

Written evidence submitted by Resolution

Introduction

Resolution is an organisation of 6,500 family lawyers and other family justice professionals in England and Wales, who believe in a constructive, non-confrontational approach to family law matters. Resolution also campaigns for better laws and better support for families and children undergoing family change.

Over 1,500 of our members currently offer family, children and/or family mediation legal aid services.

Summary

- LASPO has significantly impacted access to justice for those with private family law issues and related legal problems. The outcome of the post-implementation review has not yet delivered any improvements in access to justice for separating families.
- There are recruitment and retention problems for our legal aid members raising concerns about the long term sustainability of and access points to family legal aid services.
- Resolution would be very concerned about further family court closures. Combined with the scope and availability of legal aid, this would limit the accessibility of the family justice system.
- There are issues about whether the family court is currently what we would all want it to be for families due to the challenges posed by Covid-19. The impact of the increasing use of technology on all lay and vulnerable parties, including legal aid clients, needs to be properly evaluated.
- The LAA's Covid-19 related contingency arrangements are likely to need to be extended beyond January 2021 and this should be clarified as soon as possible. The new payment on account arrangements are welcome, but do not go far enough to help providers with cashflow and financial security.
- Our legal aid members wish to see more people early on and divert them from court if at all possible; legal aid for a wider range of family out of court dispute resolution than mediation only; and legal aid for representation of both victims of domestic abuse and perpetrators in private children cases.

How LASPO has impacted access to justice and views on the post-implementation review

1. With the majority of private family legal aid removed from scope, together with the current financial eligibility rules and the Legal Aid Agency's (LAA's) approach to means-testing, an increasing number of litigants have had no choice but to represent themselves in the family courts. Those who don't fall within the parameters of the domestic or child abuse gateways, don't have the prescribed evidence to meet the

requirements of such and/or are of modest means just don't qualify for private family legal aid. We are concerned about those who may simply give up and lose contact with their children or do not pursue legitimate applications as they cannot cope with proceedings alone. Others find themselves unsupported in the court process facing dealing with contested allegations, fact-finding processes or a generally obstructive opponent without the knowledge to be able to focus their case to the issues and achieve the best outcome. The impact on those amongst lower socioeconomic and vulnerable groups who don't have family or others who can fund them or guide them is all the greater.

2. Since the legal aid reforms implemented in April 2013, fewer people have access to legal support during their divorce or separation. National Statistics show that Legal Help has fallen to less than a third of the pre-LASPO level. This restricts people's potential to resolve their disputes, whether or not they use the courts. Before the introduction of LASPO, solicitors provided crucial initial advice for people going through separation under the legal aid scheme, helping them to understand their options and steps they needed to take. They were the major point of referral to out of court dispute resolution so some of those who might have benefitted from direction to legally aided mediation will have simply missed out. It cannot be a coincidence that Mediation Information and Assessment Meetings and Mediation Starts stand at around a third of pre-LASPO levels.
3. Resolution remains concerned that even people who are eligible for private family legal aid face challenges and are not accessing legal aid, including some sufferers of domestic abuse i.e. those who were originally intended to get help and protection. Whilst there have been many welcome changes to the gateway since implementation, the word of the applicant and/or the solicitor regularly professionally screening for domestic abuse are not accepted as prescribed evidence for the purposes of the gateway despite the fact that this would better meet the needs of victims with multiple problems who may simply not have access to any other form of evidence. The relevant regulations are not fool proof and still represent a barrier for some individuals seeking to remove themselves from an abusive relationship and finalise the legal consequences of the end of the relationship. Some survivors may have simply not been able to face reporting the abuse to or been screened for abuse by any of the prescribed evidence providers.
4. Rejected legal aid applications are often related to means. Those domestic abuse applicants in co-ownership of a property with a former partner often cannot access equity but the LAA's interpretation of the means regulations means 'trapped capital' is taken into account and they are not financially eligible for legal aid. This particularly impacts extended family members and older clients who may own a home but be income poor with no means of releasing equity to fund proceedings and yet that is what the current process expects them to do, without having regard to the fact they are wholly unable to secure loans based on their low income.
5. Neither has the exceptional case funding system for excluded cases protected fundamental access to justice for people who genuinely cannot represent themselves. For example, the system appears to have never properly taken into account the problems that a sufferer of domestic abuse would have in engaging in negotiation, mediation and/or litigation with a perpetrator about a divorce or unresolved

matrimonial finances. Our members report that they experience legal aid clients who pull out of proceedings, leaving children or finance issues unresolved, because the opponent is unrepresented, largely uncontrolled within the process and continuing to abuse through the proceedings.

6. Many family clients have multiple and not only family law problems. It is now extremely challenging to signpost to meet other needs and for family law clients to get advice in related areas of law such as housing and immigration.
7. In terms of the post-implementation review, whilst there were some helpful recommendations, this did not fully acknowledge the fundamental flaws of the post-LASPO system. Progress further to the Legal Support: The Way Ahead action plan published by the Ministry of Justice in February 2019 has been slow, with further delay in light of Covid-19 and delays to the spending review as a result of the pandemic, for example:
 - a. Proposals for extending eligibility for non-means tested legal aid for parents, or those with parental responsibility, who wish to oppose applications for placement orders or adoption orders in public family law proceedings were to be brought forward by Summer 2019, subject to Parliamentary approval. These proposals are still awaited. We are seeing the adoption process delayed while unrepresented parents seek, as litigants in person, to navigate a complex legal mix of statute and case law, which simply causes acute distress to all involved, and delays permanency for the children concerned.
 - b. Proposals to expand the scope of legal aid to cover special guardianship orders in private family law were to be brought forward by Autumn 2019. We contributed to a briefing provided to the Ministry of Justice in January 2020 with practitioners' proposals as to how, specifically, these changes should be progressed and implemented, but no timeline and firm proposals are available yet. This delay in the context of increased pressure on the care system, with most local authorities reporting increases in social work intervention during lockdown and in issued proceedings, is all the more concerning.
 - c. A campaign to improve awareness of legal aid was to be launched by autumn 2019. We understand this is being worked on, but members of the public remain confused about eligibility and limitations on legal aid availability.
 - d. A comprehensive review of the legal aid eligibility regime was to be completed by Summer 2020. The review of the means test was paused due to Covid-19, has now restarted and public consultation is currently expected in Spring 2021. It remains a concern that a family can be considered on a low income and receiving benefits or tax credits, yet are still assessed as being required to pay a contribution to legal aid. Since LASPO our members have seen a steady increase in offers of legal aid based on contributions being refused, as clients simply cannot afford them.

Role of the Legal Aid Agency

8. There is a separation of legal aid policy and operations between the Ministry of Justice and the LAA which has responsibility for operational policy, not legal aid policy. In practice the requirements of the former and LAA systems may obstruct the simple and effective implementation of potentially beneficial changes in legal aid policy. Or the LAA can only progress operational matters so far without policy change. One key area our members have tried to work on is the tightening up of guidance on experts. While we have been able to have constructive dialogue with the LAA on process issues and have achieved improvements, it is far more difficult to progress anything considered to touch on policy or experts' rates of remuneration.

Recruitment and retention problems among legal aid professionals

9. The salaries which legal aid firms can pay to trainee solicitors and newly qualified lawyers are simply not attractive to those already burdened with student loans.
10. There is an inequality of arms, not only between privately funded and legal aid practice, but also compared with the CPS and local authorities. Those employers are able to attract three and four year qualified lawyers out of legal aid practice with more certain careers, and salaries and public sector pensions which legal aid practice cannot match or maintain.
11. If legal aid rates were increased, it would be possible to pay staff undertaking legal aid work more and to properly remunerate them. Hourly rates have not risen for well over 20 years, in fact they have reduced in real terms, with both hourly rates and fixed fees cut by 10% in 2011. The current fees are based on pre-LASPO averages across both less and more complex work; legally aided work has been more complex post LASPO and required more resources to manage the rules, administration and audits involved. It is a highly specialist area, but not recognised as such. The administrative burden of managing and running the contracts is enormous, and particularly at legal help level, way beyond the remuneration involved.
12. In terms of attracting trainees, reinstatement of a trainee grant scheme should be considered.
13. Family mediators face similar issues around rates of legal aid pay and the burden of administration and audits involved in providing legal aid services.

The impact of the court reform programme and the increasing use of technology on legal aid services and clients

14. We have provided evidence to the Committee elsewhere that we agree that online processes, and digitisation of the court estate, have an important role to play but that a one-size-fits-all approach or remote services across the board in family and children proceedings would not be right. The reforms to date affect all our members and have not really had any separate impact on family legal aid services. We will want though to monitor how private and particularly public children reforms develop and impact.
15. We would be very concerned about further family court closures. Combined with the scope and availability of legal aid, such would limit the accessibility of the family

justice system at a time when it is really struggling to cope with people suffering emotionally and/or financially as a result.

16. Since the beginning of the pandemic the use of technology has significantly increased. Experiences can vary within and between courts and regions. Remote hearings can have a positive benefit for women who have experienced domestic abuse as this is effectively a special measure, but there are strong disadvantages for some clients. The experience of parties involved in children proceedings is questionable.
17. Those involved in the system have done their best under extreme pressure, and our Legal Aid Committee members report that they can manage. However, many members have reported feeling that a disservice was done to, for example, parties at home alone on the phone when they gave evidence to the court and the removal and future of their children was being decided. Not all clients have access to facilities to enable them to join a remote hearing; some courts are still claiming that this is their solicitor's responsibility but it should not be for them to buy laptops to lend to their clients. It is also very difficult to accommodate access in solicitors' offices when they are closed, not available or are unsuitable for social distancing.
18. There are some reports that things are now going better in the public children law arena, with those cases being prioritised because of the need to minimise delays for children in care. Court time is used most efficiently where parties with their representatives can be in court in person. But hybrid hearings can work well in that it is better for parents to be at court to engage in person with and be supported by their legal representatives, (with the local authority and children's guardian elsewhere), than for parents to be at home on their own or with their children present or elsewhere away from court.
19. The LAA system itself is now largely online and has not been without its problems, with much time spent in resolving glitches that should never have been there if the system had incorporated the practitioner and client experience in the design. It is a clear example that while improved technology has a role and can improve systems, it is essential that there is full input from practitioners from the start of such projects to achieve systems that will work. Recent system outages resulted in delays and significant unremunerated work for our members who had to work around the lack of digital access.

The impact of Covid-19 on legal aid services and clients

20. Covid-19 is often used as a weapon in high conflict cases to deny contact or retain the child post contact. And, as outlined above, there are issues about whether the family court is currently what we would all want it to be for families due to the challenges posed by Covid-19, social distancing and court buildings having to temporarily close if affected by virus cases. The work of the Nuffield Family Justice Observatory on remote hearings is helpful and a further report is currently being prepared.
21. In our legal aid members' experience, many clients report feeling removed from the process. Even those who have said they are comfortable with video platforms may afterwards report that they didn't follow what was being discussed or felt that the system favoured the professionals over them. While much of this is a matter of

perception, the feeling of not being listened to and not being able to engage fully is a serious concern.

22. The impact of Covid-19 on those legally aided clients (and indeed all clients) involved in private children or financial remedy proceedings, and their children, is severe due to adjournments and indefinite delay and uncertainty. The family justice system was already experiencing difficulty before the pandemic in managing delay and more cases with litigants in person which impacts on all cases.
23. The LAA has introduced various Covid-19 related contingency arrangements, many of which are currently extended to January 2021. The new payment on account arrangements are welcome, but do not go far enough to help providers with cashflow and financial security. Our members are particularly disappointed that they are still not able to claim for Family Advocacy Scheme hearings after each hearing at 100% in the same way as counsel and that this issue appears to be 'parked'. We see no reason in principle why this should not also be possible for solicitors and would ask that this be reviewed before January 2021. To be able to submit for assessment as a final claim would not only improve cash flow, but reduce the administrative burden on assessment at the end of the case, provide more certainty and ensure the advocate is paid properly at the time.
24. We were disappointed when the LAA announced with very little notice, that it would be taking over assessment of all legal aid bills during the Covid period and on a permanent basis. Whilst we can see the benefits of a simplified and faster system of payment, we remain concerned about the training of staff who are taking over a role previously undertaken by Judges who had been involved in the cases they were assessing and were aware of the work that had to be done. We also remain concerned about the appeal process when a member considers a bill has been unreasonably reduced. Legal aid practitioners operate on very thin margins, so any reduction is likely to weaken the supplier base further.
25. In our members' experience, providing quality induction and training in legal aid practice can also be particularly challenging in a time of Covid-19. The legal aid rules are so complex that it is difficult to have effective supervision and oversight of more junior members of staff on a remote basis, and to easily bridge the gap between them and far more experienced colleagues.
26. There is likely to be a need for future legal aid contracts to better reflect what works well remotely and continues post Covid-19. If the circumstances created by the pandemic continue and there is a need for firms to permanently close offices, that could in fact breach the terms of their current legal aid contracts. More importantly, for clients, access to a local, personal family legal aid service, including for families who are the subject of public children proceedings, could be more difficult in the longer term.

What the challenges are for legal aid over the next decade and what reforms are needed

27. Remote working will inevitably continue to a greater extent than pre the pandemic. Clarity around responsibility for access to technology for parties without such, and who are more likely to be legally aided, is urgently needed.
28. Two of the main challenges will be addressing succession planning in light of the recruitment and retention problems outlined above; and how to provide access points to a full range of legal aid services for those with multiple problems. If the system continues on the current track, those challenges will simply not be met. We fear real problems down the line in terms of being able to develop those needed to achieve specialist accreditation and become legal aid supervisors in the family category, in the same way as some other areas of legal aid practice have already experienced. As an organisation that has encouraged training and accreditation to ensure quality services to all clients, whatever their financial position, we want quality legal aid services to be maintained.
29. All involved need to work towards building a positive consensus around the necessary reforms, with a more fundamental review than that provided by the LASPO review. The narrative needs to be framed around how to give more people access to justice, as opposed to how to improve LASPO around the edges and restrict legal aid.
30. Resolution has long called for the extension of the availability of legal aid to a wider range of family out of court dispute resolution than mediation. Mediation is not always suitable and another way of resolving a dispute may be more suitable. This is one reform which would both help more separating couples to minimise conflict and reduce the pressure on courts. People should be able to choose which dispute resolution method will be most suitable for them. Otherwise their only choice is do nothing or go straight to court.
31. Resolution also continues to call for widening of the scope of private family legal aid. Our members wish to see more people early on and divert them from court if at all possible. In addition, the issue of perpetrators using the family justice procedure to abuse victims is much wider than cross examination; there are ancillary issues including repeat applications and dragging out the process. It can also be the case that a perpetrator is legally represented but the victim is not. Many survivors never report the abuse they have experienced, for example, sometimes only disclosing their experience for the first time when consulting a solicitor about a private family law matter. They can be ineligible for family legal aid but can be cross-examined by a perpetrator making a Children Act application to further their abuse. Legal aid for representation of both victims and perpetratorsⁱ up to and including fact finding in private family cases, without the need for gateway evidence as currently prescribed, would in our view address the problem of perpetrators seeking to use the family court process to abuse their victims more effectively than the provisions in the current Domestic Abuse Bill alone, as well as providing equality of arms.
32. Resolution remains committed to working with others on the sustainability of a fair and accessible legal aid scheme.

ⁱ Technically, legal aid for respondents remains in scope, subject to means and merits assessment, for civil legal services provided in relation to home rights, occupation orders and non-molestation orders under Part 4 of the Family Law Act 1996. But is extremely difficult to persuade the LAA that an (alleged) perpetrator meets the

merits test. A respondent may present their own gateway evidence for a private family law legal aid application where there are cross allegations, which as for victims will be subject to means and merits assessment, or occasionally successfully apply for exceptional case funding.

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