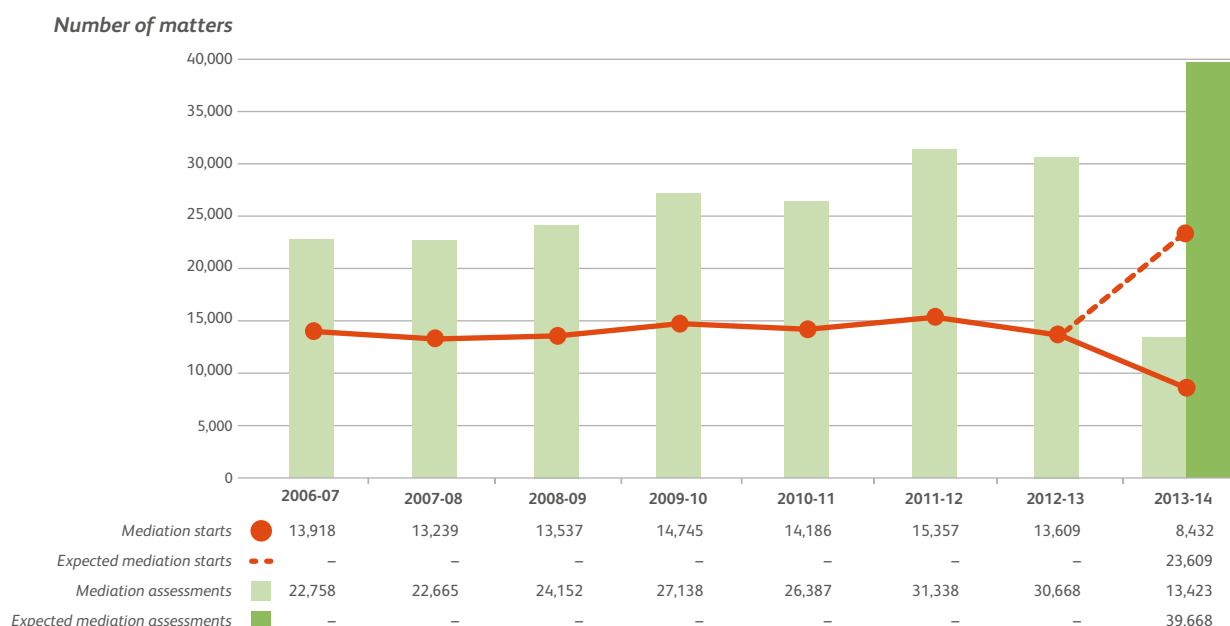
In practice, mediation and ECF have had a far lower uptake than the government predicted. This is not, we argue, due to lack of need, but is instead due to problems in the system.

#### Mediation

When the government removed legal aid for the majority of private law family matters (for example where there is a family breakdown to fund the divorce, resolve child contact and financial issues) they hoped to increase uptake of mediation so that families could resolve their problems outside of court.

The government predicted the number of family mediations would increase as families tried to resolve their problems outside of court. They predicted an increase of 9,000 mediation assessments and 10,000 mediation cases for the year 2013-14.<sup>36</sup> There was actually a decrease of 17,246 or 56% in mediation assessments in the year after the reforms. In addition, the number of mediation cases starting fell by 5,177 cases, or 38% in the same period.

#### Mediation assessments and starts between 2006-7 and 2013-14



Source: Report: 'Implementing reforms to civil legal aid', pg. 24 (National Audit Office, 2014)

<https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>

Updated statistics are available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-october-to-december-2016>

<sup>36</sup> National Audit Office, *Implementing reforms to civil legal aid* HC 784 Session 2014–15 20 November 2014, <https://www.nao.org.uk/report/implementing-reforms-to-civil-legal-aid/> paragraph 2.8

We believe that this has a simple explanation: the government failed to take account of the fact that solicitors providing early advice were a significant source of referrals to mediation, and that removing access to early advice from a solicitor would, therefore, adversely affect uptake of mediation.<sup>37</sup>

We believe that without early advice from a solicitor, many people do not know that the option of mediation exists, or how to access it.

In an attempt to address the drop in mediations, in April 2014 the government introduced:

- A requirement for applicants to the court in family law cases to attend mediation assessment meetings.
- Funding of one mediation session for both parties in cases where only one party is receiving legal aid funding.

However, the number of mediation starts continued to reduce.<sup>38</sup>

Over the same period, we have seen an increase in the number of litigants in person (LiP) in the court system. This suggests that not only have the changes not diverted people from the courts, but they have created additional pressure on the courts as they have to deal with higher than expected case volumes, and delays caused by LiPs being unfamiliar with the processes.

### Recommendation 15:

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The government should reinstate Family Help Level 1 or equivalent legal aid for early advice in family cases. The estimated cost of this would be £14 million.

### Recommendation 16:

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The government should closely monitor the use of mediation and consider what further action should be taken if take-up does not increase in line with expectations.

### Recommendation 17:

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The government should fund all Mediation and Information Assessments Meetings for a year, to encourage behavioural change.

<sup>37</sup> Ministry of Justice, Family Mediation Taskforce, *Report to the Family Mediation Taskforce*, July 2014

<sup>38</sup> <https://www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2016> table 7.1 and table 7.2

## Exceptional Case Funding

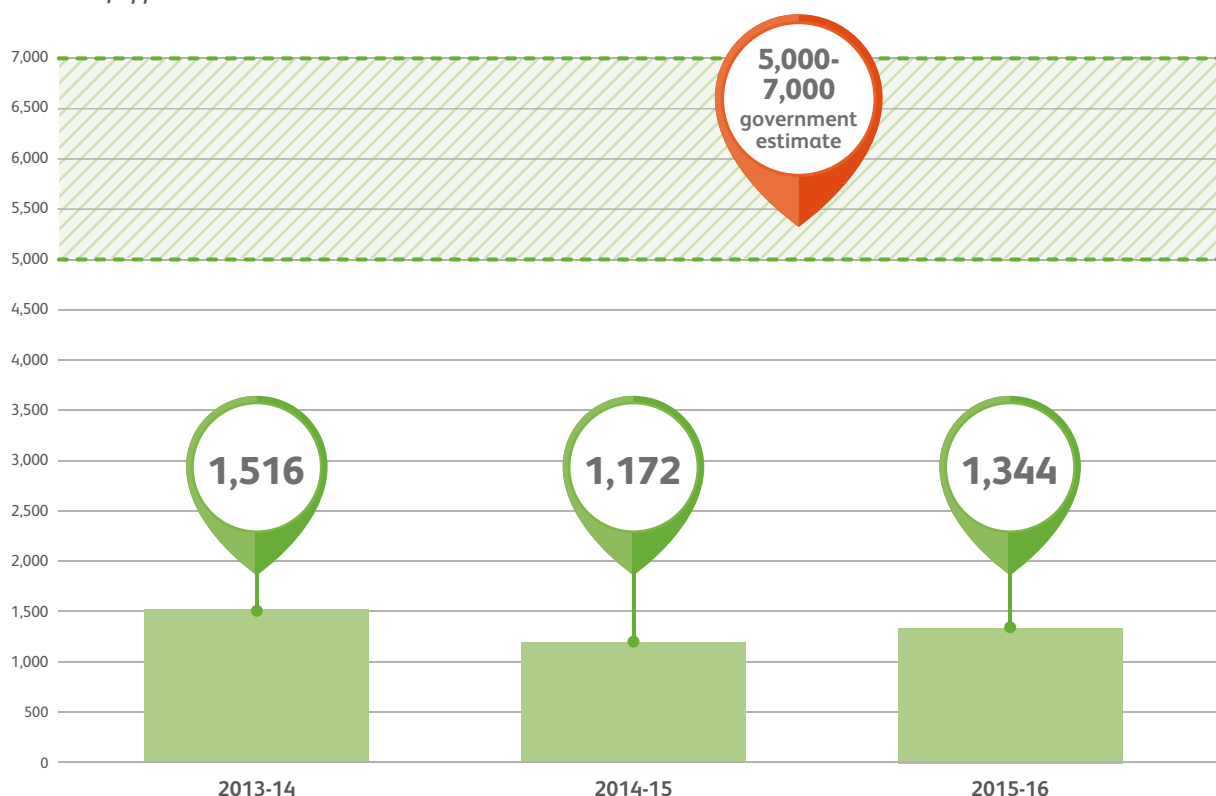
Section 10(3) of LASPO provides for exceptional case funding (ECF) for categories of law which are no longer in scope for legal aid and where failure to provide legal services would be in breach of an individual’s Convention rights (within the meaning of the Human Rights Act) or other enforceable EU rights relating to provision of legal services.<sup>39</sup> There is strong evidence that the ECF scheme is not fulfilling this requirement.

During the Parliamentary debates on LASPO, the government estimated that there would be 5,000-7,000 applications a year, of which 53-74% would be granted.

The reality has been that the application volumes are far lower than predicted, peaking at 1,516 in 2013/14.<sup>40</sup> Only half of applications resulted in a grant of legal aid, with much lower rates of success in previous years.

### Exceptional Case Funding applications 2013-14 to 2015-16

Number of applications



The most recent legal aid statistics available show that 1,344 ECF applications were made in 2015-16. This represents a slight increase over the 1,172 applications made in 2014-15, but lower than the 1,516 applications made in 2013-14. They remain around 20% of the number of the estimated 5,000-7,000 ECF applications predicted by the government prior to implementation of LASPO.

39 <http://www.legislation.gov.uk/ukpga/2012/10/enacted>

40 Legal Aid Statistics England and Wales tables Jan to Mar 2016 – Tables 8.1 and 8.2, <https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-january-to-march-2016>

ECF applications are difficult and time consuming. Solicitors only receive payment if the application is successful. The Legal Aid Agency will accept applications from applicants in person but very few have been made and still fewer have been successful. We believe that the ECF1 application form is not clear enough for lay applicants, who also have to submit the standard means and merits application forms. This is a lot of overly-complex paperwork for someone without legal training.

Most lay applicants will, unsurprisingly, lack the specialist legal knowledge to demonstrate that the highly technical criteria of breach or risk of breach of Convention or EU rights apply in their case. The scheme has been heavily criticised in reports by The National Audit Office<sup>41</sup> and the Justice Select Committee.<sup>42</sup>

## Inquests

An issue has also arisen regarding inquests, which have never been part of the mainstream legal aid scheme and were subject to an exceptional funding arrangement even prior to LASPO. ECF applications for inquests are subject to the same procedural arrangements as other ECF applications, but different criteria for determining the applications apply. Applicants must establish that an Article 2 (right to life) issue applies, or that there is a 'wider public interest' in terms of potential benefits that may arise for a particular category of person as a result of the inquest's findings. Both tests are complicated and require a detailed knowledge of the relevant case law. The case of Alexia Walenkaki (see case study below) is an example of an application being refused on the grounds that there was not wider public interest. We believe that the applications procedure and criteria for representation at inquests should be reviewed and simplified.

### TEST CASE

#### ECF test case litigation

The ECF procedure has been subject to test case litigation. In the case of *IS* the 'systemic nature' of the ECF scheme was considered. In June 2015, Justice Collins ruled in the High Court that the scheme was unlawful as it does not ensure applicants' rights are upheld, but this was later overturned in the Court of Appeal.

Also as a result of test case litigation, the Director of Legal Aid Casework was required to revise guidance issued to LAA caseworkers, resulting in the ECF application form being 'simplified' but not to the level that would make it accessible for lay applicants.

### CASE STUDY

#### Alexia Walenkaki

Five year old Alexia Walenkaki died of head injuries whilst playing on a swing in the children's play area in Mile End Park, Tower Hamlets. The swing was suspended from two tree trunks when one of them toppled over onto the child. Alexia's mother applied for exceptional case funding to be represented at the inquest, however the application for legal aid was refused by the Legal Aid Agency on the grounds that it did not meet the LASPO requirement of representation at the inquest being in the public interest, despite the fact that the case involves consideration of a local authority's responsibilities to ensure safety in a public area.

<sup>41</sup> National Audit Office, *Implementing reforms to civil legal aid* HC 784 Session 2014–15 20 November 2014, <https://www.nao.org.uk/report/implementing-reforms-to-civil-legal-aid/> paragraph 6

<sup>42</sup> *ibid*, paragraph 3.7

### Recommendation 18:

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The government should undertake research to establish the reasons for the low levels of Exceptional Case Funding applications.

### Recommendation 19:

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Exceptional Case Funding forms should be simplified, and a dedicated form for lay applicants that clearly guides them through the applications process should be available.

### Recommendation 20:

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Applicants for ECF should be entitled to obtain a decision in principle without having to submit the legal aid means assessment form, which could be submitted later if ECF is granted.

### Recommendation 21:

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Direction from a judge that ECF should be provided to prevent an applicant's human rights from being infringed should be treated as conclusive evidence of the right to legal aid.

### Recommendation 22:

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Solicitors should be entitled to a fixed fee for completing the ECF application form on behalf of clients that reflects the amount of work required to complete an application adequately. This fee should be payable whether the application is granted or not, subject to LAA discretion via contract management to take action in the event that a firm consistently submits applications that are wholly without merit.

### Recommendation 23:

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The applications procedure and criteria for representation at inquests should be reviewed and simplified.

## 4. LASPO HAS HAD A WIDER AND DETRIMENTAL IMPACT ON THE STATE AND SOCIETY

One of the government’s stated objectives when introducing LASPO was to discourage unnecessary and adversarial litigation at public expense.<sup>43</sup>

However, LASPO has undoubtedly resulted in increased public expense elsewhere as a result of increasing numbers of people unable to access free, reliable and timely legal advice.

Soaring numbers of litigants in person create a substantial burden on the courts, and a lack of early advice can result in minor problems escalating quickly, particularly in relation to debt, housing and health.

Without a holistic approach to justice, this will result in further costs to taxpayers and increased pressure on already hard-pressed public services.

### Litigants in person (LiP)

Litigants in person – those who represent themselves in court without a lawyer – have always been part of the justice system. However, since LASPO, their numbers have increased rapidly, and their profile has changed. Whereas in the past, a litigant in person represented themselves by choice, they are now more likely to do so because they cannot afford legal fees and are ineligible for legal aid.

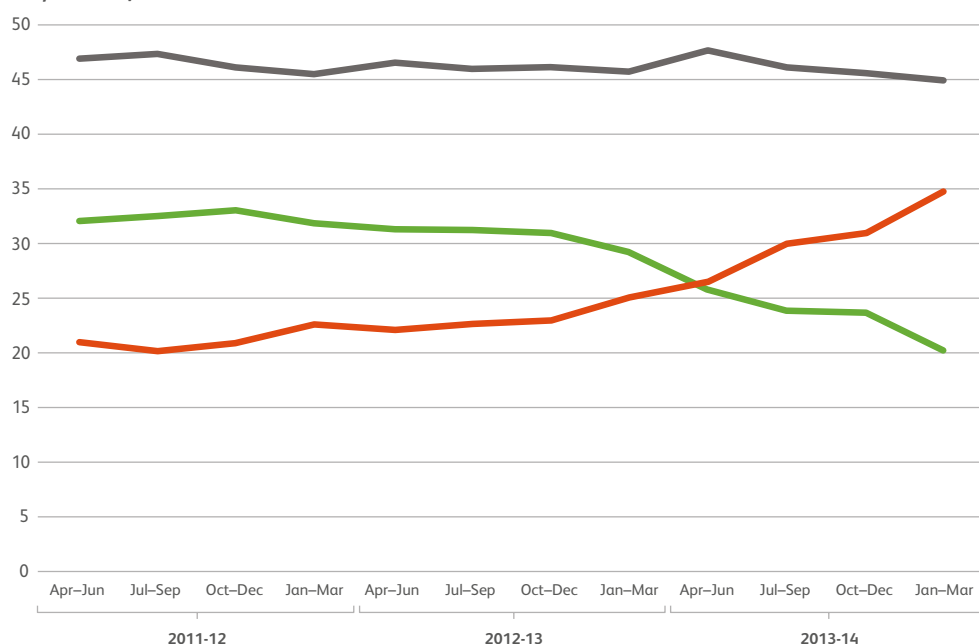
In the past, a quarter of the much smaller number of people who acted as litigants in person did so wholly or partially through personal choice. The impact of LASPO has been to introduce a substantial number of new litigants in person who have no choice in the matter.<sup>44</sup>

In 2014, the National Audit Office reported that there had been:

- A 30% increase across all family court cases (including those that remain eligible for civil legal aid) in which neither party had legal representation.

### Changes to legal representation in cases starting in the family court, 2011-12 to 2013-14

Proportion of cases (%)



Notes

One case category – forced marriage protection orders – has been omitted because of the low number of cases and poor quality of data recording on legal representation.

This chart uses legal representation status as recorded at the point when court proceedings were initiated. Unrepresented parties may obtain legal representation at a later stage of their case or represented parties may become unrepresented.

Source:

National Audit Office analysis of data from HM Courts & Tribunals Service Familyman database, September 2014

Source: Report: ‘Implementing reforms to civil legal aid’, pg. 16 (National Audit Office, 2014)

<https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>

Updated statistics are available at: <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2016>

<sup>43</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228970/7967.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf)

<sup>44</sup> Liz Trinder, Rosemary Hunter, Emma Hitchings, Joanna Miles, Richard Moorhead, Leanne Smith, Mark Sefton, Victoria Hinchly, Kay Bader and Julia Pearce, *Litigants in person in private family law*, (Ministry of Justice Analytical Series), November 2014



- A 22% increase in cases involving contact with children (Children's Act private law matters) in which neither party was legally represented.<sup>45</sup>

Litigants in person often struggle to understand their legal entitlements and the complexities of court procedures. As highlighted by the National Audit Office, litigants in person are:

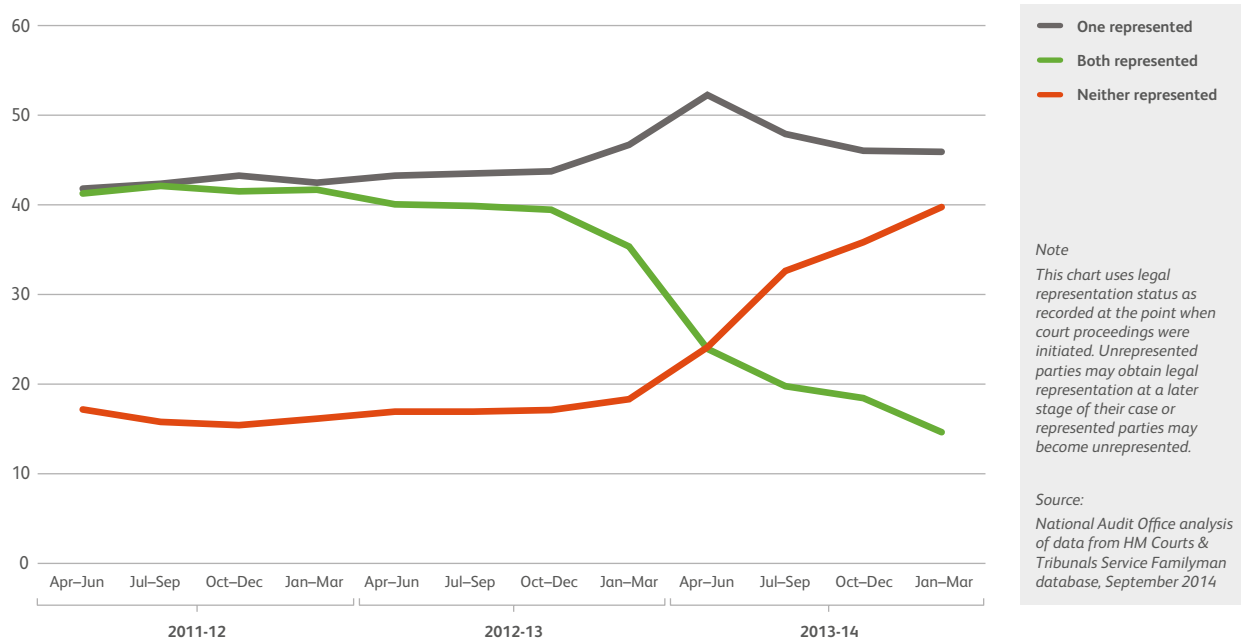
- less likely to settle cases outside of court hearings
- likely to have more court orders and interventions in their cases
- likely to lack the knowledge and skills required to conduct their case efficiently
- create additional work for judges and court staff, which can make court listing processes less efficient.

Research from the MoJ in 2014 found that LiPs reported fear and anxiety about the process regardless of their educational level, and that even those with high levels of education or professional experience found aspects of the legal process difficult. The research also found that LiPs can result in delays in the process, causes of which can include LiPs' lack of understanding resulting in critical tasks being missed out, done inadequately or being completed by the LiP only with considerable coaching and support from others, especially from judges.<sup>46</sup>

Anecdotal evidence from legal professionals supports these research findings. Judges have estimated that hearings involving litigants in person take around 50% longer on average and have reported that more cases are going to court hearings that would have been 'filtered out' with accurate advice on their legal merits.<sup>47</sup>

### Changes to legal representation in Children's Act private law cases, 2011-12 to 2013-14

Proportion of cases (%)



Source: Report: 'Implementing reforms to civil legal aid', pg. 17 (National Audit Office, 2014)

<https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>

45 National Audit Office, *Implementing reforms to civil legal aid* HC 784 Session 2014-15 20 November 2014, <https://www.nao.org.uk/report/implementing-reforms-to-civil-legal-aid/> paragraph 6

46 Liz Trinder, Rosemary Hunter, Emma Hitchings, Joanna Miles, Richard Moorhead, Leanne Smith, Mark Sefton, Victoria Hinchly, Kay Bader and Julia Pearce, *Litigants in person in private family law*, (Ministry of Justice Analytical Series), November 2014

47 NAO, *Implementing Reforms To Civil Legal Aid*, 20 November 2014, HC 784 2014-15: pages 14-15

## CASE STUDY

In the case of *Re D (A Child)* the parents of the child were seeking to have him returned to their care following removal by the local authority on the grounds that the parents' learning difficulties meant they could not care for him. The local authority wanted the child adopted. The father worked and the family lived independently, with assistance. Their income was around £35 a month over the limit for legal aid. The Official Solicitor refused an application to act for the father unless he was indemnified against an adverse costs order. The father's solicitor, who had been acting pro bono and had spent over 100 hours on applications and appeals to the Legal Aid Agency, agreed personally to indemnify the Official Solicitor.

House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012*, (Eighth Report of Session 2014-15) paragraph 32

### Cross-examination by abusers

There is a longstanding issue in the civil courts that abusers are able to cross-examine their ex-partners and children, against whom they are accused of abuse. This has been exacerbated by LASPO. As the number of litigants in person has increased, due to the changes introduced through LASPO, so too have instances where a perpetrator of abuse is able to directly cross-examine a victim.

In the criminal courts, primary legislation was enacted to prevent this from happening (S36/34 of the Youth Justice and Criminal Evidence Act 1999). Presently no such protection exists in the civil courts. The government are in the process of implementing legislation to address this issue. We welcome this announcement.

Cross-examination by abusers is technically complex. We urge the government to undertake a full consultation on proposals to address this issue to ensure that the best route to achieve protection for victims in these situations can be achieved and made to work in practice in the family courts.

### The knock on costs of Litigants in Person

Litigants in person can be a substantial burden on court finances and resources – in 2014 it was estimated that the increase in litigants in person in family courts cost the MoJ £3.4 million.<sup>48</sup>

There is also a health and emotional impact on the individuals involved. Where legal problems remain unresolved, issues can escalate, which has the potential to generate costs for the taxpayer due to additional pressure on the NHS and welfare programmes.

#### Recommendation 24:

HM Courts and Tribunals Service should improve data collected by the courts on LiPs to understand their impact on the justice system.

<sup>48</sup> National Audit Office, *Implementing reforms to civil legal aid* HC 784 Session 2014–15 20 November 2014, <https://www.nao.org.uk/report/implementing-reforms-to-civil-legal-aid/> paragraph 1.19

## Early advice in family law

The removal of legal aid for early advice has contributed to the increase in LiPs. The removal of early advice in family law has had a particularly negative impact and, as stated above, the increase in LiPs in the family courts has cost the MoJ millions of pounds.

Elsewhere in this report we highlighted that the government hoped that the removal of legal aid for most family matters would result in an increased uptake in mediation, and we also highlighted that, in reality, mediation assessments have decreased due to a lack of referrals from solicitors, due to a lack of early advice.

Funding early advice for people with familial disputes which could be resolved by mediation, would mean that, when faced with a dispute, people are more likely to speak to a legal adviser who could signpost them to mediation and support them through the process.

This would both reverse the trend of fewer people making use of mediation, and ensure fewer people enter the legal system with no advice about the options available to them after mediation, or as an alternative to mediation, where it is not appropriate.

In turn, this would make sure victims of domestic abuse are more likely to be informed of their right to legal aid to make sure that they have access to justice, without having to face their abuser unsupported in court or face the prospect of returning to an abusive relationship.

## Housing

Although housing remains an area of law for which legal aid is still available, there are some housing law issues that were taken out of scope, and are no longer covered by legal aid. These are areas which have the potential to affect other public services, as well as add to the increasing numbers of LiPs.

Legal aid is still available to defend possession proceedings but only at the point where loss of the home is imminent and the landlord is seeking an order for possession. Legal aid is not available to deal with issues such as rent and mortgage arrears that may ultimately result in possession proceedings. Some disputes could be resolved more quickly and cheaply if legal aid were available for early advice rather than having to wait for possession proceedings to be issued.

Problems with housing benefit claims are a common reason for increasing rent arrears but legal aid for housing benefit advice is no longer available. We believe that cuts to housing benefits advice are short-sighted and counterproductive. Early advice on housing benefits problems can resolve rent arrears problems, removing the need for, and costs of possession proceedings, evictions and re-housing homeless families and vulnerable individuals.

The Law Society has calculated that advice could be restored for around £2 million a year. This calculation is based on the costs of pre-LASPO advice for housing benefits.

Legal aid for advice on mortgage arrears has been limited to cases where the lender is seeking repossession. We believe that restoration of early advice on mortgage arrears could also prevent escalation of arrears and further costs of possession proceedings, thus reducing some of the additional costs arising from the legal aid cuts.

As with family law, early advice is also no longer available for housing matters. Reintroducing this would almost certainly mean a lower volume of cases going to court if problems can be resolved without recourse to litigation. In addition, there are a number of wider system benefits and savings, including health benefits as people would, for example, be able to compel landlords to carry out repairs before they become a health risk. Fewer people would be made homeless, and fewer people would leave rent arrears and mortgage debts unaddressed. We would be happy to work with the government to produce a robust estimate of the cost of reintroducing legal aid in these areas.

### Recommendation 25:

The government should bring early advice for housing benefit, and rent arrears and mortgage problems arrears back into scope of the legal aid scheme.

## Health and social care

There is a growing body of independent evidence that social welfare law problems can cause adverse impacts on health, with a knock-on cost for the health service. Early access to legal advice can improve health outcomes and consequently reduce the cost of public health care provision, and the burden to the taxpayer.

We believe that the legal aid spending reductions under LASPO could have the potential to increase NHS costs, whereas an increase in social welfare law advice provision could reduce them.

A report commissioned by the Secretary of State for Health in 2010, 'Fair Society, Healthy Lives' (The Marmot Review) considered the issue of health inequalities.<sup>49</sup> One of the key recommendations of the review is that:

*Health inequalities result from social inequalities. Action on health inequalities requires action across all the social determinants of health.... Action taken to reduce health inequalities will benefit society in many ways. It will have economic benefits in reducing losses from illness associated with health inequalities. These currently account for productivity losses, reduced tax revenue, higher welfare payments and increased treatment costs.<sup>50</sup>*

There is now a significant body of evidence that states that advice provision is one of the social determinants of health, which, if provided, can reduce health inequalities with the beneficial impacts referred to in the Marmot Review.

<sup>49</sup> <http://www.parliament.uk/documents/fair-society-healthy-lives-full-report.pdf>

<sup>50</sup> *The Marmot Review*, Executive Summary p9

Pilot schemes around the country have demonstrated the positive effects that a holistic approach to health outcomes have on social welfare issues. All the participants in these systems (GPs, clinicians, social welfare specialists, academics, and individuals experiencing social welfare issues) recognise the benefits of an integrated approach.

The Law Society is keen to work with the government and the NHS to promote a strategy of integrating social welfare advice into health budgets. This could be done at the national, local, or NHS Trust level.



### Pilot example 1

#### **Transition Project South Tyneside – Age**

**UK South Tyneside:** This pilot stage is being delivered in three GP surgeries in South Tyneside with plans to extend into a further 18 (75% of surgeries in the borough) and provides a referral to an advisor from one of three agencies able to offer advice on a wide range of issues including debt, benefits, housing and fuel poverty.

### Pilot example 2

**Bradford Community Advice Network:** The Community Advice Network (CAN) is a federation of local advice charities working across Bradford District. It provides free and quality assured advice to local people in the areas of social welfare legal rights, assisting people with issues from debt and benefits to housing, homelessness, employment rights, immigration, community care and health. Support is available in almost all GP surgeries/primary healthcare centres in the district whilst key community mental health centres also host advice sessions. Services are funded by Bradford Council, using a combination of adult social care and public health funding. Promotion of advice sessions takes place at the GP surgeries, health centres and mental health centres with most targeted at 'registered patients/service users only' and booked at the health centre.

## 5. CONCLUSIONS AND NEXT STEPS

We have been clear throughout this report that LASPO has had a negative impact across a variety of areas, restricting access to justice and creating additional pressures on the justice system and the wider state.

This is not sustainable over the long term, and we fear that without concerted efforts from the government these problems will worsen.

The government's review of LASPO is an ideal opportunity for a reassessment of the system, and to identify and change what is not currently working.

Our key conclusions regarding the impact of LASPO are as follows:

### LASPO has undermined access to justice

LASPO has severely undermined access to justice, particularly for some of the most vulnerable in our society. Despite promises from the government that the changes would result in legal aid being targeted at those most in need, in reality groups such as children and young people, and some on low incomes, have been excluded from access.

In addition, due to a shortage of provision, many of those who are still eligible for legal aid are no longer able to access advice in their local area, particularly in relation to housing.

**The government needs to ensure that those who are most in need of free and subsidised legal advice are truly able to access it.**

### LASPO has created strain on the wider justice system

The changes resulting from LASPO have created an enormous increase in litigants in person, which has caused strain on the courts. We acknowledge that litigants in person have always been part of the justice system – however, in the past most of these individuals represented themselves by choice, whereas now they do so because they cannot afford legal fees and are ineligible for legal aid.

Litigants in person often struggle to understand their legal entitlements and create additional work for judges and court staff. Judges have estimated cases involving litigants in person take 50% longer on average – this is not sustainable.

**The government needs to consider ways to reduce the number of litigants in person, such as reintroduction of legal aid for early advice.**

### LASPO is resulting in knock on costs elsewhere in the state

Without legal advice which is free or subsidised, and accessible, individuals are more likely to wait until a problem has escalated before seeking or accessing help. This means that relatively minor problems which could be resolved quickly – such as rent arrears – can end up becoming much worse – such as resulting in the loss of a home. These escalating problems can create additional costs elsewhere in the state, for example for the NHS and local authorities dealing with increased homelessness and health problems.

**The government needs to assess the wider impact of LASPO on public services, and introduce ways to prevent legal problems from unnecessarily escalating.**

## 6. LIST OF RECOMMENDATIONS

**Recommendation 1:**

The government should update exceptional case funding guidance to reflect the right of children to access legal aid.

**Recommendation 2:**

The government should reinstate legal aid for parties involved in Special Guardianship Order applications.

**Recommendation 3:**

The civil legal aid means test should be reviewed and routinely up-rated to reflect current levels of inflation and changes in the cost of living.

**Recommendation 4:**

The capital means test for civil legal aid should be scrapped for those on means-tested welfare benefits.

**Recommendation 5:**

The government should commission an independent review into the sustainability of the civil legal aid system which particularly focuses on economic viability for service providers as well as a focus on local need and demand.

**Recommendation 6:**

The government should commission a second provider of housing advice in areas that currently only have a single provider.

**Recommendation 7:**

The availability of legal aid should be more effectively advertised to ensure that people know what areas of law are in-scope for legal aid.

**Recommendation 8:**

Solicitors, and other advisers approved under the legal aid contract, should have delegated powers to confirm that a client is a victim of domestic violence.

**Recommendation 9:**

The new government should implement the previous government's proposed change that frontline domestic violence support organisations should be able to confirm that an individual is a victim of domestic violence.

**Recommendation 10:**

The new government should implement the previous government's proposed change that the ability to apply for legal aid under the Domestic Violence Gateway should not be subject to any time limit from the date of the last incident of violence.

**Recommendation 11:**

The government should remove the requirement for debt, special educational needs and discrimination law to be accessed via the Telephone Gateway. The telephone service should be retained as an option for clients who choose to use it.

**Recommendation 12:**

The government should reinstate immediately available access to face-to-face advice for debt, special educational needs and discrimination law.

**Recommendation 13:**

The Civil Legal Aid telephone advice line should be promoted more widely, for example by including details with education, health and care plan assessment decisions.

**Recommendation 14:**

The government should commission an independent review of the operator service to establish the reasons for the low levels of referrals to specialist advice.

**Recommendation 15:**

The government should reinstate Family Help Level 1 or equivalent legal aid for early advice in family cases. The estimated cost of this would be £14 million.

**Recommendation 16:**

The government should closely monitor the use of mediation and consider what further action should be taken if take-up does not increase in line with expectations.

**Recommendation 17:**

The government should fund all Mediation and Information Assessments Meetings for a year, to encourage behavioural change.

**Recommendation 18:**

The government should undertake research to establish the reasons for the low levels of Exceptional Case Funding applications.

**Recommendation 19:**

Exceptional Case Funding forms should be simplified, and a dedicated form for lay applicants that clearly guides them through the applications process should be available.

**Recommendation 20:**

Applicants for ECF should be entitled to obtain a decision in principle without having to submit the legal aid means assessment form, which could be submitted later if ECF is granted.

**Recommendation 21:**

Direction from a judge that ECF should be provided to prevent an applicant's human rights from being infringed should be treated as conclusive evidence of the right to legal aid.

**Recommendation 22:**

Solicitors should be entitled to a fixed fee for completing the ECF application form on behalf of clients that reflects the amount of work required to complete an application adequately. This fee should be payable whether the application is granted or not, subject to LAA discretion via contract management to take action in the event that a firm consistently submits applications that are wholly without merit.

**Recommendation 23:**

The applications procedure and criteria for representation at inquests should be reviewed and simplified.

**Recommendation 24:**

HM Courts and Tribunals Service should improve data collected by the courts on LiPs to understand their impact on the justice system.

**Recommendation 25:**

The government should bring early advice for housing benefit, and rent arrears and mortgage problems arrears back into scope of the legal aid scheme.



## APPENDIX A:

### REINSTATING INITIAL FAMILY LEGAL HELP ADVICE – COSTS ESTIMATE

#### Introduction

This appendix provides an estimate of the costs of reinstating Legal Help for initial legal advice in family law. This exercise arises from the policy position that provision of initial Legal Help is not only desirable from the clients' perspective but could also mitigate the additional costs to the court system resulting from the increase in family litigants in person. Initial advice could reduce the number of disputed matters coming before the court either because the parties are able to reach agreement on the basis of advice received or have been referred to mediation.

#### The decline of family legal advice

The Legal Aid Sentencing and Punishment of Offenders Act (LASPO) removed all private law family legal aid except in circumstances where an applicant has been the victim of domestic violence and meets the 'Domestic Violence Gateway' criteria for legal aid eligibility.

In June 2011 the MoJ estimated that LASPO would reduce the number of private law family Legal Help cases by 210,000 representing an 84% reduction against the 2009/10 baseline.<sup>51</sup> This was predicted to generate a costs saving of £50 million.

Even prior to the implementation of LASPO, the number of family Legal Help matter starts declined significantly from the 2009/10 baseline by over 30% from 309,054 to 205,617 in 2012/13. Post implementation of LASPO, the figure fell to 42,798 for 2013/14, a reduction of 162,819 matter starts.<sup>52</sup> When comparing the actual decline in Legal Help matter starts resulting from LASPO, it would be more accurate to compare the 2013/14 figure of 42,798 with the immediate pre LASPO figure of 205,617 rather than the 2009/10 baseline, as the former is more likely to reflect the decline resulting from LASPO rather than other factors. This provides a clearer indication of the number of cases likely to require funding if initial Legal Help were to be restored.

<sup>51</sup> <http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/annex-a-scope.pdf> – Table 1

<sup>52</sup> Legal Aid statistics April 2013-March 2014. Table 5.1, <https://www.gov.uk/government/statistics/legal-aid-statistics-april-2013-to-march-2014>

### The costs of reinstating family legal help

The current family Legal Help basic standard fee is £86.<sup>53</sup> This includes initial advice but excludes the issue of divorce proceedings and negotiations with third parties. A higher legal help standard fee of £146 is payable where divorce proceedings are issued by the legal aid provider.<sup>54</sup> This proposal is based on initial advice being reinstated at the basic Legal Help standard fee rate of £86 for all non domestic violence gateway cases. This will result in far lower expenditure than would be involved in just reinstating the pre LASPO Legal Help scheme because there is no provision for escaping the basic standard fee and the pre LASPO scheme also included the higher standard fee and the significantly higher Family Help (lower) standard fee.

If the 162,819 reduction in matter starts between 2012/13 and 2013/14 (which we assume resulted from the implementation of LASPO) were funded at the basic legal help fee of £86, this would cost £14 million.

In reality it seems that a full return to the immediate pre-LASPO level of Legal Help take up is unlikely. Factors include a modest improvement in the economy since 2013 combined with a frozen means test and more restrictive capital eligibility rules, which means that the percentage of the population financially eligible for legal aid is likely to have fallen. Additionally there has been a decrease in the level of family legal aid provision, which calls into question whether the supply would be there to cope with an increase in demand.<sup>55</sup> It is also possible that not all existing providers would be prepared to offer initial advice at the basic standard fee level where there is no possibility of progressing to higher levels or Controlled Work or Licensed Work.

The following table shows the estimated cost of restoration of family Legal Help at the basic standard fee where take up is expressed as a percentage of fall in matter starts between 2012/13 and 2013/14.

Take up	Cost
100%	£14m
90%	£12.6m
80%	£11.2m
70%	£9.8m

<sup>53</sup> The Civil Legal Aid (Remuneration) Regulations 2013, Schedule 1, <http://www.legislation.gov.uk/ukSI/2013/422/schedule/1/made>

<sup>54</sup> Ibid

<sup>55</sup> Whilst the LAA 2013/14 statistics show there has been a relatively modest reduction in the number of contracts of approximately 200, the substantial decrease in matter starts indicates that average contract sizes have significantly decreased with corresponding decreases in staffing levels.





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