

FABIAN POLICY REPORT

# THE RIGHT TO JUSTICE

*The final report of the Bach Commission  
September 2017*

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# ABOUT THE BACH COMMISSION

The Bach Commission first met in January 2016, and has spent the months since compiling a comprehensive body of evidence on the crisis in our justice system. It published its interim report in November 2016, *The Crisis in the Justice System in England and Wales*.

The commission is chaired by Lord Willy Bach, with the support of Sir Henry Brooke as vice-chair.

**Lord Willy Bach** is a Labour peer and the elected police and crime commissioner for Leicestershire. Lord Bach was a parliamentary under-secretary of state in the Ministry of Justice from 2008 to 2010, and before entering politics worked as a barrister.

**Sir Henry Brooke CMG** is a retired Lord Justice of Appeal. He is an active patron of a number of legal NGOs, including Law for Life, the Harrow Law Centre and the Public Law Project. He has more than 50 years' experience of legal aid issues.

**Raju Bhatt** is one of the founders of Bhatt Murphy Solicitors, with some 30 years' experience in civil legal aid practice, with a particular focus upon the treatment of individuals by the police service and the wider criminal justice system.

**Julie Bishop** is director of the UK Law Centres Network, a post that she has held for eight years. Julie was previously director of the National Association of Community Legal Centres in Australia for more than five years.

**Joanne Cecil** is a barrister practising at Garden Court Chambers specialising in criminal and public law. She is an executive member of the Criminal Bar Association and the Bar Human Rights Committee.

**Andrea Davies** is a specialist children lawyer with more than 20 years of legal experience. She serves on the Law Society's Children Panel.

**David Gilmore** is founder and managing director of DG Legal and has worked with a wide variety of legal organisations in the private, public and third sector.

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**Andrew Keogh** is a barrister and head of content for CrimeLine.

**Nicola Mackintosh QC (Hon)** is the sole principal at Mackintosh Law. She has a track record of undertaking complex casework for the most vulnerable people in society, and creating precedents for the benefit of people living with disabilities.

**Carol Storer OBE** has been the director of Legal Aid Practitioners Group (LAPG) since 2008. She has worked in private practice, in the third sector and in the public sector.

**Bill Waddington** is director of Williamsons Solicitors. He has more than 30 years' experience in dealing with all nature of cases within the criminal justice system.

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# ACKNOWLEDGEMENTS

The commissioners would like to thank all of those who have contributed evidence to our work over the course of the last two years.

As well as the more than 100 individuals and organisations who contributed written evidence to the commission, we would like to thank those who gave their time to speak to us in person: the Law Society, the Bar Council, Society of Labour Lawyers, Professor Richard Susskind, Professor Roger Smith, Legal Action Group, the Low Commission, the Criminal Law Solicitors' Association, the London Criminal Courts Solicitors' Association, Lord Falconer, Nick Hardwick, Jawaid Luqmani, Jenny Beck, Sandra Ruiz, Edward Daffarn, Mz B, Victoria Vasey, the Citizenship Foundation, Law for Life and the Advice Services Alliance.

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Finally, special thanks must go to Sir Henry Brooke. While this report is a collective effort, it would not have been possible without his dedication.

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Like all publications of the Fabian Society, this report represents not the collective views of the society, but only the views of the Bach Commission. The responsibility of the society is limited to approving its publications as worthy of consideration by the left.

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## ABOUT THIS REPORT

The Bach Commission on Access to Justice was founded at the end of 2015 to develop realistic but radical proposals with cross-party appeal for re-establishing the right to justice as a fundamental public entitlement, equivalent to that of education or healthcare. The Fabian Society has acted as the secretariat to the commission, assisting with the organisation, research and writing of the commission's work.

This is the final report of the Bach Commission. Our interim report, published in November 2016, focused on the crisis in the justice system. This report, the product of nearly two years' work and widespread consultation, proposes solutions for resolving the crisis we described in our interim report.

This report only covers the justice system of England and Wales, and our proposals apply to everyone subject to the law of England and Wales. Scotland and Northern Ireland have different legal systems, and are thus outside the scope of the commission's work. As this report calls for further spending in the justice system of England and Wales, the Barnett formula will apply to ensure Scotland and Northern Ireland have access to equivalent resources. Some of our proposals could be implemented on a UK-wide basis, following consultation and/or consent from the devolved legislatures, in particular our proposal for a statutory right to justice.



## GLOSSARY OF TERMS

**Advice:** We use the term advice (alternatively: education, information and advice) to refer to the spectrum of non-means tested services available to improve people's ability to understand the law, identify a problem as legal in character, and make informed decisions as to a sensible course of action to resolve the problem. This is separate from what is often called legal advice (which is subsumed within our definition of early legal help).

**Early legal help:** Legal help is the term the Legal Aid Agency use to refer to legal advice and assistance, but not representation, for a legal problem. We use the term early legal help to stress that legal help is provided before representation at a court or at a tribunal, and can help to avoid the escalation of disputes into costly court cases.

**LASPO:** The Legal Aid, Sentencing and Punishment of Offenders Act (2012) was a highly controversial act which was introduced to reduce the budget of the Ministry of Justice. It removed from the scope of legal aid most cases involving housing, welfare, debt, employment, immigration, family and clinical negligence; and replaced the non-departmental Legal Services Commission with the Legal Aid Agency, under the control of the Ministry of Justice.

**Legal aid:** Legal aid is legal assistance granted by the state to individuals who cannot afford to pay for their own legal assistance. This could take the form of legal help and/or legal representation.

**Legal assistance:** The term legal assistance sits at the heart of our new right to justice. We use the term to refer to the full spectrum of advice, legal help and representation.

**Legal representation:** We use the term legal representation to refer to the work undertaken by legal practitioners to represent their clients in a court.

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# Foreword



*Willy Bach  
Chair of the Bach Commission*

**W**e live at a time when the rule of law is under attack. Too many powerful institutions pay lip service to the concept of access to justice without having sufficient regard for what it actually means. It is, after all, fairly simple: unless everybody can get some access to the legal system at the time in their lives when they need it, trust in our institutions and in the rule of law breaks down. When that happens, society breaks down.

The work for this report began in the autumn of 2015, after Jeremy Corbyn was elected as leader of the Labour party. I approached him with a proposal for a review into legal aid and he welcomed the idea and asked me to chair it. Working with the Fabian Society, I then assembled an impressive and expert team of commissioners. In the first year of our work, we heard and received evidence from a wide range of witnesses, before producing an interim report which gained considerable interest. The report introduced our main proposal, that there should be a statutory right to justice. This important and innovative policy is now set out in detail in this, our final report.

During the first half of 2017, the commission heard more evidence that has considerably influenced our thinking. There is an urgent need to bring some areas of civil law back into the scope of legal aid, with a focus on early legal help in order to help prevent problems developing further down the track. There are also huge administrative problems with the operation of legal aid, and levels of public legal capability are dangerously low.

**There is an urgent need to bring some areas of civil law back into the scope of legal aid, but more importantly we need to refocus on early legal help in order to help prevent problems developing further down the track**

The supreme court has recently and authoritatively restated our existing rights to justice, and the importance they hold. But the crisis in our justice system shows that the rights we have now are insufficient.

We believe that a new statute is needed to codify our existing entitlements, and to establish a new right to reasonable legal assistance that people can afford. That is why we call for a new Right to Justice Act, which we believe should be monitored and enforced by a new, independent commission. We hope that this new act will help lift the provision of justice above the political fray.

I end with warm thanks to my fellow commissioners, special advisors and all the witnesses who gave up so much of their time to this enterprise. In addition, I want to thank Lord Falconer, Richard Burgon MP, Christina Rees MP, and Karl Turner MP. Above all, none of this would have been possible without three special people: Sir Henry Brooke, whose hard work and wisdom are an inspiration; and Olivia Bailey and Tobias Phibbs from the Fabian Society, without whose support this report would have never been published.

A handwritten signature in black ink that reads "Willy Bach." The signature is written in a cursive style and is underlined with a single horizontal stroke.

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# Executive summary

This is the final report of the Bach Commission. The commission was established at the end of 2015 to find solutions that will restore access to justice as a fundamental public entitlement. Over the course of the nearly two years the commission has been in existence, we have heard from well over 100 individuals and organisations with special expertise in all parts of the justice system.

The commission has found that the justice system is in crisis. Most immediately, people are being denied access to justice because the scope of legal aid has been dramatically reduced and eligibility requirements made excessively stringent. But problems extend very widely through the justice system, from insufficient public legal education and a shrinking information and advice sector to unwieldy and creaking bureaucratic systems and uncertainty about the future viability of the practice of legal aid practitioners.

The commission has concluded that the problems in the justice system are so widespread and varied that there is a need for a new legally enforceable right to justice, as part of a new **Right to Justice Act**. This act will:

- Codify our existing rights to justice and establish a new right for individuals to receive reasonable legal assistance without costs they cannot afford
- Establish a set of principles to guide interpretation of this new right covering the full spectrum of legal support, from information and advice through to legal representation
- Establish a new body called the Justice Commission to monitor and enforce this new right



## The purpose of the Right to Justice Act is to create a new legal framework that will, over time, transform access to justice

The purpose of the Right to Justice Act is to create a new legal framework that will, over time, transform access to justice. But early government action is also required. In part two of this report we set out an action plan for government so that it can take the first steps required to make the right to justice a reality.

- **Legal aid eligibility rules** must be reformed, so that the people currently unable either to access legal aid or to pay for private legal help can exercise their right to justice. This includes establishing a simpler and more generous assessment scheme for civil legal aid; ensuring all benefit recipients automatically qualify for legal aid; and making the contributions to legal aid more affordable

- **The scope of civil legal aid**, which has been radically reduced, must be reviewed and extended. The priority should be to bring early legal help back into the scope of legal aid – across a broad range of legal issues – in order to encourage early dispute resolution and prevent further distress and cost downstream. All matters concerning children should be brought back into the scope of legal aid. With respect to representation at court, some areas of family and immigration law should also be brought back into scope

- **The operation of the legal aid system needs reform.** The legal aid system is creaking at the seams, and practice as a legal aid lawyer is becoming increasingly unsustainable. An independent body that operates the legal aid system at arm's length from government should replace the Legal Aid Agency and action must be taken to address the administrative burdens that plague both the public and providers

- **Public legal capability must be improved.** At present, most people's ability to understand a legal problem or to know where to turn for information and support is poor. We call for a national public legal education and advice strategy that improves the provision of information, education and advice in schools and in the community

When the government first introduced LASPO it estimated it would save £450m a year in today's prices. But last year, legal aid spending was actually £950m less than in 2010. The Fabian Society estimate that the costs of the proposals in this report will initially total less than this underspend, at an estimated cost of around £400m per year.

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# FULL LIST OF RECOMMENDATIONS

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## PART ONE: THE RIGHT TO JUSTICE ACT

The primary recommendation of this report is for a new Right to Justice Act. This will codify and supplement our existing rights and establish a new right for individuals to receive reasonable legal assistance, without costs they cannot afford. It will also establish a new, independent body to promote, develop and enforce that right.

The Right to Justice Act would establish:

- A new individual right to reasonable legal assistance, without costs individuals cannot afford
- The basis for this new right to be enforceable through the courts
- A set of guiding principles to sit behind the new right, including the importance of early legal help, public legal education, and the smooth operation of the system

- A new, independent body called the Justice Commission, whose function is to advise on, monitor and enforce the right to justice.

The responsibilities and powers of the Justice Commission should include the requirement/power to:

- Prepare statutory guidance with respect to the implementation of the right to justice
- Monitor compliance with the new right to justice, issuing regular reports and recommendations to parliament
- Challenge perceived infringements of the right to justice through the courts
- Intervene in, and assist with, individual court proceedings that will enforce and define the right to justice in practice

## PART TWO: URGENT POLICY CHANGES

In order to comply with the Right to Justice Act, the government will need to progressively adopt a range of policies. In part two we set out an action plan for government so that it can take the first steps to making the right to justice a reality.

### Reform of the legal aid assessment

1. The government should introduce a significantly simpler and more generous scheme for legal aid. The means tests should be based on a simple assessment of gross household income, following an adjustment for family size, with the eventual aim of significantly increasing the number of households eligible for legal aid. As an interim measure these more universal criteria could apply to early legal help.
2. Everyone who receives a means tested benefit should be automatically eligible for legal aid, without further assessment. The roll-out of universal credit provides an opportunity to introduce this reform.
3. The government should scrap separate capital assessments for legal aid and adopt the same capital provisions as for means tested benefits. In particular, owner-occupied housing should be exempt from the capital assessment for legal aid.
4. If the government chooses to retain the existing means test for civil legal aid, it should be made more generous and consistent with other means tests. The 'disposable income' the government



# FULL LIST OF RECOMMENDATIONS

assumes is available to pay for legal expenses should exclude the basic living costs of the first adult in a household and council tax payments. The maximum amount that can be set aside for employment-related costs and for rent should also be increased, on the basis of evidence of reasonable costs.

5. In order to allow flexibility and realise the right to justice, the government should extend the discretion to disregard capital and/or income as part of the means test where it is reasonable to do so.

## Reform of legal aid contributions

6. We want to see many more people qualify for legal aid, including people who are in a position to pay part of their legal costs. Legal aid contributions should therefore continue but be reformed, with rules on user payments adjusted to reflect our proposals for a more generous calculation of disposable income and capital so that contribution requirements are no longer an unaffordable barrier to justice.
7. Existing capital contributions are particularly punitive, so the more generous capital thresholds and exemptions used for means tested benefits should be applied to ensure consistency; and people should only have to pay a percentage of capital over these limits, rather than having to contribute 100 per cent of their savings.
8. The government should consider how to simplify and clarify the means testing process in criminal courts, and review the level of contributions made. This

should focus on reducing the number of litigants in person; and ensuring that the level of monthly contributions is affordable and significantly below the costs of the case.

## Reform of legal aid means test and other evidence requirements

9. The evidence requirements for applications for civil and criminal legal aid should be simplified and relaxed, in order to prevent people being forced to abandon their legal aid applications.
10. There should be further liberalising reforms to the domestic violence gateway, and solicitors, legal advisers approved under a legal aid contract, and frontline domestic violence support organisations should be able to confirm that an individual is a victim of domestic violence.



## A wider scope for legal aid

11. We recommend that the government restores legal aid for early legal help (support prior to representation in courts and tribunals) to pre-LASPO levels for all social welfare law (which

includes debt, employment, welfare benefits, immigration and housing), for family law, and for prisoners in appropriate cases.<sup>1</sup>

12. **Children:** All matters concerning legal support for children should be brought back into the scope of civil legal aid.
13. **Family:** Family law cases with the following characteristics should be brought back into the scope of civil legal aid, with respect to representation in court:
  - a) representation in particularly sensitive areas of private family law (such as cases in which the primary care of a child is in dispute)
  - b) cases involving an application to remove a child from the jurisdiction
  - c) cases where there is local authority involvement in private law children proceedings
  - d) cases in which an allegation is made which is so serious it would be unjust not to provide legal representation to defend it
  - e) cases where the question of whether a child should have any contact with a parent or grandparent is in dispute
  - f) cases where a court determines expertise is necessary to decide a family case in the best interests of the child, but where the non-legally aided party is not in a position to pay a contribution towards that expertise.



**14. Immigration:** There should be a full investigation into which areas of immigration law should be within the scope of legal aid funded representation. This should be conducted with recognition of the importance of translation services, and should include reviewing the fees that clients in immigration cases are charged. In the short term, cases involving stateless persons and cases involving family reunion in which vulnerability is involved should be brought back into scope.

**15. Inquests:** Where the state is funding one or more of the other parties at an inquest, it should also provide legal aid for representation of the family of the deceased.

**16. Judicial review:** Judicial review cases have formally remained within the scope of legal aid, but new regulations have dissuaded providers from issuing proceedings. These regulations, which limit the remuneration of legal aid providers for judicial review cases, should be repealed.



### Reform of exceptional case funding

**17.** The exceptional case funding scheme has manifestly failed, and needs urgent review and reform.

### The replacement of the Legal Aid Agency

**18.** The Legal Aid Agency should be replaced by an independent body that operates the legal aid system at arm's length from government.

### Reduce administrative burdens for providers

**19.** Immediate action should be taken to fix the Legal Aid Agency's client and cost management system. This should be done by working with a group of users to identify, develop and implement solutions so that it is fit for purpose.

**20.** There should be a new legal aid composite audit, in place of today's numerous, overlapping and burdensome assessments, which should be conducted with a short notice period.

### Reduce administrative burdens for the public

**21.** The mandatory requirement for mortgage debt, special educational needs and discrimination law to be accessed via the civil legal aid gateway telephone service should be removed, and face-to-face help should be available for those who need it. Additionally, the service should be better resourced with legally trained staff.

### Action to ensure the continued viability of the legal aid profession

**22.** The government should commission an independent review of the state of the legal aid profession and its continued viability. This review should focus on the impact any decline in size or quality has on the ability of the public to access justice, and consider the effects of the decision to cut the bursary scheme for aspiring legal aid lawyers.

### Better public legal education in schools

**23.** There should be a new responsibility on Ofsted to assess in greater depth how well schools prepare children for the opportunities, responsibilities and experiences of later life. Government should also better support and facilitate the development of relationships between schools and organisations who are working to improve legal capability.

### Universally accessible advice

**24.** The government should support the introduction and maintenance of a centrally branded and easily navigable portal for online information and advice. The government should share the details of this central portal in communications about other matters such as health and education.

**25.** The government should create a new, ring-fenced fund for advice providers who are able to evidence the effectiveness of their approach to delivering advice to people within their communities.

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# Introduction: The crisis in our justice system



We will all lean on the law at some point in our lives. But its visibility in public life is different to that of the National Health Service or the education system. We often, quite wrongly, think of the legal system as only of relevance to criminals and lawyers. As such it has been hard to make the case, to the public and to policy makers alike, for properly supporting it. And when spending cuts have been made, the legal system has had to shoulder a disproportionate share of the burden.

But, in truth, an effective legal system in which all can access justice fairly is the cornerstone of a free society. The law is not something that lawyers and judges impose on criminals but a common inheritance to which everybody in society has an equal right. The law guarantees our rights, underlines our duties, and provides an equitable and orderly means of resolving disputes.

There are few principles that so clearly cross party political lines: a properly

functioning legal system that maintains the rule of law is, along with democracy, the basis of our political settlement.<sup>2</sup> While big picture political issues like the jurisdiction of the European court of justice dominate discussion, the granular, everyday workings of our justice system

**As we leave the European Union, we have the opportunity to reopen the debate about our own courts, our own justice system and how to ensure they work for everyone**

are less explored, but at least as important. As we leave the European Union, we have the opportunity to reopen the debate about our own courts, our own justice system, and how to ensure that they work for everyone.

The commission has heard, over the course of nearly two years, striking testimony from many sources about the multiple failures of the justice system. This has led us to conclude that the problems are so deep-rooted, commonplace and various that piecemeal reforms alone would simply be papering over the cracks. We have therefore concluded that what is needed is a new Right to Justice Act which codifies and extends our right to justice. A new, independent commission should monitor and enforce this act.

## **The crisis in the justice system**

The 2010 coalition government introduced a wide range of policies to curtail public expenditure, and in some cases this reduced spending gave rise to new needs for legal help. Yet the government decided to hit justice spending particularly hard,<sup>3</sup> reducing Ministry of Justice expenditure by 34 per cent from 2010-11 to 2015-16.<sup>4</sup> The Legal Aid, Sentencing and Punish-

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ment of Offenders Act 2012 (LASPO) was introduced to implement this decision.

In November 2016 our interim report described the justice system in the aftermath of LASPO as in crisis.<sup>5</sup> Despite significant rulings in the courts since then, most notably the July 2017 supreme court ruling declaring employment tribunal fees unlawful, the situation remains largely unchanged.<sup>6</sup> More and more people are unable to exercise their basic right to justice.

The law is meaningless unless people are supported to have the knowledge to understand it and the power to enforce it. Our adversarial common law system has evolved over centuries as a way to resolve disputes. But if you don't recognise when a dispute has a legal dimension then you can't resolve it through the justice system. Or if you recognise your problem has a legal remedy but don't have the means to access the justice system on a fair footing with your adversary, then the outcome that is reached is unlikely to be just. And if the expenses incurred by seeking justice are greater than the benefits from achieving it, then justice becomes irrelevant.

In our work we have heard of numerous examples of people who are unable to access justice. LASPO has removed much of civil law from the scope of legal aid, including key, and cost-effective, areas like early legal help for social welfare matters. Where legal aid remains, it is so tightly means tested that it is frequently out of reach for even those on modest incomes. Huge numbers of people facing a housing dispute or family breakdown have insufficient resources to afford private legal advice but are also deemed ineligible for legal aid. For the wronged party, too often the best course of action is to abandon justice, swallow pride and accept being the victim of the unlawful actions of a more powerful adversary. Many have decided it is easier to abandon the prospect of legal redress altogether: the number of civil legal aid matters initiated is down

84 per cent from 933,815 in 2009-2010 to just 146,618 in 2016-17, and the number of legal aid certificates granted for civil representation is down 36 per cent.<sup>7</sup> During a time of austerity it is fanciful to believe that this decline reflects an underlying reduction in legal need.

The entire justice system is also riddled with operational problems. Excessive administrative costs in the Legal Aid Agency burden the public finances at a time when the rest of the justice sector is facing crippling cuts and seemingly permanent austerity. Yet systems like the software for applying for legal aid have been rolled out before they were fit for purpose, adding to the already time-intensive administrative workloads of legal practitioners. Bureaucratic problems like these discourage people from seeking legal help and professionals from carrying out legally aided work. Their effect is damaging not just to the working lives of professionals but to everyone's right to justice.

**The entire justice system is also riddled with operational problems. Excessive administrative costs in the Legal Aid Agency burden the public finances at a time when the rest of the justice sector is facing crippling cuts and seemingly permanent austerity**

Over the course of the commission's lifespan we have heard from an extraordinary number of individuals – laypeople as well as legal practitioners and experts – and organisations who have provided detailed accounts of these injustices occurring not as aberrations but as part and parcel of everyday practice. They are not theoretical, uncommon or extreme examples. We have spoken to lawyers

and advice workers who have represented clients who have suffered such injustices; and members of the public who have been on the receiving end themselves. This body of evidence is included in the appendices listed at the end of this report, and published online. We hope that this will aid the Lord Chancellor and the House of Commons Justice Committee, and inform the ongoing post-implementation review of LASPO.

### **The change we need**

The right to justice is an ancient right enshrined in Magna Carta. It has been further developed by common law over the centuries, and it is also a fundamental human right guaranteed to us by the Human Rights Act. Yet current provision is failing to meaningfully secure our right to justice.

Our proposal for a new Right to Justice Act and the accompanying scrutiny provided by a Justice Commission will develop what the right to justice means in practice today, responding to political, economic and technological change. In time, court cases will further specify, and act as a guarantor of, our right to justice. **Part one** of the report explains the reasons why a right to justice act is needed, what the new act will look like, and how it will be enforced.

Part two of this report sets out some solutions to the most urgent problems with the justice system, proposing an action plan for government to follow. Together these recommendations constitute the initial measures required to realise a right to justice that is practical and effective.

The majority of these steps, in particular with respect to legal aid, can only be dealt with by extra public expenditure. For example, some areas of law that are no longer covered by legal aid following LASPO should be reintroduced into scope. But we do not believe that the answer to the access to justice crisis can

be found in simply repealing this one act in its entirety. We know that there were huge barriers in accessing justice before 2012 that would not be addressed even if this controversial law were replaced. And we understand that the act was a response to the financial pressures that the government still faces.

Yet LASPO may well have cost the exchequer more than it has saved. If a person is unable to obtain early legal advice to challenge a benefits decision, for example, their problems can often spiral and place a significant burden on other parts of the public sector, like the health service. The National Audit Office has criticised the Ministry of Justice for not considering the downstream implications of LASPO, arguing that it *“did not have a good understanding of how people would respond to the changes or what costs or benefits might arise”*.<sup>8</sup> It is therefore the commission’s view that some increase in spending, to help in particular with early legal advice, is economically, as well as morally and constitutionally, the right thing to do.

It is also the case that the government has saved more than twice as much as it expected to, when it first introduced LASPO. The documentation presented to parliament alongside the bill estimated savings of around £450m (in today’s prices) but legal aid spending is now £950m less annually than in 2010. The Fabian Society has provided estimates – in appendix 7 – for the costs of the proposals in this report. Those calculations suggest an annual cost of around £400m, at least for the period of the next spending review. This is less than half the savings the government has made since 2010.

In the long term, eligibility for legal aid will probably need to be extended to give practical effect to the right to justice, so that it ultimately covers perhaps half of households as was the case in the 1990s. For this to happen spending will have to be progressively increased, in future spending reviews over a decade or more,

## **BOX ONE: KEY PROBLEMS WITH THE JUSTICE SYSTEM FROM OUR INTERIM REPORT**

### **1. Fewer people can access financial support for a legal case**

There has been a huge decrease in the numbers of people who are eligible for legal aid. In the 1980s, 80 per cent of households were eligible for legal aid. By 2008 that figure had dropped to 29 per cent.

### **2. Exceptional case funding has failed to deliver for those in need**

The exceptional case funding (ECF) scheme, designed to mitigate the effects of LASPO cuts to legal aid, has failed. The government suggested around 847 children and 4,888 young adults would be granted ECF each year. Yet between October 2013 and June 2015 only eight children and 28 young adults were granted legal aid under the scheme.

### **3. Public legal education and legal advice are inadequate and disjointed**

Levels of legal aid support are falling and public legal education continues to be ineffective. The number of not-for-profit legal advice centres fell from around 3,226 in 2005 to 1,462 by 2015. The services that do exist are not effectively integrated.

### **4. Bureaucracy in the Legal Aid Agency is costly and time-consuming**

There is excessive bureaucracy in the Legal Aid Agency adversely affecting the efficiency of the legal aid system generally. While the overall budget of the Legal Aid Agency was cut by 25 per cent, the administration budget has stayed relatively steady. The complexity of the legal aid scheme needs to be addressed urgently and any unnecessary bureaucracy removed.

### **5. Out of date technologies keep the justice system wedded to the past**

The British justice system has failed to effectively utilise technological innovation. While Canada, the Netherlands and the United States have experimented with new technologies, England and Wales are lagging behind.

as case law develops and resources allow. Justice expenditure will remain a tiny share of overall public spending, and the commission believes some extra spending is a worthy investment to realise a vision of a public legal service for civil and criminal law that is available to a wide range of people.<sup>9</sup>

In 2016 Lord Neuberger, then the president of the supreme court, said: *“We have a serious problem with access to justice for ordinary citizens... if it does not exist, society will eventually start to fragment.”* This is what is at stake. Put simply, the injustices and failures we

have seen as a commission – and which we document in our interim report, in this report and in its appendices – are a threat to the rule of law. An inaccessible justice system cannot deliver justice.

**Put simply, the injustices and failures we have seen as a commission are a threat to the rule of law**

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# Part one: The Right to Justice



**E**veryone should have the right to justice. This right has been stated in various forms, from Magna Carta to the Human Rights Act. But millions of people today are denied justice because they have insufficient knowledge or insufficient money. We propose a new law to codify and extend

every individual's right to justice.

The primary recommendation of this report is for a new **Right to Justice Act**. First, this will codify and supplement our existing rights and establish a new right for individuals to receive reasonable legal assistance, without costs they cannot afford.

Second, it will establish a new, independent body to promote, develop and enforce that right. Chapter one discusses this new right, and chapter two sets out how we believe it should be enforced through a new, independent commission.

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# Chapter one: The Right to Justice Act

## IN THIS CHAPTER, WE RECOMMEND:

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The law is a key pillar of our society, and we all have a right to justice. But existing rights have been insufficient to ensure fair access to that justice. We have therefore concluded that a new right to receive reasonable legal assistance, without costs people cannot afford, is required.

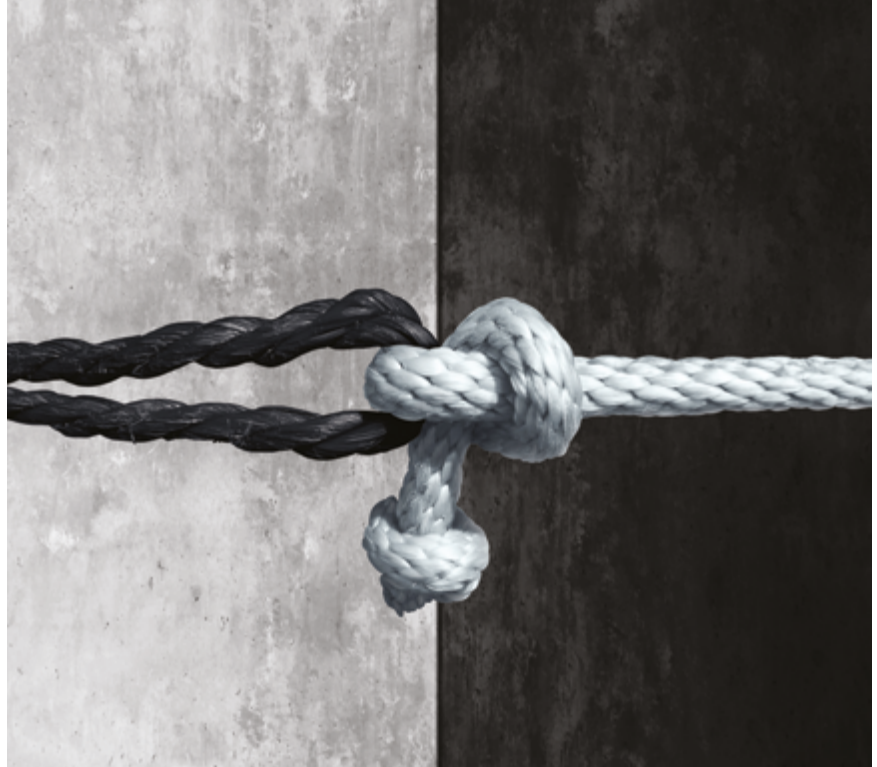
People should be able to enforce this new right, in the courts if necessary. But more importantly, government must carry out all of its functions in a way that reflects its duty to uphold the right to justice. This new law will provide clarity for the courts, remove justice from the political fray, and ensure that we widen our definition of justice to include advice and guidance, not just access to the courts.

We recommend:

- The codification of our existing rights to justice in statute
- A new individual right to reasonable legal assistance, without costs people cannot afford
- The basis for this new right to be enforceable through the courts
- A set of guiding principles to sit behind the new right, including the importance of early legal help, public legal education, and the smooth operation of the system

**T**he concept of minimum standards for access to justice is neither new, nor without existing legal and international precedent. But the current legal framework and its infrastructure allow too many people to forgo justice. And there is too much ambiguity and therefore too much discretion about what our right to justice means in practice, as the supreme court judgment on employment tribunal fees recently acknowledged. We believe that a single, statute-based right to justice will bring the clarity necessary to reset our justice system and ensure that everyone can access justice.

**We believe that a single, clear, statute-based right to justice will bring the clarity necessary to reset our legal system and ensure that everyone can access justice**



Instead of simply reversing government decisions, or trying to solve the problem through funding increases alone, the commission has concluded that we should instead effect structural change in the way the justice system works.

### Our existing rights

Our existing rights regarding access to justice have evolved over centuries. An initial minimum standard of justice is set out in Magna Carta, in one of only three of its clauses that remains on the statute book today:

*“No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right.”*

While we find ourselves in radically different times, this basic clause captures the spirit of a legal system that treats everyone equally before the law, in which financial clout, or lack thereof, ought to be irrelevant to proceedings.

In the centuries that have passed our right to justice has been extended and elaborated by both statute and common law. Recent attempts to define a minimum standard for access to justice have added considerable detail, from the 1949 Legal Aid and Assistance Act to the Human Rights Act 1998. (See box two opposite). Our proposed Right to Justice Act would begin by restating and codifying these existing rights to justice. This should take the form of a simple restatement of the HRA and common law. The act could also include clauses that specify existing case law in order to provide greater clarity and political force, including elements from supreme court judgment on the affordability of tribunal fees, and the court of

## BOX TWO: EXISTING RIGHTS

**The Legal Aid and Assistance Act 1949:** Until this act, legal help and representation were only available to people with low incomes in very limited circumstances. The act built on the work of the Rushcliffe Committee, which argued that legal aid was a right; that the state had a duty to provide legal aid to meet that right; that the lawyer-client relationship should be maintained; and that legal aid should not simply be available to the poorest members of society.<sup>10</sup>

**The Human Rights Act 1998 (HRA):** Article 6 guarantees the right to, and elaborates on the process of, a fair trial. It also sets out a series of “*minimum rights*” to which those charged with a criminal offence are entitled. These include the right to be informed promptly and clearly about charges, the right to have adequate time and facilities to prepare a defence, and the right to defence “*in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*”.

These principles have been further elaborated on in the court of appeal in the context of legal aid for civil litigation as recently as 2014.<sup>11</sup> In particular, human rights protections under article 6 have been specified by the court to include a practical and effective right of access to the courts; the ability to “*present the case properly and satisfactorily*” before the court or tribunal; fairness and the appearance of fairness in the proceedings; and equality of arms such that each side can present their case “*under conditions that do not place them at a substantial disadvantage via-a-vis their opponent*”.

**Unimpeded access to the courts:** The right to unimpeded access to the courts is one that has been reiterated through centuries of English common law. The supreme court restated this common law right in its important judgment in *R (Unison) v Lord Chancellor*, which declared current employment tribunal fees unlawful, ruling that court and tribunal fees must be “*reasonably affordable*” to all.<sup>12</sup> The judgment discussed the history of the right to access the courts at length, citing Magna Carta, the 17th century jurist Sir Edward Coke and numerous cases in the 20th and 21st centuries that demonstrate the practical application of this common law right in different factual scenarios.

appeal judgment which summarises ECHR case law on access to civil justice.

### The benefit of a new right to justice

Our existing rights bring important protections. In recent times they have been used to outlaw extortionate employment tribunal fees and relax the conditions for accessing legal aid. But they have been an insufficient defence against

the drastic cuts to legal aid we have seen. A clearer, broader statute on the right to justice would make a real difference.

We believe that a new statutory right to justice will achieve three crucial things:

**Clarity:** There is significant ambiguity in existing law. As the supreme court judgment in *R (Unison) v Lord Chancellor* noted, there is currently “*wide discretion*

conferred upon the Lord Chancellor by the relevant statutory provision” in relation to determining what constitutes reasonable access to the courts. The supreme court’s judgment demonstrated that there are legal limits to the government’s discretion. But a clear statute would probably have prevented unaffordable employment tribunal fees ever being imposed.

**Political consensus:** A new right to justice will help re-establish a consensus that is above the political fray. A new law will make it harder for a lord chancellor to propose new legislation that overrides our human rights or the common law principle of unrestricted access to the courts. Any future infringement would not only be circumventing the established case law of the courts, but a modern act of constitutional significance. In these circumstances parliament would be invited to explicitly diminish a constitutional right to justice and the government would therefore expect its proposals to receive very intense scrutiny. The legal aid cuts of recent years would have been much harder to achieve in this political and legislative context.

**A broader conception of access to justice:** Access to the courts and access to justice are not synonymous. A lack of knowledge or information can prevent justice, as much as a lack of representation in the courts system. A new right to reasonable legal assistance includes the full spectrum of public legal education, information, advice and representation.

We believe it is the right time to consider these matters. The UK’s departure from the European Union provides an opportune moment to specify the right to justice clearly in the law of England and Wales. As Brexit re-establishes the primacy of domestic law and institutions of justice, there would be huge value in simultaneously articulating the domestic right to justice under the law.

Our proposal also sits alongside the

longstanding debate on the future of the Human Rights Act. Our proposal for a statutory right to justice could run in parallel (or be absorbed within) current proposals to replace the HRA, which enshrines the convention rights of the European Convention on Human Rights, with a purely domestic law. Some supporters of this idea want a UK ‘bill of rights’ that freezes or even reduces the law’s existing specification of our human rights. In our view it would be completely unacceptable



### We propose that a Justice Commission is established to scrutinise and develop the right to justice

to remove any of the rights to justice enshrined in the convention. A new bill of rights could offer the opportunity to extend our fundamental, constitutional protections. We suggest that any future bill of rights should specify an expanded set of rights with respect to justice (just as we propose in our freestanding Right to Justice Act). For example, the 2012 Commission on a Bill of Rights called for a right to justice in any new bill of rights, arguing “that there are a number of rights re-

lating to our civil and criminal justice system that have come under threat from short term political pressures under successive governments that we would like to see specifically included, and thus protected, if there were to be a UK Bill of Rights.”<sup>13</sup>

### The new right

We believe that everyone should have “the right to receive reasonable legal assistance, without costs they cannot afford”. It is possible that codifying existing law might lead to the development of this right over time. In particular, the judgment of the supreme court on what it means for justice to be “reasonably affordable” could have significant implications for the design of the means test for legal aid. However current case law sets out fairly demanding conditions before legal aid is needed to achieve effective access to justice.

For this reason, the commission has concluded that the right to justice should be extended by statute. We propose that people are guaranteed access to reasonable legal assistance which they can afford. This is designed to be a lower threshold than the present guarantee of effective access to justice. In particular it would encompass legal information, advice and support before any litigation is commenced – the areas where public support has been cut-back the most. The new right would guarantee a reasonable and proportionate level of support in the early stages of legal support, in contrast to the law’s existing focus on intensive, expensive support for unusual and complicated cases.

This modest extension of the existing right to justice should have the same constitutional status as the existing protection under the Human Rights Act. Individuals must be able to enforce the right through the courts and every decision taken by the government and every act of parliament must be compatible with it. Additionally we propose that a Justice Commission is established to scrutinise and develop the



right to justice, including our proposed extension to it, which we discuss in more detail in chapter two.

The new right would be enforced in a number of ways:

**Individual enforcement:** In complaints involving ongoing cases, judges would have the power to halt proceedings and request that the right to justice is upheld for one of the parties in the case. In practice, this means that they would be able to adjourn proceedings and issue a certificate that states that in their judgment, and in the interests of justice, legal aid should be made available. The case would then be referred back to the legal aid authorities, who would be expected to comply with the certificate. The law could also be used to secure access to advice or initial support in making an application. In addition, any government action suspected of breaching people's rights under the act could be challenged by judicial review.

**Institutional overview:** To enforce and develop the right to justice our proposed Justice Commission would be mandated to carry out inquiries, issue guidance, challenge government decisions and intervene in individual litigation to support implementation of the right in practice. Its guidance would be used by the courts to inform their judgments.

**Declaration of incompatibility:** If a higher court considers that part of a primary act of parliament is incompatible with the right to justice it would be able to make a declaration of incompatibility. Parliament would then be forced to consider whether it wanted to amend the law. This is equivalent to the process created by section 4 of the HRA.<sup>14</sup>

### Guiding principles

In addition to this new right to justice, the Right to Justice Act should also set down a range of guiding principles to aid interpretation of the right to justice. These



principles will form the basis of statutory guidance on the right to justice issued by the Justice Commission, discussed in the following chapter.

The new right to justice is designed to cover the spectrum of legal help and advice, from public legal education through to representation in court. The right to justice is also about more than just financial barriers to legal assistance, it is also about the operation of the legal system. The principles should include:

#### High quality public legal education and information

The state must ensure the provision of sufficient public legal education and legal information, both during formal education and throughout later life, such that people have a solid understanding of their basic rights and how to enforce them. There is already some provision in the school curriculum, but various reports have estimated that millions fail to effectively enforce their rights every year because people do not understand the legal system or know how to use it for their benefit.<sup>15</sup>

**Early legal help:** Since LASPO, legal aid

The new right to justice is designed to cover the spectrum of legal help and advice, from public legal education through to representation in court

for early legal help has fallen dramatically. In 2009-10 there were 933,815 legal help matters started, but this fell to 146,618 in 2016-17 – a decrease of more than 84 per cent, far greater than the decrease seen for legal representation.<sup>16</sup> This leaves legal aid provision in these areas skewed towards the courts, even though it would be significantly cheaper to resolve disputes at an earlier stage.<sup>17</sup> As the Low Commission's work has demonstrated, early legal help is as important as representation, and should be given parity of esteem.

#### Cross-departmental collaboration:

Government departments can often work against each other when it comes to access to justice. The department for work and pensions (DWP), for example, is well known for making questionable benefits

decisions that are often overturned either after mandatory reconsideration or at an appeal.<sup>18</sup> As well as the initial injustice of the imposition of wrongful decisions, the high proportion of poor quality DWP decisions also clogs up the tribunals. The responsibility for meeting the requirements of the right to justice must not sit with the Ministry of Justice alone. Every department should consider how the quality of its decision-making impacts on the right to justice, and we suggest that every department is instructed to include detailed information on how it is assisting people with their right to justice in their departmental plans. To help enforce this, the government might want to consider the principle of ‘polluter pays’ in cross-charging the costs of justice that are associated with decisions made by arms of the state.



### **The smooth operation of the system:**

There is a need to redesign the whole justice system to reduce complexity and cost so that effective remedy is as cheap and efficient as possible for all concerned. As part of this, the government must invest in the modernisation and digitisation of legal services. A flurry of recent reports have suggested innovation in this area, starting with the Civil Justice Council report on Online Dispute Resolution (ODR), and culminating in Lord Justice Briggs’ final Civil Courts Structure Review Report and the UK government white paper, *Transforming Our Justice System*.<sup>19</sup>

But modernisation must be focused on ensuring fair access to justice for all. Technology has the capacity to enhance, empower and automate, but it also has the potential to exclude vulnerable members of society. We therefore welcome Lord Justice Briggs’ insistence on providing full and effective support to those unable themselves to access digital content. Further technological innovation must reduce the considerable bureaucratic burden placed on the public and on providers.

**Client focused design:** The justice system must be designed to maximise the ease those experiencing legal problems have in accessing justice. As the Low Commission wrote, this means: *“addressing the issues of users in the round, and not just tackling problems in silos; looking not just at the presenting problem but also at the background issues; [and] bearing down on inefficiencies in the system that give rise to delay and bureaucratic mistakes and working with public service providers to improve their early delivery.”*<sup>20</sup> In practice, this means giving individuals the capacity to address or at least recognise problems of a legal nature themselves, providing opportunities for early intervention, and integrating services effectively so that people encounter opportunities for legal support in the places where they are likely to face legal problems.

**Not just a service for the poor:** Fewer and fewer people are able to access legal aid, with help restricted to the very few most in need in a few areas of law. This is a significant departure from the origins of our legal aid system, which lie in the

While reverting to a near-universal system may not be achievable in the medium term, a more widely accessible system of legal aid would ensure that many more of those currently slipping through the gaps can access justice

Legal Aid and Assistance Act 1949. The act understood that in order for the service to maintain high standards it could not only be a service for the poorest. While reverting to a near-universal system may not be achievable in the medium term, a more widely accessible system of legal aid would ensure that many more of those currently slipping through the gaps can access justice. Appendix 6 of this report contains a history of legal aid between 1945 and 2010, so that readers can see how the original scheme developed over the years.

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# Chapter two: The Justice Commission

## IN THIS CHAPTER, WE RECOMMEND:

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The first purpose of the Right to Justice Act is to codify the right to justice and to set in statute the right to reasonable legal assistance without costs people cannot afford. But the act would also establish a new body with the power to ensure that this new right is brought to life.

We recommend the establishment of a new, independent body called the Justice Commission, whose function would be to advise on, monitor and enforce the right to justice:

- The Right to Justice Act should require the Justice Commission to prepare statutory guidance with respect to the implementation of the right to justice

- The Justice Commission should monitor compliance with the new right to justice, issuing regular reports and recommendations to parliament
- Where the Justice Commission feels the right to justice has been undermined, it should have the power to challenge this in the courts. It should also have the power to intervene in, and assist with, individual proceedings

By itself, our proposed new statutory right to justice will take time to change the justice system. We therefore propose the establishment of an independent body to interpret, monitor and enforce the right. We suggest this body should be called the Justice Commission.

### The structure of the Justice Commission

The commission has concluded that the most appropriate form for the Justice Commission should be a non-departmental public body led by a chief commissioner, and with a board of legal practitioners, public champions and other relevant experts. The chief commissioner should have significant legal experience: we suggest a suitable candidate might be a serving or retired senior judge. Appointments should be made on a cross-party basis and comply with the governance code on public appointments.

In reaching this recommendation, the commission explored a number of



possible models for a new body to advise on, monitor and enforce the right to justice. One option which was considered was to broaden the functions of an existing organisation with relevant supervisory powers – or merge several different organisations – and add to the existing remit a duty to improve access to justice. There are several existing bodies with monitoring, supervisory and regulatory duties over different aspects of the justice system. These include:

- The oversight regulator of the legal profession, the Legal Services Board
- The professional regulators designated under the Legal Services Act 2007 including the Law Society, the Bar

Council and the Chartered Institute of Legal Executives (CILEx)

- The frontline regulators: the Solicitors Regulation Authority, the Bar Standards Board and CILEx Regulation
- Other relevant bodies such as the Equality and Human Rights Commission (EHRC), the Children’s Commissioner, the Civil Justice Council, the Legal Aid Agency and the Legal Ombudsman.

Several particularly pertinent examples are discussed in box three below.

However, substantial changes to the terms of reference of these organisations would be required before any of them could take on responsibility for monitor-

ing and securing the right to justice. They each have a confined remit and it is not immediately obvious that any of them could become the supervisory guardian of access to justice as a whole. In the case of the EHRC, its remit is too wide to provide sufficient focus on the justice system.

The commission also studied a number of independent inspectorates

**The commission also studied a number of independent inspectorates and non-departmental public bodies in considering the best form of organisation to monitor the Right to Justice Act**

### **BOX THREE: EXAMPLES OF EXISTING BODIES**

The commission has studied several existing bodies to establish whether any would be suitable to monitor the Right to Justice Act. The following are a selection which have the clearest existing mandates regarding access to justice.

**The Legal Services Board** has a mandate to ensure that regulation in legal services is carried out in the public interest. One of its eight objectives is to improve access to justice. Another is to increase public understanding of individuals’ legal rights and duties. Yet, in common with the legal professionals’ own regulatory bodies, the board has given little prominence to either objective during the last 10 years, as witness after witness to the commission has testified. What is more, its scope is too restrictive; it is the regulatory body for legal professionals – not the justice system as a whole.

The **Civil Justice Council** is responsible for coordinating the modernisation of the civil justice system, with a focus predominantly on procedure and costs. Similarly, the Family Justice Council, a non-statutory, advisory body, monitors the family justice system. Both have a scope too narrow to monitor the sector as a whole.

The **Equality and Human Rights Commission (EHRC)** is a statutory non-departmental public body established by the Equality Act 2006. It provides advice and guidance, reviews the effectiveness of the law and takes legal enforcement action to clarify the law and address significant breaches of rights. While the EHRC is in theory the guardian of the right to justice as laid down in the Human Rights Act, its very broad remit leaves it unable to give adequate focus to the justice system.



and non-departmental public bodies in considering the best form of organisation to monitor the Right to Justice Act. There are hundreds of regulatory bodies in the United Kingdom at present. These follow a wide range of different models and come with different powers, ranging from the purely advisory to implementation and enforcement. In all of them, there is a trade-off between total independence and the power to enforce.

In considering this trade-off, the commission concluded that the first priority of the regulatory body must be to ensure that the right to justice is enforceable. As former lord chancellor Lord Falconer put it in his evidence to the commission: *“What is the good, ultimately, of rights that are not enforceable?”*<sup>21</sup>

### The role of the Justice Commission

The Justice Commission should be responsible for ensuring that the Right to Justice Act is understood and enforced. It should have three crucial roles:

**Advising on the right to justice:** The Right to Justice Act will require the Justice Commission to issue guidance on the right to justice. This statutory guidance will be used by the courts, by government, and by public bodies – and will be regularly updated to reflect changing circumstances and new case law. The Justice Commission will be able to seek action through the courts if this guidance is ignored. This guidance should be based on the principles behind the right to justice, as set out in chapter one. These include the importance of high quality public legal education and information, and the importance of early legal help.

**Monitoring the right to justice:** The Justice Commission should also be responsible for monitoring the government’s compliance with the right to justice. This should take the form of regular reports, issued to parliament, which set out recom-



The Justice Commission should also have a role in the enforcement of individual rights. Where a judge is considering compliance with the right to legal assistance in a court case, the judge may request additional clarification from the Justice Commission on their interpretation of the right

mendations for the government to follow. We recommend that the government is mandated to respond to these reports within a set period of days, as with Her Majesty’s Inspectorate of Prisons.

**Enforcing the right to justice:** We also believe that the Justice Commission should have the ability to enforce the right to

justice through the courts. The EHRC offers an instructive example here. Where it believes a public body is contravening the HRA or the Equality Act 2010, it can issue proceedings for judicial review. The courts then determine whether or not the public body has acted lawfully and can issue injunctions and quash decisions accordingly.

The Justice Commission should also have a role in the enforcement of individual rights. Where a judge is considering compliance with the right to legal assistance in a court case, the judge may request additional clarification from the Justice Commission on their interpretation of the right. The Justice Commission should also have the power to intervene in, or assist with, any individual cases that have been brought before the court touching on the right to justice, and should be notified of any relevant applications for judicial review.

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## Part two: Urgent policy changes



Our proposal for a Right to Justice Act will cement the principle of access to justice firmly at the heart of government, and provide a legal framework for political decisions. But this framework will only be successful if policy makers are also committed to restoring access to our justice system.

In part two of this report we set out what we see as the most urgent policy decisions that are needed to begin to make the right to justice a reality. Together, these proposals constitute a 25 point plan for government. The Fabian Society estimate that in the short term these changes will cost around £400m per year (see appendix 7), with key components including: £120 million for widening

the scope of early legal help; £110m for extending eligibility for civil legal aid; £60m for limited widening of the scope of civil legal representation; and, £50m for a national fund for advice services. We hope the government considers these recommendations as part of the post-implementation review of LASPO, which is due to be completed by April 2018. We also urge the government to review very carefully the significant and concerning body of evidence which we have collected since we began our work in 2015, and which we have detailed in the appendices to this report.

In due course, we aim to see the Justice Commission in a position to make policy recommendations to government, along-

side its enforcement role. We hope that our report and evidence will be useful as it goes about its work.

However, our action plan is not exhaustive. Its focus is mainly on the operation of the legal aid system, and access to education, information and advice. The Justice Commission will need to conduct a much wider review of the operation of the justice system to advise on how to bring to life all the guiding principles of the right to justice act that we proposed in chapter one. The 25 points we list here are the most pressing reforms required to begin to make the Right to Justice Act a reality, and to prevent the worst denials of justice.

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# Chapter three:

## Reform eligibility requirements

The first part of our plan for government concerns the rules on eligibility for legal aid. The commission heard a wide range of evidence that showed there is now a substantial gap between those who qualify for legal aid and those who can afford to pay privately for legal help and representation.<sup>22</sup> This leaves huge numbers of people unable to access legal help because they cannot afford it, infringing their right to justice.

The number of people who are eligible for legal aid has been in a steady decline that long precedes LASPO. The proportion of the population eligible for legal aid fell from 80 per cent in 1980 to 53 per cent in 1998, to 29 per cent in 2007.<sup>23</sup> The Haldane Society of Socialist Lawyers estimate that the figure could now be as low as 20 per cent.<sup>24</sup> While it may not be possible to immediately reverse the numbers of those eligible back to the levels of the 1980s,

there is an urgent need for action to halt the decline in eligibility and reintroduce legal aid provision for those most in need to ensure that justice is within the reach of the majority and not just the very wealthy and the very poor. For now, the goal could be to ensure that everyone with a below median income has access to support, as was the case in the late 1990s.

### IN THIS CHAPTER, WE RECOMMEND:

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The commission recommends that the government reforms the eligibility criteria for legal help and representation. We recommend:

#### Reform of the legal aid assessment

1. The government should consider a significantly simpler and more generous scheme for legal aid. The means tests should be based on a simple assessment of gross household income, following an adjustment for family size, with the eventual aim of significantly increasing the number of households eligible for legal aid. As an interim measure these more universal criteria could apply to early legal help.
2. Everyone who receives a means tested benefit should be automatically eligible for legal aid, without further assessment. The roll-out of universal credit provides an opportunity to introduce this reform.
3. The government should scrap separate capital assessments for legal aid and adopt the same capital provisions as for means tested benefits. In particular, owner-occupied housing should be exempt from capital assessment for legal aid.
4. If the government chooses to retain the existing means test for civil legal aid, it should be made more generous and consistent with other means tests. The 'disposable income' the government assumes is available to pay for legal expenses

should exclude the basic living costs of the first adult in a household and council tax payments. The maximum amount that can be set aside for employment-related costs and for rent should also be increased, on the basis of evidence of reasonable costs.

5. In order to allow flexibility and realise the right to justice, the government should extend the discretion to disregard capital and/or income as part of the means test where it is reasonable to do so.

#### Reform of legal aid contributions

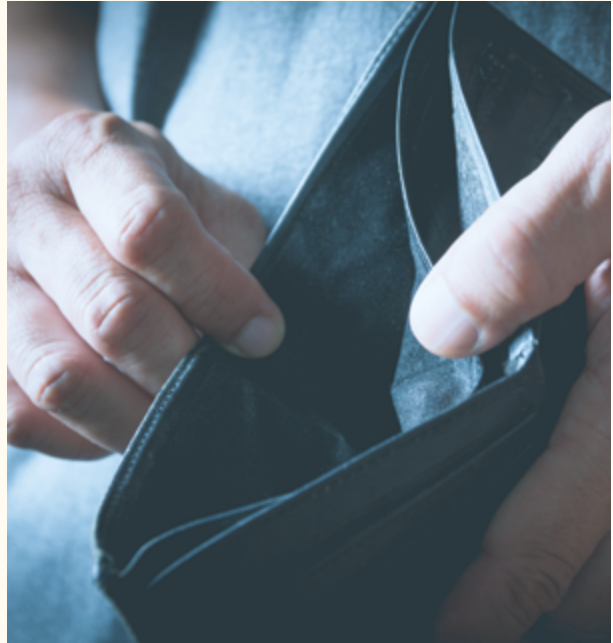
6. We want to see many more people qualify for legal aid, including people who are in a position to pay part of their costs. Legal aid contributions should therefore continue but be reformed, with rules on user payment adjusted to reflect our proposals for a more generous calculation of disposable income and capital so that contribution requirements are no longer an unaffordable barrier to justice.
7. Existing capital contributions are particularly punitive, so the more generous capital thresholds and exemptions used for means tested benefits should be applied to ensure consistency; and people should only have to pay a percentage of capital over these limits, rather than having to contribute 100 per cent of their savings.

*Continued...*

8. The government should consider how to simplify and clarify the means testing process in criminal courts, and review the level of contributions made. This should focus on reducing the number of litigants in person; and ensuring that the level of monthly contributions is affordable and significantly below the costs of the case.

### Reform of the legal aid means test and other evidence requirements

9. The evidence requirements for applications for civil and criminal legal aid should be simplified and relaxed, in order to prevent people being forced to abandon their legal aid applications.
10. There should be further liberalising reforms to the domestic violence gateway, and solicitors, legal advisers approved under a legal aid contract, and frontline domestic violence support organisations should be able to confirm that an individual is a victim of domestic violence.



### The civil legal aid assessment

There are significant problems with the Legal Aid Agency's methods of assessing the income and capital of people who apply for civil legal aid. The evidence provided to the commission by Rights of Women was particularly instructive about the problems with the income assessment, summarised by the following comment from a respondent to one of their surveys:

*"I earn a low income, yet I've been assessed as having too much disposable income (they don't take into account living costs for utilities etc...) and when you aren't eligible you're expected to pay full solicitors' costs - there's no help anywhere in between. I've had to face my violent ex-partner in court twice now, and will have to continue to do so as I simply cannot afford costs."*

The fundamental problem with the legal aid income assessment is that it is insufficiently generous and excludes many people who are not in a position

to pay significant legal expenses. But the system's parsimony also drives complexity and inconsistency that should be resolved.

Over the long term, the government should consider a significantly simpler and more generous scheme for civil legal aid. Ultimately the means tests should be based on a simple assessment of gross household income, following an adjustment for family size, with the possible aim of covering all households with below median incomes. This might increase substantially the civil legal aid caseload and expenditure, so would need to be phased in gradually. As a start, this more generous means test could be applied to initial legal help, which is cheap and likely to prevent or resolve most problems at an early stage.

This would mean abolishing the detailed assessment of disposable income used today, and making a simple decision based on gross income. The threshold for eligibility would vary according to family

size (currently the first stage of the civil legal aid assessment ignores household size, except when there are five or more children).

Alongside a more generous means test, the government should automatically 'passport' all households receiving means tested benefits to legal aid. It is wrong that one part of government can assess a household to have an income that is sufficiently low to require a supplement from the state; while another says it is not eligible for support with legal costs. This reform would provide a guarantee of legal support to people receiving in-work benefits.

This reform requires the following steps:

### Passporting for households receiving universal credit and its predecessors:

The government is proposing that households receiving universal credit should be exempt from an income assessment for legal aid only if they have zero earnings.



#### **BOX 4: UNIVERSAL CREDIT AND 'PASSPORTING' EXPLAINED**

At present, some households are deemed to automatically meet the income requirements for legal aid on the basis of their receipt of specified means tested benefits. This system of automatic qualification, or 'passporting', reduces unnecessary duplication and bureaucracy, easing the burden on applicants for legal aid and the LAA alike. However recipients of the key in-work means tested benefits are currently excluded from these arrangements (ie housing benefit and tax credits).

Universal credit is a new benefit combining all existing working-age means tested payments. The full roll-out of universal credit, which is available to people with low earnings as well as to households without work, would have caused a steep increase in the number of households deemed to automatically meet the income assessment for legal aid. But the government is planning on limiting these passporting provisions only to those recipients of universal credit with zero income from employment.<sup>25</sup>

The commission believes this is the wrong approach. We want all universal claimants to be exempted, as well as beneficiaries of precursor benefits not included in passporting arrangements at present (ie tax credits and housing benefit). This would increase the proportion of households automatically meeting the legal aid income assessment from 19 per cent to 29 per cent, according to Fabian Society calculations.<sup>26</sup>

**Treatment of capital:** The Ministry of Justice should also scrap separate capital assessment rules and adopt the same capital provisions as for means tested benefits. This would mean that anyone who receives universal credit will be automatically eligible for civil legal aid, which will greatly reduce the system's complexity. This would mean adjusting capital thresholds in the assessment but the main change required would be to exempt owner-occupied homes, as was the practice before 2012. The current capital assessment is equivalent to the 'dementia tax' with respect to community care charging, proposed by the Conservative party at the 2017 election and then abandoned. It only allows for the first £100,000 of the value of a home to be disregarded – plus up to £100,000 of any

outstanding mortgage.<sup>27</sup> In many parts of the country even small dwellings are likely to come with mortgages well over £100,000 and every penny on a person's mortgage above £100,000 will count towards the LAA's assessment of their disposable capital. There is nothing disposable about this capital – unless a person's home is considered disposable – since there are few fast or practical options for converting housing equity into cash for legal fees.

**The disposable income assessment:** We have already recommended that a simple assessment based on gross income is used to assess eligibility for legal aid. However, for as long as the existing assessment of disposable income continues it should be more generous and consistent with other means tests. Part of the assessment calculates whether a household's disposable income is below a specified level after making disregards for housing costs, children, a partner, work-related expenses and childcare. However, the basic living costs of the first adult are not disregarded and there is no deduction for council tax, unlike for income tax and national insurance. The assessment should be reformed to include deductions for both. Deductions

for employment-related costs are capped at £45 per month and deductions for rent for people without dependants are capped at £545 per month (a sum that is below the maximum housing benefit available to single people in a quarter of local housing markets).<sup>28</sup> These values do not reflect the true cost of travelling to and from work or renting property, particularly in many cities. Both allowances should be increased, on the basis of evidence of reasonable costs.

Finally, the government should consider whether there are cases when financial assessments should be made more flexible, for example by excluding the resources of specified household members. For example, when the client is a child, the circumstances of the case may mean they cannot access a parent's income or capital. More flexibility should also be introduced when one member of a couple lacks mental capacity and is unable to access joint assets, or where assets will be needed to pay care costs. Previously this discretion was provided for in the Community Legal Service (Financial) Regulations 2000. We recommend the extension of the discretion to disregard elements of a household's capital and/or income when calculating legal aid eligibility, where it is reasonable to do so.

#### **Legal aid contributions**

We want to see more people qualify for legal aid – and some of these people will be in a position to pay a portion of the costs of their legal assistance. We therefore support the principle that people should contribute towards their legal costs, to the extent that it is reasonably affordable for them to do so.

However, at the moment the contribution system operates in a way that is completely unaffordable for many people. Contributions are calculated based on the LAA's assessment of the applicant's disposable income and also their disposable capital, with payment required

once people's means exceed a very low level of disposable income or capital. The contribution system raises very little money for the Legal Aid Agency: instead it simply deters people with good cases from pursuing justice.

The contribution system is particularly punitive with respect to capital. Applicants for legal aid, including people who lack mental capacity, are often required to make contributions from their capital which leave them with few funds: in non-family civil legal aid cases people can be asked to contribute until they are down to £3,000 of capital. The more generous capital thresholds and exemptions used for means tested benefits should be applied to ensure consistency (for universal credit the threshold is currently £6,000); and people should only have to pay a percentage of capital over these limits, rather than having to contribute 100 per cent of their savings.

Surprisingly, even legal aid for obtaining domestic abuse injunctions is subject to a harsh contributions regime, even though legal aid in these cases is not supposed to be means tested. The high contributions which kick in at a very low disposable income often act as a complete bar to a person being able to access the courts to protect themselves and their children from harm.

In their written evidence to us, Rights of Women cited data from the National Centre for Domestic Violence. It showed that between October and November 2014:

*“One in five of the 2,026 callers to the NCDV helpline who wished to apply for a non-molestation order, were unable to proceed with their application because they could not afford the legal aid contributions.”*

A number of other examples were cited in the evidence received about the unaffordability of contributions, including

from the Police Action Lawyers Group who said a number of clients had to *“withdraw their claim because they are unable to pay [the] contributions”*.<sup>29</sup> The commission recommends that the contributions system should be adjusted to reflect our proposals for a more generous calculation of disposable income and capital.

The commission has also heard specific



**The commission recommends that the contributions system should be adjusted to reflect our proposals for a more generous calculation of disposable income and capital**

concerns about the contributions system for criminal legal aid. There is a means test for legal aid eligibility in both the magistrates' court and the crown court. The threshold for legal aid is £22,325 of gross household income, although defendants whose assessed household income is between £12,475 and £22,325 may

have pay contributions to their costs.<sup>30</sup> These contributions, whose make-up is never explained, can be very high: the level of monthly contributions demanded sometimes exceeds the cost of the case, and frequently exceeds the client's ability to pay.<sup>31</sup> In such cases clients will either be forced to represent themselves or, if they can, they may come to an arrangement with their solicitor to pay privately at a discounted rate.

The government should consider how to simplify and clarify the means testing process in criminal courts, and review the level of contributions made. This should focus on reducing the number of litigants in person; and ensuring that the level of monthly contributions is affordable and significantly below the costs of the case. Everyone charged with a criminal offence should have equality of arms in the presentation of their defence.

We have also had representations from a number of criminal practitioners who highlighted problems with defence costs orders. Acquitted defendants who paid private rates because they were ineligible for legal aid are only reimbursed their costs at legal aid rates. This leaves innocent people significantly out of pocket because of the disparity between legal aid and private rates. The commission proposes that anyone ineligible for legal aid should be reimbursed at a level broadly commensurate with the lower end of solicitors' guideline hourly rates.<sup>32</sup> This change would reverse the 'tax on innocence' that acquitted defendants currently encounter.

### **Evidence requirements**

The evidence requirements for both the civil and criminal legal aid assessments are unnecessarily onerous, and the LAA is too rigid in its approach. Applying for criminal legal aid and undertaking the means test is so complex that it often requires cases to be adjourned while ev-

In civil legal aid the evidence requirements are frequently prohibitive, especially for those most in need, and lead to people abandoning their claims

idence about income is gathered.<sup>33</sup> There can be particular problems in extradition cases, where often defendants are paid in cash and cannot provide proof of earnings.

In civil legal aid the evidence requirements are frequently prohibitive, especially for those most in need, and lead to people abandoning their claims. The Legal Aid Practitioners' Group explained in its written evidence, *"Even if a case is covered by the legal aid scheme it can be difficult for people to produce evidence of their financial position so that work can be started on the case."* This is especially true for those who most need urgent help. Individuals in such situations should not be penalised for circumstances which are no fault of their own.

There is often a mismatch between people's actual situations and the rigid evidence requirements that apply. Evidence requirements should therefore be simplified to avoid discouraging people from seeking advice and support. There is also the concern that those offering legal aid services waste valuable time on administrative tasks; time much better spent assisting their clients. A reduction in the amount of red tape surrounding the legal aid application process can only benefit everyone, reducing the amount of resources and time spent on each application, on all sides.

In addition to this, there is also an urgent need to reform the domestic violence gateway, the screening mechanism for accessing legal aid in family cases introduced by LASPO. The gateway's excessive



stringency and its very precise evidence requirements means that many people who had suffered domestic violence were unable to access legal advice.

The Centre for Law and Social Justice in their evidence to the commission wrote that the:

*"narrowness of the evidence requirements for legal aid funding in these cases means that many victims of financial, sexual and emotional abuse as well as less overt physical abuse, who are often unable to obtain the required evidence, are now faced with the prospect of self-representation if they need to access the family court."*<sup>34</sup>

Rights of Women showed in 2014 that 43 per cent of women who had experienced or were experiencing domestic violence could not produce any of the forms of evidence that were at that time prescribed in order to access legal aid.<sup>35</sup>

In 2016 some of the gateway's original evidence requirements were ruled unlawful and the rules have since been relaxed. Evidence of domestic violence that occurred up to five years before the application is now admissible, the range of acceptable supporting evidence has

been extended, and evidence of financial abuse may now be accepted as constituting domestic violence. The commission welcomes these developments, and hopes that the constructive discussions over further liberalisation with which the Ministry of Justice was involved before the June 2017 general election will be continued.

The commission recommends further liberalising reforms to the domestic violence gateway. In particular, solicitors, legal advisers approved under a legal aid contract, and frontline domestic violence support organisations should be able to confirm that an individual is a victim of domestic violence.<sup>36</sup>

Jenny Beck, an experienced family lawyer and co-chair of the Legal Aid Practitioners' Group told the commission that *"the general election stopped a remedy being provided for the cases in which an abusive husband who is unrepresented now cross-examines his victim."* A remedy for such a serious abuse of justice as this should be found as a priority. A remedy should also be found to the injustice caused by an unrepresented party having to mount a defence against allegations of sexual abuse by a represented party when the allegations are denied.

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# Chapter four:

## Broadening the scope of civil legal aid

As part of the cuts to government expenditure following 2010, the government determined “that it is no longer affordable to provide legal aid for the extensive range of issues for which it is currently available”.<sup>37</sup> LASPO was introduced to implement this decision. It left criminal law untouched but removed many areas of civil law from the scope of legal aid, including many categories of housing, employment, welfare benefits and immigration law. The result has been that increasing numbers are denied access to justice because they cannot afford it. This marks England and Wales apart from other European countries. The Hague Institute of International Law

found that since LASPO our regime is “special” because we “exclude far more areas from legal aid than other countries.”<sup>38</sup>

To attempt to mitigate injustices caused by the reduced scope of civil legal aid the government introduced exceptional case funding (ECF). Since ECF was introduced incredibly low numbers of people have secured support, far fewer than the government said it expected.<sup>39</sup> For example, the Ministry of Justice planned on the basis that 847 children and 4,888 young adults would be granted ECF each year. Yet between October 2013 and June 2015 only eight children and 28 young adults actually received legal aid under the

scheme.<sup>40</sup> Although the number of awards has subsequently increased, it is still tiny.

Our proposal for a new right to justice including “**the right to receive reasonable legal assistance, without costs they cannot afford**” has significant, long-term implications for the scope of legal aid. Over time, the system may need to broaden further where it can be shown that this is necessary for people to access affordable legal assistance. In our work we have considered what immediate action is needed, to make a start on bringing this new protection to life.

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### IN THIS CHAPTER, WE RECOMMEND:

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The commission has reviewed the impact of LASPO and concluded that the government must pursue immediate reform in three key areas in order to ensure the right to justice. First, it must restore support for early legal help to pre LASPO levels for the majority of civil law. This will help prevent problems developing and becoming costly for both the individual and the state. Second, the government should widen the scope of funded legal representation in several critical areas including elements of housing, family and immigration law. It should also bring back into scope all matters concerning children. Finally, the government must urgently review and reform the exceptional case funding scheme.

We recommend:

**11.** The government restores legal aid for early legal help to pre-LASPO levels for all social welfare law (which includes debt, employment, welfare benefits, immigration and housing), for family law, and for prisoners in appropriate cases.

**12. Children:** All matters concerning legal support for children should be brought back within the scope of civil legal aid.

**13. Family:** Family law cases with the following characteristics should be brought back into the scope of civil legal aid, with respect to representation in court:

- a) representation in particularly sensitive areas of private family law (such as cases in which the primary care of a child is in dispute)
- b) cases involving an application to remove a child from the jurisdiction
- c) cases where there is local authority involvement in private law children proceedings
- d) cases in which an allegation is made which is so serious it would be unjust not to provide legal representation to defend it

- e) cases where the question of whether a child should have any contact with a parent or grandparent is in dispute
  - f) cases where a court determines expertise is necessary to decide a family case in the best interests of the child, but where the non-legally aided party is not in a position to pay a contribution towards that expertise.
14. **Immigration:** There should be a full investigation into which areas of immigration law should be within the scope of legal aid funded representation. This should be conducted with recognition of the importance of translation services, and should include reviewing the fees that clients in immigration cases are charged. In the short term, cases involving stateless persons and cases involving family re-union in which vulnerability is involved should be brought back into scope.
15. **Inquests:** Where the state is funding one or more of the other parties at an inquest, it should also provide legal aid for representation of the family of the deceased.
16. **Judicial review:** Judicial review cases have formally remained within the scope of legal aid, but new regulations have dissuaded providers from bringing proceedings. These regulations, which limit the remuneration of legal aid providers for judicial review cases, should be repealed.
17. The exceptional case funding scheme has manifestly failed, and needs urgent review and reform.

## Early legal help

One of the most damaging aspects of the cuts to scope has been the withdrawal of legal aid for early legal help across a number of areas. It is also one of the least cost effective cuts. Whether housing help or advice about a family breakdown, an early understanding of how the law can help resolve problems can help prevent significant distress downstream. It will also save the state money; the pressure on welfare services, for example, from a homeless person far exceed the cost of early help. As Lord Low told the commission, early legal help should be invested in for “its preventative value”.<sup>41</sup>

In part one, we proposed a new right to ‘reasonable legal assistance’ not just access to justice in the courts, precisely because early help has suffered so disproportionately. Immediately, we recommend that the government returns to pre-LASPO levels for several areas of early legal help, which we are convinced will in the long term ensure significant savings for the exchequer. This should include all social welfare law (including debt, employment, welfare benefits, immigration and housing), family law, for prisoners in appropriate cases. Early legal help is particularly

important in the following areas of law:

**Family:** As organisations like Resolution and individuals like Jenny Beck told the commission, early legal help in family law increases the uptake in mediation, and thereby reduces the demand on court time. It also enables parents to understand that the interests of their children are of paramount importance following a breakdown in their relationship.<sup>42</sup> Colin Stutt, former head of funding at the Legal Services Commission, told the commission, “[with] family legal aid – a little early help goes a long way.” Without it, people pursue “unnecessary proceedings”, at great cost to the court system.<sup>43</sup> The Law Society estimates that restoring early legal help for family cases will cost between £9.8m and £14m.<sup>44</sup>

**Welfare benefits:** The law on welfare benefits is particularly complicated – Liverpool Law Society, for example, described welfare benefits law to the commission as “increasingly complex”<sup>45</sup> and the government itself has cited welfare benefits as an area of law which has become too complex.<sup>46</sup> This means those who face a problem, for example being assessed as



ineligible for jobseeker’s allowance, will frequently require legal help.

In addition, appeals over welfare benefits challenge decisions made by a public authority like the DWP or a local authority. It is a double injustice when people suffer the consequences of a poor decision by a public authority and then have no means to rectify it through access to legal support.

At the same time as legal aid for problems involving benefits has been with-

drawn, the need for it has risen: the Law Centres Network told the commission that major social security reforms and an increasingly punitive approach from DWP have led to a sharp rise in inaccurate decisions and benefit sanctions. While law centres and similar agencies have tried to maintain dedicated pro bono projects to meet the need for help, demand is on a scale that cannot – and should not – be met by reliance on unfunded support alone. There is also a real risk that the skills of advisers and practitioners in this complex area will be completely lost.

**Employment:** The Discrimination Law Association wrote in its evidence to the commission that, “*the provisions of initial advice enabled many claims to be explored with an expert, and resolved without the need for litigation.*”<sup>47</sup> As with early legal help in other areas of law, such early help prevents the escalation of disputes into costly tribunal cases. Citizens Advice have demonstrated that every £1 spent on legal help for employment matters saves the state £7.13.<sup>48</sup>

**Housing law:** The term ‘the housing crisis’ usually denotes the decline in home

ownership, the un-affordability of private rented homes, and the lack of social housing. But the huge fall in the number of people who are able to resolve housing law problems constitutes a crisis of its own. As Shelter, among other organisations, told the commission, legal aid used to offer an effective means of preventing and resolving housing issues. It helped people to enforce their rights to housing, housing benefit and a decent service from landlords, providing support at times of difficulty so that they did not lead to personal disaster for them and their families.

The consequences of LASPO have been stark. As the Housing Law Practitioners’ Association wrote in its statement to the commission, it has led to a:

*“substantial reduction in the number of housing [law] providers and the number of legal aid housing cases being undertaken.<sup>49</sup> Figures produced by the LAA have shown a reduction in housing cases of over 50 per cent since LASPO came into force, in a period in which rough sleeping<sup>50</sup>, statutory homelessness<sup>51</sup> and evictions from rented accommodation<sup>52</sup> are all on the rise.”*

The costs are not only felt in the justice system; the effects of avoidable evictions of families, homelessness and so on are felt by individuals, local councils and the NHS

LASPO removed most cases of housing disrepair from the scope of legal aid, greatly weakening tenants’ rights. Previously housing lawyers could provide initial help in disrepair cases and send a letter of claim to a landlord, which usually resulted in the landlord carrying out the necessary repairs, thus resolving the issue with very little public expenditure (the fee payable for an entire case was just £157 plus VAT).

Today, legal aid is only available for a claim brought by a tenant against their landlord for breach of repairing covenant where there is “*serious risk of harm to the health and safety of the individual or a relevant members of the individual’s family.*”<sup>53</sup> In practice, this means the disrepair must be ongoing. Where claims are for disrepairs which have been resolved, or where the tenant has now moved, or where the disrepair is not deemed “*serious*”, legal aid is no longer available.

Legal help with respect to housing benefit has also been taken out of scope. This is despite extensive evidence from Citizens Advice and others that preventative advice, as well as performing an invaluable service to clients, helps avoid the escalation of disputes and thus unnecessary costs to both landlord and the courts.

The costs are not only felt in the justice system; the effects of avoidable evictions of families, homelessness and so on are felt by individuals, local councils and the NHS. By contrast, the Law Society has calculated that advice in relation to all housing benefit issues could be brought



back into scope for an annual cost of between just £1.7m and £2m each year.<sup>54</sup>

**Prisoners:** Many prisoners have long term unmet civil legal need, and legal advice should be available in appropriate cases. This is especially important where the client is disabled, a child or an older person with particular needs for support and access to health and care services, not readily available in a prison setting.

Currently, prisoners are only allowed legal aid in cases that directly affect their liberty. This was ruled unlawful by the court of appeal in April 2017, which recognised that the cuts to the scope of legal aid created “systemic unfairness.”<sup>55</sup> The provision of the possibility of exceptional funding (without any adaptations to the civil scheme) for some of the areas previously cut from scope is insufficient to restore meaningful access for most prisoners. We recommend that, in particular, legal advice should be available for problems with progression, resettlement and unlawful treatment in prison.

### Widening the scope of funded legal representation

When it comes to legal representation, the commission does not seek to simply return to the pre-LASPO scope of civil legal aid. We recognise the financial constraints, and the political reality. In the future it should be for our proposed Justice Commission to make evidence-based recommendations on where funded legal representation is routinely needed to uphold the right to justice.

However, there are a number of areas of law which we believe should be returned to scope for legal representation. These include all law concerning children, and some aspects of family law and immigration law.

Areas which we have not considered in depth, but nonetheless require action, include debt, which is an increasing



problem for larger parts of the population during times of austerity, and the availability of legal aid for cases concerning mental capacity issues including people detained in a variety of settings in care homes and the community.<sup>56</sup>

**Children:** It is extremely concerning to the commission that matters involving vulnerable children in areas of law such as clinical negligence, immigration and debt have been taken out of the scope of legal aid. The Office of the Children’s Commissioner has published work which shows that, as a result, children have been forced to become litigants in person, obtain advice and support pro bono or from the already stretched voluntary sector, or are not attempting to resolve their legal problems at all.<sup>57</sup>

The United Nations Convention on the Rights of a Child (UNCRC), to which this country is a signatory, states in article 12 that the state “shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” In particular, “the child shall in particular be provided the opportunity to be heard in any judicial and

*administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”<sup>58</sup>*

A wide array of organisations and reports have found our current arrangements for the provision of legal support for children wanting. In March 2015 the Joint Committee on Human Rights, for example, described the effects of LASPO on children as a “significant black mark on [the government’s] human rights record.”<sup>59</sup> The commission recommends that all matters involving children should be brought back into the scope of funded legal aid. It has been estimated this would cost £7m per annum.<sup>60</sup>

**Family law:** The greatest change in the civil legal aid regime brought about by LASPO occurred in the field of family law. Legal aid was withdrawn in all private law family cases unless the applicant qualified for legal aid through an exceptional ‘domestic violence gateway’. The scale and impact of these changes has been enormous. There are nearly a quarter of a million fewer people now receiving legal help in family cases each year than there were in 2009-2010.<sup>61</sup> LASPO introduced legal aid help for family mediation cases as a partial remedy to the reduction in scope



for the rest of family law. But it is clear this policy has failed; in 2016-2017 assistance for family mediation was provided in just 279 cases.<sup>62</sup> Similarly, the exceptional case funding grants that were intended to mitigate the cuts and correct injustices have been barely used. In 2016-2017 only 303 applications were made and 98 grants awarded across all family cases.<sup>63</sup>

When family law disputes reach the courts, people who cannot afford private legal support are either giving up on justice altogether or are forced to become litigants in person, representing themselves in court.<sup>64</sup> As the Consortium of Expert Witnesses in Family Courts wrote to the commission, this means that they have “no access to representation or to expert reports, so that they and their children are denied justice in serious matters concerning sexual, physical, and emotional abuse, and neglect.”<sup>65</sup>

The commission therefore recommends that family law cases with the following characteristics are brought back into the scope of civil legal aid:

a) representation in particularly sensitive areas of private family law (such as cases in which the primary care of a child is in dispute)

**When family law disputes reach the courts, people who cannot afford private legal support are either giving up on justice altogether or are forced to become litigants in person, representing themselves in court**

- b) cases involving an application to remove a child from the jurisdiction
- c) cases where there is local authority involvement in private law children proceedings
- d) cases in which an allegation is made which is so serious it would be unjust not to provide legal representation to defend it
- e) cases where the question of whether a child should have any contact with a parent or grandparent is in dispute
- f) cases where a court determines expertise is necessary to decide a family case in the best interests of the child, but

where the non-legally aided party is not in a position to pay a contribution towards that expertise.

**Immigration law:** Immigration accounted for only a very small portion of legal aid expenditure before LASPO. In 2014 a report by The Hague Institute for the Internationalisation of the Law showed that Scotland and – especially – England and Wales spent less on legal aid for immigration problems than most comparable countries.<sup>66</sup> In 2012-2013, the year before LASPO took effect, England and Wales spent 2 per cent of its legal aid budget on such work, whereas Belgium spent 17 per cent and the Netherlands 13 per cent.<sup>67</sup>

LASPO greatly reduced the scope of legal aid in relation to immigration law. Areas outside the scope of support include all EU cases, post-conviction deportation cases, cases relying on article 8 of the European Convention on Human Rights (‘the right to private and family life’) and cases in which applicants raise mental health or mental incapacity issues. In such cases, there is now no help available for paying disbursements, including for translators, court fees and expertise. Often those affected will be living on subsistence support, without access to benefits or the right to work, and will not have any money with which to pay for advice, representation and expenses. The immigration team at Garden Court Chambers told the commission that:

*“It is our considered view that the important fundamental right of access to justice – a right our constitutional and justice system has long rendered to all persons in the UK – is no longer available to or effective for migrants, asylum seekers and their families.”*

The commission has considered the evidence, in particular the evidence of immigration solicitor Jawaid Luqmani, and recommends a full investigation into



which areas of immigration law should be within the scope of legal aid funded representation. This should be conducted with recognition of the importance of translation services, and should include reviewing the fees that clients in immigration cases are charged. In the short term, we recommend that cases involving stateless persons and cases involving family reunion in which vulnerability is involved are brought back into scope.<sup>68</sup>

**Inquests:** The commission has heard that there are frequent occasions at inquests where the government funds legal representation for individuals or agencies of the state, but not for the family of the deceased. As the chief coroner wrote in his 2015-2016 annual report:

*“In some cases one or more agencies of the state such as the police, the prison service and ambulance service, may be separately represented. Individual agents of the state such as police officers or prison officers may also be separately represented in the same case. While all of these individuals and agencies may be legally represented with funding from the state, the state may provide no funding for representation for the family.”<sup>69</sup>*

The chief coroner went on to write that this imbalance means, in some instances, “the inequality of arms may be unfair or may appear to be unfair to the family” and should therefore be resolved. The commission recommends that in cases where the state is funding one or more of the other parties at an inquest, it should also provide legal aid for representation of the family of the deceased.

**Claims for damages:** A number of respondents called on the commission to support the reintroduction of legal aid into some fields of law (such as personal injury) where government policy since 1999 has removed the availability of legal aid. The

commission does not believe that reform in this area is a priority, but our proposed Justice Commission should examine the case for legal aid being reintroduced in rare cases.

**Judicial Review:** Judicial review cases have formally remained within the scope of legal aid. But regulations introduced in 2014 regarding the payment of legal aid providers have, in practical terms, dissuaded legal aid providers from bringing proceedings for judicial review. In so doing they have undermined the right of individuals to challenge the actions of public bodies.<sup>70</sup>

The regulations in question stipulated that remuneration would only be paid to providers if the court gave permission to bring judicial review proceedings or if certain criteria were met regarding the relative strength and success of the application in cases where the proceedings came to an end before the court made its decision.<sup>71</sup> If these criteria are not met, then the provider is unable to recoup remuneration from the LAA. The commission has heard from a number of legal aid providers that this lack of certainty regarding remuneration is putting them off applying for judicial review altogether, with the public law department at Irwin Mitchell writing of “the unacceptable costs risks placed on providers that provide a disincentive to pursue judicial review claims.”<sup>72</sup> The commission recommends the relevant regulation limiting the remuneration of legal aid providers for judicial review is repealed.

### Exceptional case funding

The commission has heard extensive evidence about the failings of the exceptional case funding scheme. It has proven practically impossible for litigants to take advantage of this supposed safety net for cases where a denial of legal aid would result in a breach of a person’s rights under

either the ECHR or EU law. Shockingly, in its first year of operation, only 1 per cent of non-inquest applications for ECF were granted.<sup>73</sup> Indeed, the number of ECF applications themselves were worryingly low, only a fraction of those predicted by the MoJ.<sup>74</sup> In 2014 the high court found that the restrictive guidance published by the then lord chancellor on the exceptional case funding scheme was incorrect and unlawful.<sup>75</sup>

We have also heard evidence about applications to the ECF scheme for representation for bereaved families. In assessing an application, the LAA is required to carry out intrusive means testing of members of the deceased’s family. Yet a 2015 Freedom of Information Act response disclosed that no applications for exceptional case funding to pay for representation at inquests were rejected on the basis of financial eligibility. The commission recommends that this blanket requirement for means testing members of the deceased’s family for exceptional case funding is removed.

The commission is extremely concerned that what was billed as an essential safeguard for those at risk of human rights violations is failing in its – already limited – purpose. The ECF scheme needs urgent review and reform, but it is also a clear manifestation of a broken system. We hope that the policy recommendations within this report, as well as the new Right to Justice Act, will supersede the need for the scheme by broadening the availability of mainstream legal aid, and by embedding the right to justice firmly at the heart of government decision-making.

**The ECF scheme needs urgent review and reform, but it is also a clear manifestation of a broken system**

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# Chapter 5:

## The operation of legal aid

Excessive bureaucracy is hampering the ability of legal aid practitioners to do their job and resulting in fewer people being able to access justice. The operation of the justice system as a whole, and of the LAA in particular, is being harmed hugely by the time and money spent on needless administration. As the former justice secretary, Michael Gove put it:

*“There are two nations in our justice system...the wealthy, international class who can choose to settle cases in London with the gold standard of British justice. And then everyone else, who has to put up with a creaking, outdated system to see justice done in their own lives.”<sup>76</sup>*

The administrative costs of the LAA kept rising for years (until a fall in 2016-2017), even though its overall budget has been cut by 25 per cent since LASPO.<sup>77</sup> The cost to legal aid providers is at least as damaging. Hundreds of hours that should be spent helping people are instead spent filling out forms. Many providers have abandoned legal aid work, and many of those that are left are considering withdrawing from legal aid contracts because of the bureaucratic burden they impose. While it may seem trite to criticise bureaucracy, the consequences are significant for the right to justice. As Ben Hoare Bell LLP explained to the commission in its written evidence:

*“The bureaucratic legal process is such that it is becoming harder for anyone to enforce their legal and human rights because of significant problems in the system at every turn.”*

In addition to the administrative problems, the publicly funded sector of the profession is also facing a crisis. The squeeze in public funding has led to advice agencies and law centres closing and legal aid lawyers leaving the profession. There is significant uncertainty about the future sustainability of legal support in many areas, with potentially devastating consequences for the public’s ability to exercise their right to justice.<sup>78</sup>

### IN THIS CHAPTER, WE RECOMMEND:

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In order to meet the requirements of the right to justice, we recommend urgent reform to the operation of legal aid. This should start with the replacement of the Legal Aid Agency with a new independent body. We recommend:

#### The replacement of the Legal Aid Agency

18. The Legal Aid Agency should be replaced by an independent body that operates the legal aid system at arm’s length from government.

#### Reduce administrative burdens for providers

19. Immediate action should be taken to fix the client and cost management system. This should be done by working directly with a group of users to identify, develop and implement solutions so that it is fit for purpose.
20. There should be a new legal aid composite audit, in place of today’s numerous, overlapping and burdensome assessments, which should be conducted with a short notice period.

#### Reduce administrative burdens for the public

21. The mandatory requirement for mortgage debt, special educational needs and discrimination law to be accessed via the civil legal aid gateway telephone service should be removed, and face-to-face help should be available for those who need it. Additionally, the service should be better resourced with legally trained staff.

#### Action to ensure the continued viability of the legal aid profession

22. The government should commission an independent review of the state of the legal aid profession and its continued viability. This review should focus on the impact any decline in size or quality has on the ability of the public to access justice, and consider the effects of the decision to cut the bursary scheme for aspiring legal aid lawyers.

## The replacement of the Legal Aid Agency

Decisions about the granting or refusal of legal aid are, in effect, decisions about which of us are able to obtain justice. It is therefore vital that the operation of the legal aid scheme, whether at the level of initial legal help and advice or for representation in proceedings, is a transparent and independent process which is open to proper scrutiny.

Until 2013 the legal aid system was always administered at arm's length from government: first by the Law Society (1949-1988); then by the Legal Aid Board (1988-2000); and finally by the Legal Services Commission (2000-2013). There were very few occasions which gave rise to unease that decisions were being taken under ministerial pressure, and there was a genuinely independent appeals process for anyone who thought that legal aid was being unjustly refused.

One of the driving forces behind the move to create the LAA as an executive agency of government was the concern that existed over the Legal Services Commission's inability to control its expenditure, but the abolition of that commission in 2013 and the creation of the LAA with its closer relationship to government resulted in a blurring of boundaries between Whitehall and the administration of the legal aid scheme.

There are widespread concerns, expressed to the commission by experts such as former director of JUSTICE Roger Smith and director of Legal Action Group Steve Hynes, about the lack of transparency and independence in the process for appealing decisions about the availability of legal aid. We have been told of poor quality decision making in the appeals process, vital appeal documentation being omitted on behalf of the appealing party, and the absence of proper reasons for decisions. More broadly, for an agency to consider appeals against its own initial



decisions undermines independence, proper administration and confidence in the system. As Steve Hynes put it in his evidence, there is *"extreme risk of interference with independence of decision-making"*, but even if there is no direct ministerial interference there *"can be an equally damaging perception of interference."*<sup>79</sup> The erosion of high quality, independent decision-making, whether real or perceived, has significantly damaged the integrity of the justice system and access to justice. The commission recommends that the LAA should be replaced by an independent body which will in future operate the legal aid system at arm's length from government. Its governance structure should resemble the structure adopted for the governance of Her Majesty's Courts and Tribunals Service.<sup>80</sup> Additionally, all appeals should be heard by an organisation which is wholly independent of government.

### Administrative burdens for providers

Legal aid practitioners have told the commission of the growing administrative hurdles they must clear just to apply for legal aid and meet the demands of the auditing regime. Every hour spent on unnecessary administration is an hour not spent helping people with their problems. The bureaucracy also adds to the demoralisation of the profession, which has significant ramifications for its future sustainability.

### Client and cost management system

The client and cost management system (CCMS) is an online application process that legal aid providers must use to apply for legal aid. It was introduced on 1 April 2016 and took the place of a paper system, which many have told us worked better.<sup>81</sup> Under the old system, providers could fill in a four-page form and expect

to hear the result of an application on the same day if it was an emergency request. Under the new system, if the CCMS is working (it regularly crashes) practitioners have to fill in a 13-page form, which can take days or weeks to complete – even before the wait for the result. And at the end of the laborious process, providers are not adequately remunerated for the time spent collating the necessary evidence and completing the form.

The commission has heard from a range of legal practitioners who have detailed the predictable consequences of this system. Ben Hoare Bell LLP summarised it as follows in its evidence to the commission: *“The system frequently crashes, does not work effectively [...] and [makes delayed decisions] on a regular basis leaving children in situations of significant harm for weeks, often months at a time.”*<sup>82</sup> Mary Ward Legal Centre in Camden wrote that *“trying to get paid by the Legal Aid Agency at the end of a case can be as much of a battle as getting the legal aid granted in the first place.”*<sup>83</sup> The commission recommends that immediate action is taken to fix problems with the CCMS. This should be done by working directly with a group of users to identify, develop and implement solutions so that it is fit for purpose.

#### **Auditing regime**

The legal aid audit regime is also overly complex and burdensome. The number of audits has proliferated over recent years. Providers feel like they are constantly under audit – and sometimes they are.

One small West Midlands legal aid firm, for example, in a period of just nine months from 30 June 2016 to 27 April 2017 was subject to two on-site audits; a peer review; a contract manager visit; and a quality of advice check by the Solicitors’ Regulations Authority. The consequences of this overbearing approach are not simply a bit of bother for providers. It is diverting practitioners from the provision

of services to their clients and contributing to the demoralisation of a profession already stretched to the limit. The firm in question is considering withdrawing from its legal aid contract altogether.

Some audits have a unique and valuable purpose and should remain unchanged – for example, the quality assurance audits and peer reviews which have helped ensure a quality service for clients.



**The legal aid audit regime is also overly complex and burdensome. The number of audits has proliferated over recent years. Providers feel like they are constantly under audit – and sometimes they are**

However, others should be merged to reduce the burden on both the LAA and providers. These should be combined to create a new composite audit, in place of today's numerous, overlapping and burdensome assessments, which should be conducted with a short notice period.

#### **Administrative burdens for the public**

The burden of failing administrative systems do not only lie with the providers of legal aid. Clients too face significant challenges in navigating the bureaucratic hurdles to obtaining legal advice. In particular, the commission has heard extensive criticism of the current functioning of the mandatory civil legal aid gateway telephone service.

In order to obtain face-to-face advice on legal matters relating to special education needs, mortgage indebtedness, and discrimination, clients are prevented from going directly to a legal aid provider of their choice. Instead, they must first pass through the civil legal aid gateway telephone service, which is not staffed by legal experts. In addition to the removal of choice, there are doubts as to whether clients, especially disabled clients and children, are able to receive the specialist advice they need through this service.

The Deaf and Disabled People's Organisation, for example, in its evidence to the commission, wrote that the gateway service *“raises significant hurdles for disabled people in accessing advice.”*

This echoes the experience of Nicola Mackintosh QC (Hon), one of the members of the commission and a legal aid practitioner for over 25 years specialising in mental capacity. She told us that: *“[a telephone advice system] does not work for this particular client group where face to face advice is needed.”*<sup>84</sup>

Similarly, Coram Children's Centre, a charity that protects and promotes the work of children, including providing legal advice and representation, told us: *“There is a high risk of callers being diverted away from specialist legal advice because they are unable to fully explain the scope and nature of their problem.”* JustRights wrote in its evidence that, *“awareness of the service is so low amongst both children and young people and the professionals who work*

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*with them as to render it invisible.”*

The Housing Law Practitioners’ Association in its written evidence to the commission summarise the situation well:

*“Vulnerable clients may struggle to articulate their issue meaning that the exact kind of client who is likely to require face-to-face advice, will be unable to obtain it.”<sup>85</sup>*

Similarly, the Islington Law Centre wrote:

*“We have spent many hours (funded under our local authority grant) attempting to ensure that someone with a discrimination case was able to get assistance, and she had to return to us frequently as the nature of her disability meant that she found it incredibly difficult to give informed instructions remotely. This has diverted money away from front line provision, has created duplication, and has been a major barrier to many people, without evidence that other equally high needs are being effectively met.”<sup>86</sup>*

The result of this is a service that is inhibiting rather than enabling people in need to access legal aid. The Public Law Project has undertaken detailed work on the gateway and their findings suggest that the volume of advice being given out is 75 per cent less than expected, based on the figures of the Legal Aid Agency’s forerunner, the Legal Services Commission.<sup>87</sup> Additionally, in its evidence to the commission it wrote that:

*“Service users experienced difficulty in navigating and proceeding beyond the operator service; that there was a very low level of awareness of the service amongst potential service users; and that significant numbers of matters results in ‘outcome not known or client ceased to give further instruction’, indicating that individuals were struggling to engage with it.”<sup>88</sup>*

The commission recommends that the mandatory requirement for mortgage debt, special educational needs and discrimination law to be accessed via the civil legal aid gateway telephone service should be removed, and face-to-face help should be available for those who need it. Additionally, the service should be better resourced with legally trained staff.

### **The legal aid profession and its continued viability**

It is the work of legal aid professionals that props up the legal aid system and ensures that those who are eligible for legal aid can secure justice. It has never been the most lucrative branch of the legal profession. But the legal aid sector must be able to sustain itself, with providers continuing to carry out legally aided work and new recruits bolstering the profession. Yet with downward pressures on legal aid fees, cuts to bursaries for aspiring legal aid lawyers and low morale in the profession, many are turning away from legal aid work altogether. In the medium and long-term, such a shrinkage of the legal aid profession will inevitably

have consequences on the quality and quantity of legal aid provision, and therefore people’s ability to access justice on a fair footing. The legal aid profession can also be a pipeline into the judiciary for people from a wide range of backgrounds, so its erosion will also compound existing problems of diversity within the judiciary, which fuels distrust of the justice system amongst communities who most need it.

The UK justice system is commonly praised as being one of the best in the world, with London praised as the “world’s legal centre and a destination for dispute resolution”.<sup>89</sup> Indeed, legal services contributed £25.7bn to the UK economy in 2015.<sup>90</sup> However, that statistic masks the huge pressures on the publicly funded

*The UK justice system is commonly praised as being one of the best in the world, with London praised as the “world’s legal centre and a destination for dispute resolution”*





arm of the legal profession that were accelerated by the enactment of LASPO.

Law firms working for clients in sectors which rely heavily on public funding – health, housing, local government, education, family – have seen much of their work dry up. Many have had to cut the size of their workforce and reduce or halt trainee recruitment.<sup>91</sup> To survive, firms have shifted to non-contentious or private sector work, and have stopped taking on meritorious cases which now fall outside the scope of legal aid if the client cannot afford to pay.<sup>92</sup>

The Law Society concluded that reform to legal aid, in combination with other factors, make it “*extremely difficult*” to estimate the future size of the solicitor profession, creating considerable uncertainty.<sup>93</sup> Barristers are also struggling, particularly at the junior end, with legal aid funded work paying so poorly that it is simply not a viable career option for many.<sup>94</sup> A government bursary scheme that had provided training to 750 legal aid lawyers since 2002 was scrapped by the coalition government in 2010.<sup>95</sup> Advice

**However, despite their excellent work, the leading pro bono charities are clear that pro bono cannot, and should not be expected to, replace publicly funded provision or the state’s duty to ensure access to justice for all**

deserts are emerging where there are no advice centres, law centres or legal aid practices offering legally aided advice. The Law Society has shown that housing law, in particular, has suffered: “*Almost one third of legal aid areas have just one – and in some cases – zero firms who provide housing advice which is available through legal aid.*”<sup>96</sup>

Alongside the decreasing provision of legal aid by law firms, non-profit agencies have been hit hard too, with many closing their doors altogether. The original Birmingham Law Centre, the Immigration Advisory Service and Streetwise are just some examples of charities that have collapsed.<sup>97</sup>

None of this would be so significant if the level of need for legal support had fallen. But there is no evidence that this has happened. While there is evidence of increased pro bono activity at all levels of the profession, the leading pro bono charities are clear that unfunded legal support cannot, and should not be expected to, replace publicly funded provision or the state’s duty to ensure access to justice for all.<sup>98</sup> The reduction in the capacity of providers has instead meant that fewer people are able to resolve their problems. And this state of affairs is unlikely to reverse quickly as it is affecting the career choices of young lawyers who can no longer risk dedicating their careers to areas of law heavily funded by legal aid.<sup>99</sup>

We recommend that the government commissions an independent review of the state of the legal aid profession and its continued viability. This review should focus on the impact any decline in size or quality has on the ability of the public to access justice, and consider the effects of the decision to cut the bursary scheme for aspiring legal aid lawyers.

# Chapter 6:

## Education, information and advice

Public legal education, information and advice are frequently overlooked, but must form a key part of government policy to realise the right to justice. It is easy to think that understanding of the law is less urgent than ensuring people have unimpeded access to the courts. But as the commission wrote in our interim report: *“In order for citizens to act on their right to justice, they need the capacity to identify a problem as legal in character, understand the help to which they are entitled and select an appropriate service.”* Without that capacity, they cannot meaningfully access justice.

For this reason, our proposal in part one for a right to justice is intended to be broad, to include access to basic legal information and advice. In this chapter we present recommendations to complement the principles underpinning the Right to Justice Act and rebalance the focus of the justice system towards increasing people’s legal capacity and solving problems early. Firstly, and most immediately, if members of the public are not able to identify issues in their lives as legal problems, they cannot set about resolving them using their legal rights. But the problem does not end there. Often people are thrust into making decisions within the justice system with insufficient knowledge. Acting on either no advice or poor advice, they take actions that may adversely impact their right to justice.

For example, most people are unaware of the potential consequences of accepting a caution for a crime. Julian Hunt, an experienced criminal defence barrister and former senior crown prosecutor told the commission of a minicab driver who:

*“lost his living after 17 years as an honest, decent cabbie. He had been accused of taxi*



*touting and had a strong defence ... but the duty rep at the police station told him to take the caution for taxi touting to get him in and out. It meant that he automatically lost his cab licence due to the Transport for London zero tolerance policy.”<sup>100</sup>*

These problems go wider than just a knowledge deficit, although there certainly is a deficit of public knowledge about the law. The issue is a lack of ‘legal capability’, the capacity to understand and confront legal problems. As Lisa Wintersteiger, chief executive of Law for Life, told the commission, legal capability is constituted of *“knowledge, skills and confidence”*. It is a:

*“key indicator for the effective use of legal services. People with low levels of legal capability are less likely to act and less likely to sort things out effectively on their own. They are also less able to solve legal problems successfully, and are twice as likely to experience stress-related ill-health, to experience damage to family relationships, and to lose their income.”*

This public deficit in legal capability is longstanding. But to make matters worse the provision of public legal education,

information and advice has suffered significant cuts in recent years. The commission therefore believes there is a need for a joined up and national approach to assess need and allocate resources accordingly. Action is needed to improve legal capability in schools, online and throughout life.

The 2014 Low Commission report on the future of advice and legal support proposed six main principles for tackling these issues, which are very helpful in thinking about future provision:

- *“early intervention and action rather than allowing problems to escalate*
- *investment for prevention to avoid the wasted costs generated by the failure of public services*
- *simplifying the legal system*
- *developing different service offerings to meet different types of need*
- *investing in a basic level of provision of information and advice*
- *embedding advice in settings where people regularly go, such as GP surgeries and community centres.”<sup>101</sup>*

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## IN THIS CHAPTER, WE RECOMMEND:

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To help realise the right to justice, we support the recommendation of the Low Commission that a specific minister should create a national government strategy for legal advice and support, driven by these principles. This strategy should encompass everything from public legal education in schools through to online information and face-to-face advice.

We recommend:

### Better public legal education in schools

23. There should be a new responsibility on Ofsted to assess in greater depth how well schools prepare children for the opportunities, responsibilities and experiences of later life. Government should also better support and facilitate the

development of relationships between schools and organisations who are working to improve legal capability.

### Universally accessible advice

24. The government should support the introduction and maintenance of a centrally branded and easily navigable portal for online information and advice. The government should share the details of this central portal in communications with the public about other matters such as health and education.

25. The government should create a new, ring-fenced fund for advice providers who are able to evidence the effectiveness of their approach to delivering advice to people within their communities.

### The current state of public legal capability

Public legal education is not something discrete and separate to the justice system, to be delivered only in schools. It should be seen – along with information and advice – as an essential part of the provision of legal support in general. As the Low Commission put it, support for social welfare law is:

*“a spectrum or continuum including public legal education, informal and formal information, general advice, specialist advice, legal help and legal representation. The more preventive work we can do at the beginning of this continuum, the less we should have to do at the end.”<sup>102</sup>*

But the state of public legal education and advice has been poor for a long time. In 2007 Professor Dame Hazel Genn’s Public Legal Education and Support Task Force concluded that about one million civil justice problems went unresolved every year because people did not understand the legal system or know how to



About one million civil justice problems went unresolved every year because people did not understand the legal system or know how to use it for their benefit



use it for their benefit.<sup>103</sup> It described this as “legal exclusion on a massive scale”. The previous year, government economists had estimated that unresolved law-related problems cost individuals and the public purse the astonishing figure of £13bn, over a three-and-a half year period.<sup>104</sup>

Public legal education, information and advice increase legal capability, equipping people with the knowledge and confidence to make the rights that they have meaningful. Advice and education also act to prevent the unnecessary and costly escalation of disputes into the courts. As Professor Richard Susskind told the commission:

*“The ambulance should be at the top of the cliff. The state should play its part in promoting dispute avoidance. We need to reduce the need for dispute resolution by placing a fence at the top of the cliff. Legal education is [an] aspect of this.”*

The most detailed work into the state of public legal capability is found in the analyses of the results of the 2010 and 2012 English and Welsh Civil and Social Justice Panel Surveys, which were conducted by Law for Life<sup>105</sup> and Pascoe Pleasence et al.<sup>106</sup> The findings make discouraging reading. The study found that over half of the population will experience a civil justice problem over the course of three years. And yet relatively few of us are equipped to understand our rights relative to commonplace problems we face.

Usually there should be no need to use a lawyer to solve a legal problem, if people feel well informed and can find a satisfactory resolution without recourse to the justice system. But the study found that only 11 per cent of people can accurately identify legal problems in the first place. In this context, the fact that only 6 per cent of those with legal problems use a lawyer and only 4 per cent use an advice service is a cause for alarm.



Over half of those who experienced a legal problem suffer negative side effects including “stress-related ill-health, loss of income or confidence, physical ill-health and family breakdown”. As the Law for Life report states: “The collective impact on the wellbeing of individuals and the economy is staggering.”<sup>107</sup>

**Over half of those who experienced a legal problem suffer negative side effects including “stress-related ill-health, loss of income or confidence, physical ill-health and family breakdown”**

People with low legal capability are twice as likely to experience these negative side effects.<sup>108</sup> What is more, there is a large overlap between the demographics of those most likely to experience legal problems – manual and routine workers, those with few educational qualifications, migrants, the poor, the young and the old – and those who are least likely to possess legal capability.

## Schools

The first issue the government must consider is the provision of legal education in schools. Citizenship has formed part of the national curriculum since 2002 and it is the avenue through which public legal education is taught in schools. One of the four aims of the citizenship curriculum is to ensure that all pupils “develop a sound knowledge and understanding of the role of law and the justice system in our society and how laws are shaped and enforced”. In key stage three, when students are aged between 11 and 14, they are expected to be taught about “the precious liberties enjoyed by the citizens of the United Kingdom”, and “the nature of rules and laws and the justice system, including the role of the police and the operation of courts and tribunals.” In key stage four, when they are aged between 14 and 16, they are expected to be taught about “the legal system in the UK, different sources of law and how the law helps society deal with complex problems”.<sup>109</sup>

This is a strong starting point. But the citizenship curriculum is rarely taught by specialists. As the Citizenship Foundation told the commission, the number of trainee citizenship teachers has fallen from 240 in 2010 to just 54 in 2016.<sup>110</sup> More worryingly, Ofsted is no longer required

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to inspect citizenship as a subject. In addition, academies, free schools and independent schools are not required to teach the national curriculum and therefore have no mandatory requirement to teach a specified curriculum of public legal education. They are simply required to have a curriculum which prepares pupils “for the opportunities, responsibilities and experiences of later life”.

In addition to the national curriculum, a number of legal organisations work with schools to provide further information about the law. The Citizenship Foundation provides resources and teacher training for non-specialist teachers, and runs conferences and other events led by legal professionals to teach students about legal issues. But this work is small-scale and poorly funded. Financial support for national government for the Citizenship Foundation, for example, has fallen from around 60 per cent of its total income to “virtually 0 per cent”.<sup>111</sup>

The principles of the Right to Justice Act will place a new onus on government to provide an adequate level of public legal education and information, including within schools. As part of this, we suggest they consider introducing a new responsibility on Ofsted to assess in greater depth how well schools prepare children for the opportunities, responsibilities and experiences of later life. We also recommend the government better supports and facilitates the development of relationships between schools and organisations who are working in schools to improve legal capability.

### Universally accessible advice

Most people who experience a legal problem are unlikely to recognise it as such. Even those that do may not know

**Most people who experience a legal problem are unlikely to recognise it as such**

where to turn to: advice centres, law centres, legal aid practices, helplines and online portals are no use where people don't know to visit them. Advice should therefore be easily accessible, clearly signposted, and situated in places where those most in need are likely to find it. It should also always be universally available; no-one should have to face a financial assessment in order to access basic advice about their legal rights, or to discover whether or not the problem they face is legal in character.

### Online and on the phone

There are a range of charities and organisations who provide free advice on legal matters. These include well known websites like Citizens Advice and Advice Now, and more specialised websites and helplines from organisations like Age UK, Shelter, and Liberty. But many people, upon encountering a legal problem, would not know where to look. Lisa Wintersteiger told the commission:

*“[People] are also hindered from using digital help effectively because they struggle to frame their problems in a way that enables them to search for what they need. If they do find information, they are often unable to assess its quality and veracity properly. In addition, they cannot always correctly identify whether the information they have accessed applies to the relevant jurisdiction (for example, a user may be applying US law unknowingly to a UK legal problem).”*

While organisations like Advice Now have made valiant efforts to bring together various different advice services, the commission has concluded that there is a need for a centrally recognised and recognisable online brand, which people know to visit when they have a problem. Such a centralised portal would also mitigate against the risks of institutional memory loss, where rapid staff turnover, organ-

isational or technology change leads to valuable information disappearing or becoming out dated.

The commission recommends the introduction and maintenance of a centrally branded and easily navigable portal for online information and advice. This portal should signpost to different online services, hosted by different organisations such as Citizens Advice and Advice Now, as appropriate. This site should be independent of government and subject to stringent quality control, and it could be provided by an existing provider, or providers, which responds to a government tender. The government should share information about this new central portal in communications about other matters such as health and education.

We should remain cautious about depending on online information alone. Research from earlier in the decade found that only 25 per cent of people use the internet to solve legal problems.<sup>112</sup> While there is every reason to believe that figure has risen and will rise still further, it will never compensate entirely for face-to-face advice.<sup>113</sup> Lindsey Poole, director of Advice Services Alliance, described online advice as like the fourth lane of a motorway; it will be widely used and does a very good job for those who can access it, but in and of itself it won't help those with the highest need. It should be used as a mechanism for freeing up resources for more personally tailored help for those who need it, not a means of reducing what is often the most valuable aspect of advice – human contact.<sup>114</sup> This accords with the strategy adopted by Citizens Advice. 22 million people viewed their website last year – a significant increase on earlier years – while the numbers using their face-to-face advice have remained pretty constant.<sup>115</sup>

### In person advice

In addition to online and telephone

services, there are a number of organisations that provide advice in physical locations within communities. These include Citizens Advice, whose offices are situated around the UK, and law centres and legal advice practices, which have been closing at an alarming rate in recent years. Ministry of Justice research shows that the number of all not-for-profit legal advice centres fell from around 3,226 in 2005 to 1,462 by 2015. And, as we wrote in our interim report: *“More than half of the 700 who responded to the Ministry of Justice survey reported that they had client groups who they were unable to help due to lack of resources, expertise, or because they fell outside the centre’s remit.”*<sup>116</sup>

These centres, along with other advice organisations, provide a vital service – from free information through to expert advice and representation funded by legal aid. In the context of today’s low levels of legal capability the commission is concerned by the loss of a physical place which members of the public can visit for free, initial support. For those people who do not use the internet or telephone help-lines to solve their legal problems, these serve as vital signposting sites.

But returning to the pre-2012 system, when advice centres, law centres and legal aid practices provided expert support funded by legal aid, is not by itself the answer. Lindsey Poole told the commission that the target-based approach of the Legal Aid Agency, when it was responsible for issuing contracts to providers, *“changed the way that [advice services] viewed services”*. The questions providers would ask themselves, Lindsey Poole told us, turned from *“Does it meet the need? Does it meet our charitable objective in helping the most vulnerable to access social justice?”* to *“Have we had enough clients at this time in order to meet the contract that we had?”* Such an approach would also likely lead to too little support being given for small, specialist organisations delivering advice to niche communities.



### Advice centres, law centres and legal aid practices must take their expertise out to their communities rather than just waiting for people to come to them

To tackle this, the commission agrees that a shift is needed in the way that advice is delivered at the local level. As numerous providers are already doing, advice centres, law centres and legal aid practices must take their expertise out to their communities rather than just waiting for people to come to them. One way that this has been done successfully is through the provision of advice in GPs’ surgeries. As Lindsey Poole told us, services should be redesigned to *“take advice to health care settings, to the courts (including criminal) and to local non-advice voluntary organisations.”*<sup>117</sup>

But sometimes this will not be enough. In communities which have little trust in authorities or the rule of law, there is a need for mediating figures who have the trust of both the legal profession and the community in question. In her evidence to the commission, Lisa Wintersteiger spoke of *“trusted intermediaries”*. These could be teachers, faith leaders or leaders

of migrant groups. Advice organisations regularly work with them to deliver advice to hard to reach communities, who may have a problem understanding or trusting authorities.

The first report of the Low Commission discusses the example of Advice Services Coventry, which was a partnership – supported by local government – between the independent advice agencies in Coventry to coordinate the delivery of advice services in the city.<sup>118</sup> The network shared a website and a referral system, so clients could be directed to the most appropriate resource. Additionally, Coventry Law Centre set up several partnerships with non-advice voluntary organisations, such as the city’s ‘Troubled Families’ scheme and local Community Based Champions, to deliver advice to people in the settings where they are likely to require it.

The Low Commission called for the creation of a £100m fund, with half the funding coming from government (to be administered by the Big Lottery Fund), and half from a combination of other local and national statutory, commercial and voluntary providers.<sup>119</sup> We echo this call, and support the introduction of a new, ring-fenced fund for advice providers who are able to evidence the effectiveness of their approach to delivering advice to people within their communities.

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# INDEX OF APPENDICES

The commission has gathered a very wide range of evidence during the course of our work. We are pleased to publish this evidence, along with a series of appendices, which can be found at <http://www.fabians.org.uk/right-to-justice-the-appendices/>.

The appendices include edited extracts and analyses of significant parts of the oral and written evidence. They are:

- Appendix 1: Oral evidence (first session)
- Appendix 2: Written evidence (current state of access to justice)
- Appendix 3: Written evidence (ways to transform our justice system)
- Appendix 4: Oral evidence (second session)
- Appendix 5: Analysis of the evidence received in key areas
- Appendix 6: The history of legal aid from 1945-2010
- Appendix 7: Cost implications and potential savings

The Bach Commission is very grateful to its vice-chair, Sir Henry Brooke, who compiled and authored appendices 1 to 6.

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## ENDNOTES

1. To avoid confusion, we use early legal help in reference to all legal assistance other than representation in all matters – even though this work is technically referred to as ‘legal advice’ in prison matters.
  2. Sir John Laws. (1995) *Law and Democracy* Public Law 72
  3. HM Treasury. (2015) *Public Expenditure, Statistical Analyses 2015* Accessed September 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/446716/50600\\_PESA\\_2015\\_PRINT.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446716/50600_PESA_2015_PRINT.pdf)
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  5. See Box 1 below and the Bach Commission. (2016) *The Crisis in the Justice System in England and Wales*. Accessed September 2017: <http://www.fabians.org.uk/publications/the-crisis-in-the-justice-system-in-england-wales/>
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  11. R (*Gudanaviciene*) v The Director of Legal Aid Casework [2014] EWCA Civ 162. Accessed September 2017: <https://www.judiciary.gov.uk/wp-content/uploads/2014/12/gudanaviciene-ors-v-dir-of-legal-aid.pdf>
  12. R (*Unison*) v Lord Chancellor [2017] UKSC 51. Accessed September 2017: <https://www.supremecourt.uk/cases/docs/uksc-2015-0233-judgment.pdf>
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  15. See, for example, Public Legal Education and Support Task Force. (2007) *Developing capable citizens: the role of public legal education*. Accessed September 2017: <http://lawforlife.org.uk/wp-content/uploads/2013/05/pleas-task-force-report-14.pdf>
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  18. For the latest figures, see Department of Work and Pensions. (2017) *Jobseeker's Allowance, Employment and Support Allowance and Universal Credit sanctions: decisions made to March 2017*. Accessed September 2017: <https://www.gov.uk/government/statistics/jobseekers-allowance-employment-and-support-allowance-and-universal-credit-sanctions-decisions-made-to-march-2017>
  19. Civil Justice Council. (2015) *Online Dispute Resolution for Low Value Civil Claims*. Accessed September 2017: <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version.pdf>
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20. The Low Commission. (2017) *Getting it right in social welfare law*, p.24. Accessed September 2017: [http://www.lowcommission.org.uk/dyn/1435772523695/Getting\\_it\\_Right\\_Report\\_web.pdf](http://www.lowcommission.org.uk/dyn/1435772523695/Getting_it_Right_Report_web.pdf) Ibid, p.25.
21. See evidence of Lord Falconer in appendix 4 at p. 3.
22. This includes evidence from organisations such as the Association of Costs Lawyers, Greater Manchester Immigration Aid Unit and Young Legal Aid Lawyers. See <http://www.fabians.org.uk/right-to-justice-the-appendices/>
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24. See its evidence in appendix 2 at p. 6.
25. Ministry of Justice. (2017) *Legal Aid Financial Eligibility and Universal Credit*. Accessed September 2017: [https://consult.justice.gov.uk/digital-communications/legal-aid-eligibility-and-universal-credit/supporting\\_documents/universalcreditconsultation.pdf](https://consult.justice.gov.uk/digital-communications/legal-aid-eligibility-and-universal-credit/supporting_documents/universalcreditconsultation.pdf)
26. Office for Budget Responsibility. (2016) Supplementary forecast information release: Universal Credit caseload forecasts. Accessed September 2017: [http://budgetresponsibility.org.uk/docs/dlm\\_uploads/UC-caseload-forecasts-supplementary-forecast-information-release.pdf](http://budgetresponsibility.org.uk/docs/dlm_uploads/UC-caseload-forecasts-supplementary-forecast-information-release.pdf)
27. Legal Aid Agency. (2016) LAA civil legal aid eligibility key card. Accessed September 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/528095/eligibility-keycard.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/528095/eligibility-keycard.pdf)
28. Ibid
29. Evidence of the Police Lawyers' Action Group, pp 5-6, which also contains examples of the size of contributions. See WE.
30. Legal Aid and Advice (Financial Resources) Regulations 2013, reg. 18, S.I.2013/47. Accessed September 2017: [http://www.legislation.gov.uk/ukxi/2013/471/pdfs/ukxi\\_20130471\\_en.pdf](http://www.legislation.gov.uk/ukxi/2013/471/pdfs/ukxi_20130471_en.pdf)
31. Bill Waddington told the commission of a case in which a couple's assessed household income was only £2,500, yet after one month bailiffs arrived unannounced to enforce payment of the first of six monthly instalments of £500, despite the fact that the defendant had not been told what to pay or whom to pay it to. In the event the defendant decided to represent himself, rather than continuing with a liability for monthly payments which he could not afford.
32. HM Courts and Tribunals Service. (2010) *Solicitors' guidelines hourly rates*. Accessed September 2017: <https://www.gov.uk/guidance/solicitors-guideline-hourly-rates>. For example, £146 an hour is the rate outlined in the guideline rates for cases in the most affordable parts of the country, with relatively inexperienced practitioners (Band C, where Band A is the most expensive and Band D is the least expensive).
33. Evidence of Jonathan Black (London Criminal Courts Solicitors' Association), appendix 1 at p. 74.
34. See the evidence of the Centre for Law and Social Justice in appendix 2 at p. 40.
35. Rights of Women. (2014) *Evidencing domestic violence: a year on*. Accessed September 2017. <http://rightsofwomen.org.uk/wp-content/uploads/2014/10/Evidencing-DV-a-year-on-2014.pdf>
36. As recommended by the Law Society. (2017) *Access Denied? LASPO four years on*, recommendation 9. Accessed September 2017: <http://www.edf.org.uk/law-society-review-access-denied-laspo-four-years-on/>
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38. Maurits Barendrecht et al, Hague Institute for the Internationalisation of the Law (HiIL). (2014) *Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* p. 30. Accessed September 2017: [http://www.hiil.org/data/sitemanagement/media/Report\\_legal\\_aid\\_in\\_Europe.pdf](http://www.hiil.org/data/sitemanagement/media/Report_legal_aid_in_Europe.pdf)
39. See, for example, pages 10-11 of our interim report. Accessed September 2017: [http://www.fabians.org.uk/wp-content/uploads/2016/11/Access-to-Justice\\_final\\_web.pdf](http://www.fabians.org.uk/wp-content/uploads/2016/11/Access-to-Justice_final_web.pdf)
40. See response to Lord Falconer's written question to parliament HL2802, 20 October 2015. Accessed September 2017: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2015-10-20/HL2802>
41. See appendix 1, at p. 20.
42. See the evidence of Jenny Beck in appendix 4 at p. 15.

43. See the evidence of Colin Stutt in appendix 3 at p. 17.
44. Law Society. (2017) *Access Denied? LASPO four years on*. Accessed September 2017: <http://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/>
45. See the evidence of the Liverpool Law Society in appendix 2 at p. 83.
46. Cabinet Office. (2013) *When laws become too complex*. Accessed September 2017: <https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex>
47. See the evidence of the Discrimination Law Association in Appendix 2 at p. 102.
48. Professor Graham Cookson and Dr Freda Mold. (2014) *The business case for social welfare advice services*. Low Commission and Legal Action Group. Accessed September 2017: <http://www.lowcommission.org.uk/dyn/1405934416347/LowCommission-Pullout.pdf>
49. The LAA statistics show that the number of legal aid providers in the housing law field was reduced from 681 in 2012-13 (pre-LASPO) to 449 in 2016-17. Legal Aid Agency. (2017) *Statistics January to March 2017*, Table 9.4. Accessed September 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/631334/legal-aid-statistics-bulletin-jan-mar-2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/631334/legal-aid-statistics-bulletin-jan-mar-2017.pdf)
50. Department of Communities and Local Government (DCLG). (2016) *Rough sleeping in England: Autumn 2015*. Accessed September 2017: <https://www.gov.uk/government/statistics/rough-sleeping-in-england-autumn-2015>
51. Department of Communities and Local Government (DCLG). (2016) *Statutory homelessness in England: October to December 2015*. Accessed September 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/509763/Statutory\\_Homelessness\\_Statistical\\_Release\\_October\\_to\\_December\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509763/Statutory_Homelessness_Statistical_Release_October_to_December_2015.pdf)
52. Ministry of Justice. (2016) *Mortgage and landlord possession statistics: October to December 2015*. Accessed September 2017: <https://www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-october-to-december-2015>
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54. See appendix 2 to the *Submission of the Law Society to the Labour Party Review of Legal Aid*, February 2016. Accessed September 2017: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/submission-to-the-labour-party-review-of-legal-aid/>
55. *R (Howard League for Penal Reform and the Prisoners' Advice Service) v The Lord Chancellor [2017] EWCA Civ 244*. Accessed September 2017: <http://www.bailii.org/ew/cases/EWCA/Civ/2017/244.html>
56. See the evidence of Nicola Mackintosh QC (Hon) in appendix 4 at pp. 35-36.
57. Joel Carter, Office of the Children's Commissioner and Just for Kids Law. (2014) *The impact of legal aid changes on children since April 2013: Participation work with children and young people*. Accessed September 2017: [http://www.justforkidslaw.org/wp-content/uploads/2014/09/Just-for-Kids-Law-Report\\_final1.pdf](http://www.justforkidslaw.org/wp-content/uploads/2014/09/Just-for-Kids-Law-Report_final1.pdf)
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64. In 2014, for example, the National Audit Office reported that in 80 per cent of family court cases starting in the last quarter of 2013-14 at least one of the parties did not have legal representation. National Audit Office. (2014) *Implementing Reforms to Civil Legal Aid*, p. 15. Accessed September 2017: <https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>
65. See the evidence of the Consortium of Expert Witnesses in Family Courts in appendix 2 at p. 35.
66. See the *Submission of the Law Society to the Labour Party Review of Legal Aid*, February 2016. appendix 1, para 24. Accessed September 2017: <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/submission-to-the-labour-party-review-of-legal-aid/>
67. Maurits Barendrecht et al, Hague Institute for the Internationalisation of the Law (Hiil). (2014) *Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* p. 68. Accessed September 2017: [http://www.hiil.org/data/sitemanagement/media/Report\\_legal\\_aid\\_in\\_Europe.pdf](http://www.hiil.org/data/sitemanagement/media/Report_legal_aid_in_Europe.pdf)
68. See the oral evidence of Jawaid Luqmani, appendix 4, at p. 31.
69. Report of the Chief Coroner to the Lord Chancellor, 2015-2016. Accessed September 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/550959/chief-coroner-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/550959/chief-coroner-report.pdf)
70. The number of legally aided public law cases has reduced from 984 in 2013-2014 to 581 in 2016-2017, even though judicial review remained in scope. Legal Aid Agency. (2017) *Statistics January to March 2017*, Table 6.5. Accessed September 2017: <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2017>
71. The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015, Article 5A. Accessed September 2017: <https://www.global-regulation.com/law/united-kingdom/46836/the-civil-legal-aid-%2528remuneration%2529-%2528amendment%2529-regulations-2015.html>
72. See evidence of Public Law Department of Irwin Mitchell in appendix 2 at p. 154.
73. *R (Director of Legal Aid Casework and the Lord Chancellor) v IS* [2016] EWCA Civ 464. Accessed September 2017: <http://www.bailii.org/ew/cases/EWCA/Civ/2016/464.html>
74. Alison Pickup. (2017) How safe is the legal aid 'safety net?'. Open Democracy, Accessed September 2017: <https://www.opendemocracy.net/openjustice/alison-picku/how-safe-is-legal-aid-safety-net>
75. *R (Gudanaviciene and Others) v Director of Legal Aid Casework and Another* [2014] EWHC (Admin) 1840. Upheld, [2014] EWCA Civ 162 (see fn 11 above). Accessed September 2017: <https://www.judiciary.gov.uk/wp-content/uploads/2014/12/gudanaviciene-ors-v-dir-of-legal-aid.pdf> See also, *IS (by the Official Solicitor as litigation friend) v DLAC and Lord Chancellor* [2015] EWHC 1965 (Admin). Accessed September 2017: <http://www.bailii.org/ew/cases/EWHC/Admin/2015/1965.html>
76. Rt Hon Michael Gove MP. (2015) *What does a one nation justice policy look like?* Accessed September 2017: <https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like>
77. The LAA started in 2013-4, and their administration costs in the four years have been £106m; £110m; £112m; £95m. See Legal Aid Agency. (2015) *Annual Report and Accounts 2014-15*, p. 66. Accessed September 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/434072/laa-annual-report-accounts-2014-2015.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434072/laa-annual-report-accounts-2014-2015.PDF) See also Legal Aid Agency. (2017) *Annual Reports and Accounts 2016-17*, p. 74. Accessed September 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/632150/laa-annual-report-2016-17.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632150/laa-annual-report-2016-17.pdf)
78. The Law Society. (2016) *The Future of Legal Services*. Accessed September 2017: <http://www.lawsociety.org.uk/news/stories/future-of-legal-services/>
79. See evidence of Steve Hynes in appendix 1 at p. 24.
80. HM Courts and Tribunals Service. (2014) *HM Courts and Tribunals Service Framework Document*, sections 4.5 and 4.6. Accessed September 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384922/hmcts-framework-document-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf) The board has an independent non-executive chair, three judicial representatives; the chief executive and three other executive directors; three non-executive directors; and possibly a Ministry of Justice member, appointed by the Permanent Secretary to that Ministry. There might be three representatives of the legal profession, instead of the three judges, on the board that administers the legal aid scheme.



81. See, for example, the evidence of Adam Tear, at that time a director of Duncan Lewis Solicitors, in appendix 2 at p. 14.
82. See the evidence of Ben Hoare Bell LLP in appendix 2 at p. 14.
83. See the evidence of Mary Ward Legal Centre in appendix 2 at p. 14.
84. See the evidence of Nicola Mackintosh QC (Hon) in appendix 4 at p. 36.
85. See the evidence of the Housing Law Practitioners' Association in appendix 2 at p. 15.
86. See the evidence of the Islington Law Centre in appendix 2 at pp. 15-16.
87. Public Law Project. (2015) *Keys to the gateway: an independent review of the mandatory civil legal advice gateway*, p. 45. Accessed September 2017: <http://www.publiclawproject.org.uk/data/resources/199/Keys-to-the-Gateway-An-Independent-Review-of-the-Mandatory-CLA-Gateway.pdf>
88. See the evidence of the Public Law Project in appendix 2 at p. 16.
89. Rt Hon David Lidington MP. (2017) *Speech by the Lord Chancellor: Dinner for HM Judges 2017*. Accessed September 2017: <https://www.gov.uk/government/speeches/speech-to-hm-judges-dinner>
90. The City UK. (2016) *UK Legal Services 2016*. Accessed September 2017: <https://www.thecityuk.com/assets/2016/Reports-PDF/UK-Legal-services-2016.pdf>.
91. For example, it was reported recently that Fisher Meredith had halved the number of trainees it employs in the past few years and cut solicitor numbers by a third. See Chambers Student, *Trends affecting the legal profession*. Accessed September 2017: <http://www.chambersstudent.co.uk/where-to-start/trends-affecting-the-legal-profession>
92. Ibid.
93. The Law Society (2016). *The Future of Legal Services*. Accessed September 2017: <http://www.lawsociety.org.uk/news/stories/future-of-legal-services/>
94. Martin Bentham. (2015) *Legal aid cuts see barristers work for "below minimum wage"*. The Evening Standard. Accessed September 2017. <https://www.standard.co.uk/news/politics/legal-aid-cuts-see-barristers-work-for-below-minimum-wage-a3139806.html>
95. Law Gazette. (2010) *Moj axes training grants for legal aid*. Accessed September 2017: <https://www.lawgazette.co.uk/news/moj-axes-training-grants-for-legal-aid-/56225.article>
96. The Law Society. *End Legal Aid Deserts*. Accessed September 2017: <http://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/end-legal-aid-deserts/>
97. Chambers Student. (2013) *Legal Aid Cuts and Reforms*. Accessed September 2017: <http://www.chambersstudent.co.uk/where-to-start/newsletter/legal-aid-cuts-and-reforms>
98. LawWorks. (2016) *LawWorks clinics network report April 2015-March 2016*. Accessed September 2017: <https://www.lawworks.org.uk/sites/default/files/LawWorks%20Clinics%20Network%20Report%202015-16.pdf>
99. "... it is a tragedy that able and capable barristers are leaving publicly funded areas of work, or leaving the Bar entirely, because they cannot afford to practise or because they see no future there". Daniel Sternberg. (2016) *Reflection on the future of the Young Bar*, Counsel Magazine. Accessed September 2017: <https://www.counselmagazine.co.uk/articles/reflections-the-future-of-the-young-bar>
100. See Julian Hunt's evidence in the footnote in appendix 2 at pp. 97-98.
101. The Low Commission. (2014) *Tackling the advice deficit*, p. viii. Accessed September 2017: <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>
102. The Low Commission. (2015) *Getting it right in social welfare law*, p. iii. Accessed September 2017: [http://www.lowcommission.org.uk/dyn/1435772523695/Getting\\_it\\_Right\\_Report\\_web.pdf](http://www.lowcommission.org.uk/dyn/1435772523695/Getting_it_Right_Report_web.pdf)
103. PLEAS Task Force. (2007) *Developing capable citizens: the role of public legal education*. Accessed September 2017: <http://lawforlife.org.uk/wp-content/uploads/2013/05/pleas-task-force-report-14.pdf>

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104. This estimate was quoted by the then Lord Chancellor, Lord Falconer, in his foreword to Professor Pascoe Pleasence et al. (2016) *Causes of Action: Civil Law and Social Justice, Second Edition*, LSRC Research Paper No 14. Accessed September 2017: [https://www.researchgate.net/publication/271209992\\_Causes\\_of\\_Action\\_Civil\\_Law\\_and\\_Social\\_Justice](https://www.researchgate.net/publication/271209992_Causes_of_Action_Civil_Law_and_Social_Justice)
105. Law for Life. (2015) *Legal needs, legal capability and the role of public legal education*. Accessed September 2017: <http://www.lawforlife.org.uk/wp-content/uploads/Legal-needs-Legal-capability-and-the-role-of-Public-Legal-Education.pdf>
106. See summary in Professor Pascoe Pleasence et al. (2015) *How People Understand and Interact with the Law*. Accessed September 2017: [https://www.thelegaleducationfoundation.org/wp-content/uploads/2015/12/HPUIL\\_report.pdf](https://www.thelegaleducationfoundation.org/wp-content/uploads/2015/12/HPUIL_report.pdf)
107. Law for Life. (2015) *Legal needs, legal capability and the role of public legal education*, p. 3. Accessed September 2017: <http://www.lawforlife.org.uk/wp-content/uploads/Legal-needs-Legal-capability-and-the-role-of-Public-Legal-Education.pdf>
108. Ibid.
109. Department for Education. *National Curriculum in England: citizenship programmes of study for key stages 3 and 4*. Accessed September 2017: <https://www.gov.uk/government/publications/national-curriculum-in-england-citizenship-programmes-of-study/national-curriculum-in-england-citizenship-programmes-of-study-for-key-stages-3-and-4>
110. See the written statement of Citizenship Foundation in appendix 4 at p. 92.
111. Ibid.
112. See the written statement of Law for Life in appendix 4 at p. 73.
113. Shelter referred the commission to a valuable research report in 2015 which identified the different roles played by face-to-face, telephone and online services in getting people the help they need. Accessed September 2017: [https://england.shelter.org.uk/\\_data/assets/pdf\\_file/0005/1053662/2015\\_16\\_01\\_TNS\\_BMRB\\_The\\_future\\_role\\_of\\_digital\\_housing\\_advice\\_and\\_support\\_Research\\_Report.pdf](https://england.shelter.org.uk/_data/assets/pdf_file/0005/1053662/2015_16_01_TNS_BMRB_The_future_role_of_digital_housing_advice_and_support_Research_Report.pdf)
114. See the evidence of the Advice Services Alliance in appendix 4 at p. 86.
115. See appendix 5, chapter 16.
116. The Bach Commission. (2016) *The crisis in the justice system in England and Wales*. Accessed September 2017: [http://www.fabians.org.uk/wp-content/uploads/2016/11/Access-to-Justice\\_final\\_web.pdf](http://www.fabians.org.uk/wp-content/uploads/2016/11/Access-to-Justice_final_web.pdf)
117. See the evidence of the Advice Services Alliance in appendix 4 at p. 86
118. Low Commission. (2014) *Tackling the Advice Deficit*, p. 59. Accessed September 2017: <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>
119. Low Commission. (2014) *Tackling the Advice Deficit*. Accessed September 2017: <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>
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