

## **APPG on legal aid, 12 July 2016**

### **Oliver Carter, Co-Chair Young Legal Aid Lawyers**

Young Legal Aid Lawyers is a group of over 2,500 junior and aspiring lawyers who work – or aim to work – in those areas of law, both criminal and civil, which have traditionally been publicly funded. YLAL members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers up to 10 years PQE or call based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

YLAL's objectives are to campaign for a sustainable legal aid system which provides good quality legal help to those who could not otherwise afford to pay for it, to increase social mobility and diversity within the legal aid sector and to promote the interests of new entrants and junior lawyers.

Many of you will know that in recent years, the government has introduced a series of reforms which have restricted access to justice in a number of ways. We have campaigned and lobbied against these measures, which include: cuts to the scope of legal aid; cuts to the fees paid to legal aid lawyers; introducing or increasing court and tribunal fees; seeking to introduce a residence test to limit civil legal aid to those who have been lawfully resident in the country for at least 12 months (although this was recently ruled unlawful by the Supreme Court, and we await the written judgment); and reforms to judicial review, including the “no permission, no payment” regulations, which aimed to prevent legal aid lawyers from being paid for judicial review cases which were not granted permission to proceed to a final hearing [plus rules on third party costs].

Before speaking about legal aid, I'd like to say a couple of words about the impact of court and tribunal fees on access to justice. During the last few years, we have seen the introduction of significant fees in the Employment Tribunal leading to a 70% reduction in the number of cases brought against employers. We have seen huge increases to civil and family court fees, the introduction of the thankfully short-lived criminal courts charge and now the government has proposed vastly increased fees in the Immigration and Asylum Tribunals.

The Justice Select Committee recommended that the fees for bringing cases to employment tribunals should be substantially reduced and that the increase in the divorce petition fee from £410 to £550 should be rescinded. The Committee said the proposed fee increases in the Immigration and Asylum Tribunal caused them considerable concern and that it is unwise for the government to have brought forward proposals for fees set at full cost-recovery levels in the Immigration and Asylum Tribunal without having published its review of the implementation of employment tribunal fees.

As an overarching point in relation to fees, the Committee said this: “the introduction of fees set at a level to recover or exceed the full cost of operation of the court requires particular care and strong justification. Where there is conflict between the objectives of achieving cost-recovery and preserving access to justice, the latter objective must prevail.” YLAL would echo that sentiment.

Turning to legal aid, many of you will know that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) partially or wholly removed areas of law including housing, debt, welfare benefits, immigration and private family law from the scope of legal aid. The latest statistics from the Legal Aid Agency confirm that LASPO has resulted in a huge reduction in the number of civil cases being funded by legal aid. For the Legal Help scheme – which provides initial advice and assistance – the number of cases funded now is at about one-third of pre-LASPO levels. For civil representation in cases which could go to court, the number of cases funded now is at about two-thirds of pre-LASPO levels.

Overall, in 2012-13, before the implementation of LASPO, there were 724,243 new civil cases started under Legal Help or civil representation. The figure before the coalition government came to power was even higher – in 2009-10, there were 1,102,221 new cases started. This year, the figures for 2015-16 show that the number of new cases started has fallen to 258,460 (2013-14 = 282,155; 2014-15 = 264,438). This is a reduction of 465,783 new cases per year since 2012-13, and a reduction of 843,761 from the figure for 2010. Hundreds of thousands of people are no longer able to obtain legal advice and representation through legal aid every year.

The stated motivation for much of this reform is to cut public spending in order to eradicate the budget deficit. For legal aid, this has meant a reduction in the overall legal aid budget from £2.1bn in 2010 to £1.6bn today (of which £870m is spent on criminal legal aid and £700m is spent on civil legal aid).

Those of us who campaign for access to justice must acknowledge that austerity has a democratic mandate. However, the only reference to legal aid in the Conservative manifesto for the 2015 election was a pledge to “continue to review our legal aid systems, so they can continue to provide access to justice in an efficient way”. (The 2010 manifesto had said: “We will carry out a fundamental review of legal aid to make it work more efficiently, and examine ways of bringing in alternative sources of funding.”) The government is also due to review the operation of LASPO between three and five years after its implementation, i.e. between April 2016 and April 2018. We look forward to contributing to this review.

In recent months, many of us in the broad access to justice campaign have seen the Labour review of legal aid as a reason to be hopeful – a faint glimmer of hope following years of severe cuts. The review was instigated by Jeremy Corbyn just days after his election as Labour leader and is led by Lord Bach, who has appointed a Commission on Access to Justice, which will – I quote from its page on the Fabian Society website – “explore establishing access to justice as a fundamental public entitlement ... Its starting point will be that access to justice is an essential public service, equal to healthcare or education.”

This ties in with the briefing note which YLAL submitted to Lord Bach at the launch of the Commission, which he subsequently referred to with approval in the House of Lords. We said: “Equal access to justice for all irrespective of wealth should be the absolute core principle of our legal aid system. We believe that the cost of legal aid should be met by the state through general taxation. We believe that access to justice is a public good that should be classed by the government in the same category as the rights to healthcare and education.” Lord Bach said “these are principles that should unite us all, and I believe in principle that they do”.

The Commission sought written submissions and has taken oral evidence on the current state of access to justice and ideas to transform our justice system. It is, I understand, due to publish an interim report by the time of the Labour party

conference in late September, with a final report due in April 2017. We do not yet know what the Commission will say, and nor do we even know who the Labour leader will be when the final report is published next year, or whether there will be a general election in the near future.

At the very least, Lord Bach's Commission has provided an opportunity for us to think and talk about legal aid in a positive, proactive and innovative way, rather than simply campaigning reactively against the latest cuts and reforms. Responding to the Bach Commission's call for evidence, YLAL set out our three biggest concerns about the current state of access to justice, which were as follows:

- the removal of areas of law from the scope of legal aid by LASPO;
- overly stringent financial means tests for legal aid which undermine one of the founding principles of the legal aid system: that provision should not be limited to those normally classed as poor, but rather should be available to anyone who is unable to afford to pay for legal advice and representation; and
- court and tribunal fees which have been increased drastically in recent years to unaffordable levels, putting access to the courts out of reach for many individuals and organisations.

The Commission asked what practical steps could be taken to ensure access to justice for all was a reality. In our view, the three most important such practical steps are as follows:

- Repeal LASPO, bring the areas of law which were removed from scope back into scope and return to a presumption that a case which satisfies the means and merits criteria is within the scope of legal aid except in limited categories which are specifically excluded;
- Increase the thresholds and simplify the financial means tests for civil and criminal legal aid to ensure that legal aid is not reserved for only the poorest and most vulnerable in society, but rather is available to anyone who is unable to afford to pay for legal advice and representation; and
- Conduct an independent and comprehensive review of the impact of court and tribunal fees on access to the courts and recognise that the cost of justice should be primarily borne by society as a whole, rather than by people using the courts to defend or protect their rights.

These may seem like hopelessly optimistic goals in the current climate, but if we as young legal aid lawyers are not young and idealistic, no one else will be. The latest statistics from the Legal Aid Agency continue to demonstrate that fewer and fewer people are getting the legal advice and representation they need. This was the predictable and widely predicted consequence of LASPO. It is a depressing picture of justice denied to hundreds of thousands, if not millions, of people.

As will be apparent from our response to the Bach Commission, the change we would like to see in the legal aid system is ambitious and extensive. It would certainly require greater investment in access to justice than the government currently deems

appropriate. However, at present we have a justice system in which equality before the law is a mirage.

Whether austerity becomes a long-term feature of British policy-making may depend on the fallout from the EU referendum, the views of the new Prime Minister, the forthcoming leadership election in the Labour party and whether there is another general election in the near future. For now, much in politics is uncertain.

Theresa May said yesterday that “we need a bold, new, positive vision for the future of our country – a vision of a country that works not for a privileged few but for every one of us”. Part of this vision must surely be a justice system which works for everyone and which everyone can access. As Home Secretary, Theresa May recognised the importance of publicly funded legal representation to the families of those who died in the Hillsborough tragedy at the recently concluded inquests.

We will wait to see whether the new Prime Minister does anything to address the current crisis in access to justice, and we will keep campaigning and lobbying politicians of all parties for an effective and sustainable legal aid system.

## **Nimrod Ben Cnaan of Law Centres Network**

### **What the legal aid stats DO tell us**

1. Fewer acts of assistance and **fewer people helped**
  - a. In non-family civil it's a 13% drop, which might not say much – but it means 21,000 fewer civil legal aid cases compared with last year
  - b. **No offset**: in housing, for example, legal aid has dropped expectedly because of scope changes, but there was no offset in certificated cases, and HPCDS is flagging too – despite known rises in evictions and homelessness
2. Beyond the initial cut, the system keeps shrinking, suggesting **market failure**
  - a. **Fewer access points**: 509 fewer access points than last year, 902 fewer than before LASPO – still need to cater locally to nearly 14m people in poverty, of which 2.5 children
  - b. Much **fewer new cases overall**, even in areas still in scope: 13%
  - c. **Fewer new telephone cases**: only 1 in 9 callers gets through to a specialist and the number of new cases in the gateway areas is plummeting

### **What the legal aid stats DO NOT tell us**

1. **Where need is**, and to what extent legal aid provision is meeting it: that's because there is no legal needs study. Legal aid is provided with no clear statement of purpose, so hard to assess its efficacy
2. **Geographical distribution**: it was only through the NAO report, a year and a half into LASPO that we found out about areas of zero take-up of legal aid
3. **Provider sustainability**: there have been more stories in the legal press of providers dropping out. LAA prefers fewer, larger providers is bearing down on not-for-profits, even though were are more likely to help the hard to reach
4. **Problem of attrition**: where do people go whom legal aid can no longer help?

- a. What is being done to help them access justice and is it working?
- b. Immigration: lots of cowboys, Law Centres pick up the pieces later
- c. Employment: the relevance of the CMA study of legal services market, which highlights employment as a focus area

The claim that “we have one of the most generous legal aid systems in the world” is misleading: we have a large and costly system, but is it effective?

- Last year’s MoJ annual report and accounts: civil legal aid indicator was cost per case – an input indicator – and it had gone up
- This year: no indicator reported on at all

Civil legal aid is ripe for review to make the most of its more limited resources. As we are at the start of a financial downturn, we need to act now to be prepared for increased need.

**Steve Hynes, Director of Legal Aid Practitioners Group**

**1. Opportunity and Predictions**

We have an opportunity with a new PM and a new cabinet to make our case for legal aid and to persuade them not to make the same mistakes of previous governments.

Some predictions (not a good thing to do in the present political climate!) -

We will get a new PM tomorrow,

Brexit will happen and there will be a vote in parliament.

We will remain in the Council of Europe and bound by the ECHR

In the context of legal aid policy the last is the most important, but first another prediction- the government might well go for a British Bill of Rights that could go one of two ways-

1. the Russian way with legislation which allows the UK to ignore the Strasbourg court- illegal under international law

Or,

2. Brexit tinged HRA - which restates the legal position which the UK courts have to consider the convention rights,

**2. LASPO Act and Human Rights**

It should be remembered that the LASPO Act was framed as a human rights safety net and this means that the government will have limited flexibility to alter the scope of the scheme.

LAG's preference is for the LASPO Act to be scrapped but we recognise that amendment is probably the best we can hope for.

### **3. Gove and his legacy**

Say it a bit quietly but Gove has been rather good as justice secretary. He has spent much of his time unpicking the legacy of his predecessor, Chris Grayling, but in the last few months has been engaged with an agenda around prison reform and a project to digitise the courts and tribunal service. I also have it on good authority he was also turning his thoughts to a rethink on legal aid policy.

As we have already heard, the take-up of the legal aid services still in scope continues to fall. LAG has said for some time this predates the LASPO Act, but of course it fell off a cliff after the scope changes.

Around £600m has been cut from legal aid - the original target was £350m.

The number of cases in both criminal and civil legal aid continues to fall. The MoJ are spending far less than they budgeted for.

Interesting though the cost of administration has gone up.

The budget underspend means that the new justice secretary has room to innovate. LAG argues that the MoJ needs to look at the following areas of scope

- prison law. The penal system is in a volatile state - restoring meaning and enforceable rights for prisoners will help the reform agenda Gove started to put in place,

- benefits advice particularly in housing cases. This is an easy invest to save argument due to the social and other costs of families losing their homes,

- private law family. The courts are struggling to deal with the influx of LIPs especially in cases involving children.

- immigration advice. This is needed to deal with the fallout post Brexit vote.

### **4. Rights culture**

Part of the problem with the public dialogue about rights has been their conflation in sections of the media with the EU. Post Brexit we need to reclaim the debate on legal rights albeit with a more British tinge.

The next PM says she wants to build a country "not for the privileged few" we must ensure that this applies equally to our legal system and access to justice policy.

### **Carol Storer Director of Legal Aid Practitioners Group**

Sought to cover any issues not already picked up by the speakers and in particular looked at the reduction in crime cases.

Litigation post LASPO has been rather more successful at effecting change post LASPO than campaigning was pre LASPO.

Hurdles to access to justice are not just the cuts made by LASPO but include difficulties for people who seek advice in proving their financial position and for those alleging domestic violence, trying to obtain officially sanctioned evidence.

Another barrier is the CCMS IT system, which was brought in by the LAA to process civil applications and billing, which can be painfully slow and difficult and creates another hurdle slowing down cases and causing great frustration to practitioners.

The full judgment on the residence test is due tomorrow and that will set out more information on why the Supreme Court considered that the test could not be brought in.

She flagged up the idea that perhaps now was the time when serious thought should be given to separating out the Legal Aid Agency from the ministry of justice.

#### **Questions and Points from the Floor**

There were a number of points made from the floor including about the welcome abolition of the court charges; the difficulty of dealing with the LAA if in receipt of legal aid; the difficulty of legal aid funding being intermittent when the recipient is autistic and appears to understand what is going on but has difficulty processing what happens in court; there was a need to review LASPO (as the government promised to do in the three to five year window after LASPO came into force) but to monitor the review terms carefully as the review of the immigration procedure was woefully poor. Efforts should be made to ensure that the polluter pays.

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Sent to Alison

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