

## PART 1 – Recommendations to improve the sustainability and sufficiency of legal aid

1. In rebuilding our society in the wake of the past year and a half, we have an opportunity to look afresh at the justice system and at the ability of those in need to have real, practical access to justice. We have tried to determine what justice should look like and what is sufficient in terms of access. We have not sought to compare our legal aid system with other systems around the world, but it is the Commission's belief that our justice system is renowned globally. We say that not least because of the quality and commitment of those working in private practice and third sector advice organisations that we have had the privilege of meeting during the course of this Inquiry.
2. In making these recommendations we are aware of the ongoing public policy dilemma of a country seeking to rebuild after the ravages of the pandemic. We are conscious of the multiple and competing demands that will be placed upon the public purse in the coming months and accordingly we are not proposing wholesale structural reform. Rather, these recommendations are intended to mitigate some of the damage done to the sector over the past two decades and to ameliorate the impact of the pandemic. But there must be a recognition across government that the Rule of Law is not something we can have for free. It is a choice we make as a society: either we decide that the law should apply to us all equally or we don't. If we decide we do, then there is a cost. It is a small cost relative to other areas of public spending and it is one that we believe is worth paying.

### Recommendations A – C: Legal Aid Fees

#### **A. Increase legal aid fees in line with inflation**

While the cost of the legal aid system generally increased in the decades pre-LASPO, the fees paid to providers have not been increased since 1996. We recommend that legal aid fees be raised in line with inflation as this would mitigate the damage done by many years of frozen or decreasing fees. This would incentivise practitioners to return to legal aid work and reflect that the cost of delivering services has increased over time. An equitable settlement will include an uprating to reflect inflationary increases over a specified period of time. We would suggest using 2011 as a baseline for this calculation so that an inflationary increase can also account for the 10% cut introduced to civil fees that year. The services producer price inflation index gives a 25.02% rate of inflation since 2011.<sup>1</sup> If this rate is applied to all of civil and family legal aid, we estimate that this will cost £171m more per annum. If the same rate is applied to criminal legal aid, this would be a further £224m.

#### **B. Reverse the 8.75% cut made to criminal legal aid fees**

Furthermore, it is our recommendation that the 8.75% cut made to criminal legal aid fees in 2014 be reversed with immediate effect.<sup>2</sup> The Impact Assessment 'Transforming Legal Aid – Next Steps:

---

<sup>1</sup><https://www.ons.gov.uk/economy/inflationandpriceindices/bulletins/servicesproducerpriceindices/previousReleases?page=3>

<sup>2</sup> <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/procurement-criminal-legal-aid-services-response-ia.pdf,paragraph> 22, 27 February 2014

Government Response, Procurement of Criminal Legal Aid Services estimated that this would cost £60m per annum without any inflationary increase.<sup>3</sup>

### **C. Establish an Independent Legal Aid Fee Review Panel**

The provision of legal aid is a public service and we recommend that an Independent Fee Review Panel be established to undertake an annual review of legal aid fees and to bring the profession in line with other public service providers. The members of this panel would be appointed by the Secretary of State. The panel itself would be similar in nature to the Review Body on Doctors' and Dentists' Remuneration and determine whether fees properly reflect the cost of delivering legal aid services (by solicitors, barristers and external experts). The Panel must be authorised to make appropriate recommendations which, while non-binding, could advise Government on setting appropriate fee levels to accurately reflect the cost of delivering services.

In reaching its recommendations, the Review Panel should have regard to the following needs:

- I. to recruit, retain and motivate solicitors and barristers in the social welfare sphere;
- II. to provide high-quality legal advice and representation
- III. to provide value for money to the taxpayer
- IV. to responds to the needs of the public both now and in the future
- V. to ensure that the provider base is robust and sustainable
- VI. to contribute to the efficiency and effectiveness of the justice system; and
- VII. regional/local variations in the various communities around England and Wales and their effects on the recruitment and retention of legal professionals.

## Recommendation D: Recruitment and Retention

### **D. The Ministry of Justice should fund training and qualification placements within legal aid firms and NfPs and publicly-funded chambers**

We heard detailed evidence about the crisis in recruitment and retention at the junior end of the legal aid profession. We believe further investment should be made in the sector to allow firms, NfPs and chambers to recruit, train and retain new lawyers. The Legal Services Commission used to award publicly-funded training grants of £20k per trainee, per annum to legal aid firms to allow them to fund 100% of the tuition fees of the Professional Skills Course, and to contribute towards Legal Practice Course fees and the trainee's salary for the two years of their training contract. This practice assisted more than 750 trainees in qualifying but ceased in 2010<sup>4</sup>. Others have stepped in to assist with these costs, most notably the Legal Education Foundation's Justice First Fellowship Scheme, but this is able to help far smaller numbers of prospective lawyers (15-20 per year). It is our recommendation that publicly funded grants should be reinstated for solicitors, barristers and legal executives to ensure an adequate pipeline of new practitioners into the sector. We look to the relevant ministerial team for proposals as to how best to action this recommendation.

The SRA should also work with the profession and with education providers to ensure that the new Solicitor's Qualifying Exam includes modules on social welfare law. It is vital that the sector continues to encourage bright and committed individuals to its ranks and that the profession

---

<sup>3</sup> Ministry of Justice (2014) *Transforming Legal Aid – Next Steps: Government Response, Procurement of Criminal Legal Aid Services – impact assessment* (IA No MoJ199), para 22, p5. Available at: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/procurement-criminal-legal-aid-services-response-ia.pdf> (accessed 11 September 2021).

<sup>4</sup> <https://www.lawgazette.co.uk/news/moj-axes-training-grants-for-legal-aid-/56225.article>

remains as open to those from diverse backgrounds as it always has been. We recognise however that this is a complex process, and one where the profession must work with regulators to find a solution that does not undermine access to justice. The government has a role to play in facilitating these discussions, but we have not made a specific recommendation for government on this issue.

## Recommendations E - H: Broadening the scope of civil legal aid and meeting legal need

### **E. Review the scope of civil legal aid and link scope to independent research on legal need**

The scope of the legal aid scheme is not only relevant to the issue of meeting public legal need, it also shapes the provider base and influences whether services are sustainable. An urgent and independent review is needed in relation to the scope of civil legal aid to determine whether it is currently meeting the needs of those who lack the means to pay for legal assistance. The MoJ has been discussing a formal review of civil sustainability, to include a review of scope, for many months and yet as this report goes to print nothing concrete has been announced. We are, however, aware that any review panel will take months to form and years to report and we are concerned about the impact on client access and provider sustainability in the meantime. We set out our thoughts on areas of law that should be brought back into scope below.

### **F. Immediate changes to legal aid scope to increase access to justice**

Due to our concerns about client needs and provider sustainability, and how these two issues have deteriorated over the course of the pandemic, we recommend that the government consider a range of immediate changes to the scope of legal aid. These changes should be made to provide the public with a more holistic service and to make the provision of legal aid a more financially viable choice for providers, addressing the disparity between the work required to provide a quality service to the public, and the work currently remunerated by legal aid.

#### **F1 Restore legal aid for early legal advice to the pre-LASPO position**

We recommend that the government restores legal aid for early legal advice to pre-LASPO levels for all areas of social welfare law (including debt, employment, welfare benefits, immigration and housing).

We recommend that early legal advice be restored for family law and for prisoners in certain appropriate cases.

The removal of certain areas of law from scope fails to reflect the reality of how problems present themselves. As MPs, we have seen this in our own casework. Although some people may experience only one type of problem in isolation, it is the nature of social welfare problems that they occur in a cluster of interrelated issues. Both socio-legal research<sup>5</sup> and social exclusion studies have shown that people tend to experience a combination of interrelated problems, with money and debt identified as the 'central element'. So the provision of a service is made especially difficult if only certain aspects of a problem are within scope and the individual's legal issues cannot be dealt with as a whole.

Legal problems should be viewed in a holistic manner and lawyers should be able to advise on all parts of the issue rather than simply those that are deemed within scope. If specialist advice is given at the early stages of a problem, the problem is less likely to escalate and generate

---

<sup>5</sup> P Pleasence, N Balmer, A Buck, A O'Grady, H Genn, 'Multiple justiciable problems: common clusters and their social and demographic indicators', *Journal of Empirical Legal Studies*, July 2004.

greater cost for both the individual and the state. In relation to the cost of early legal advice in various areas of social welfare law, we calculated the figures below on the basis of the legal aid spend in the financial year 2012-2013 before the LASPO took effect. These figures are pre-inflation and are included as an indication only. We note that the actual spend would vary considerably depending on the case mix and volume of cases in any given year and that demand for these services (and therefore cost) may be higher due to the impact of the pandemic.

- Housing - £10m
- Welfare Benefits - £26m
- Debt - £17m
- Employment law - £4m
- Immigration - £10m<sup>6</sup>
- Private family - £31m

We heard evidence about the difficulties in sustaining areas of legal aid practice where certain types of work have been removed from scope. These problems have been exacerbated over the past year with the drop in income for many providers caused by the lockdowns and delays or halts to certain types of court and tribunal proceedings. The government has considered a range of measures intended to help the legal aid community to weather the past year. However, for a number of reasons these have not been implemented. It is our view that the government should widen the scope of funded legal advice and representation in several critical areas including elements of housing and family law as this will allow practice to be more financially viable.

## **F2 Restore funding for housing disrepair cases**

The Commission is concerned about the impact on legal aid providers of the recently published MoJ response to the 2019 consultation paper – Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson’s Proposals. We heard evidence from housing providers that recovering costs at inter partes rates is of central importance to the viability of legal aid practices. It is likely that the extension of Fixed Recoverable Costs to all areas of civil litigation will have serious adverse effects for legal aid practitioners and, in consequence, their clients. If inter partes costs are cut to the levels proposed in the consultation response, the sustainability of many legal aid firms will be further undermined.

While these recommendations are not intended to address each area of legal aid, it is clear that the pandemic has had a particularly adverse financial impact on housing law providers who have struggled to keep their businesses afloat as a result of the moratorium on evictions and reduction in capacity in the courts since possession claims resumed. We recommend that all disrepair work be put back into scope with immediate effect. The removal of areas from scope is particularly relevant in respect of disrepair cases, for which public funding was abolished save in relation to the removal or reduction of a serious risk of harm to the health or safety of the tenant or a member of his or her family. This will have limited cost to government as a large proportion of the costs associated with proceedings will be borne by landlords who default on their statutory repairing obligations. It will, however, make housing contracts more viable, address the lack of client access to these services, and more accurately reflect the work that is required to provide a full service to clients. Were disrepair to be

---

<sup>6</sup> We note that the political environment, and immigration and asylum law has developed considerably in the years since 2013 rendering it difficult to assess the likely investment needed in this area.

reintroduced to scope, based on the figures from 2012-2013, we estimate that this would cost £3m per annum.

### **F3 Remove barriers to legal advice and representation for those seeking protection from domestic abuse and their families**

The pandemic and the measures put in place to contain it have created a perfect storm for survivors of abuse. We are particularly conscious of the effects of the lockdown; financial concerns, children being off school, anxiety associated with illness and a lack of space for individuals to 'cool off', all heaping pressure on families. We heard evidence that the usual means of escape for victims have been eroded, that women's refuges are often full and that there are associated health risks with different families using communal areas.

The role of the criminal justice system is crucial in the response to domestic abuse. The statutory definition of abuse needs to be effectively incorporated into both criminal and civil remedies. Government has recently taken welcome steps to make civil protection for survivors more accessible during lockdown by publishing information on how victims can apply for an injunction in the family court if they are unrepresented.<sup>7</sup> Over the course of the pandemic, experts, including Domestic Abuse Commissioner Nicole Jacobs, Dame Vera Baird QC, Victims' Commissioner for England and Wales, and other called for the abolition of the means test in accessing legal aid to apply for protective injunctions for survivors and their families.

We welcome the advances that have been made in this area such as the decision to remove the £100,000 mortgage cap<sup>8</sup> for capital eligibility and we are pleased at the decision of the courts to ensure that inaccessible capital should not be taken into account. However, we are saddened that it was necessary for a victim of domestic abuse to litigate to obtain legal aid because of a means test so out of step with legal need.

We recommend that the criteria for legal aid should be urgently revised to ensure that survivors of domestic abuse can access legal advice irrespective of their means. Aside from applications for urgent protections by way of injunctions, survivors of abuse need continued assistance with legal representation for associated family matters such as arrangements for children and finances. The current gateway evidence fails to fully recognise the statutory definition of domestic abuse which includes psychological abuse and coercive and controlling behaviour. Gateway evidence needs to be amended so that evidence of coercive and controlling behaviour (now recognised one of the most dangerous abusive behaviours) can enable access to the legal representation that survivors need. We recommend that the gateway criteria should be extended to cover evidence of coercive and controlling behaviours in the same way that financial abuse is currently evidenced.

### **F4 Restore legal aid for private family law and for both sides in a dispute**

We believe that funding advice for private family law disputes would result in the resolution of many disputes before one or both parties resort to litigation, would increase the take-up of mediation services and would reduce the number of litigants in person trying to navigate the court system. All of these outcomes would result in direct savings to the state.

---

<sup>7</sup> <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/Home-Affairs-Select-Committee-COVID-19-Preparedness.pdf>

<sup>8</sup> <https://www.gov.uk/government/news/civil-news-changes-to-mortgage-debt-in-eligibility-calculations>

In circumstances where litigation is unavoidable, legal aid should be brought back in for both parties (particularly where there are allegations of domestic abuse) to ensure equality of arms and to ensure that the courts are not used to perpetuate abuse between parties.

#### **F5 Expand access to legal aid for bereaved families for inquests**

We have heard a great deal of evidence in relation to the law around inquests and the inequality that exists in the current system towards the grieving family. In order for the system to be fair and to represent the needs of all parties, 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. The cost of this has been estimated as between £30-70m per annum<sup>9</sup>, although we note that the charity INQUEST has disputed this estimate, adding that this figure 'has to be considered within the context of the costs to the public purse of state lawyers.

We note that further to the Means Review, the Ministry of Justice has announced that they will be removing the means test for applications for ECF in relation to legal representation at inquests. Further, they propose to provide non-means tested legal help in relation to an inquest for which ECF has been granted for legal representation. We commend the Ministry for their work on this review and the steps that they are taking. However, it is our belief that there is further work to be done.

#### **G. Conduct further research into how to increase the capacity of providers in areas that are currently in scope**

We explore a number of worrying issues that relate to areas of law that remained in scope post-LASPO. Advice deserts have developed across vast swathes of England and Wales in areas such as Housing and Community Care, despite LASPO retaining Community Care and some areas of housing law within the scope of legal aid. Areas like Special Education Needs and Discrimination were delivered by a telephone-only service until the gateway was abolished in May 2020<sup>10</sup> but attempts to tender for face-to-face services have attracted few providers. Whilst many will posit that this decline in providers is predominantly down to uneconomic fees (and it may be) further research must be done to understand how scope, contracting, compliance, auditing, other forms of bureaucracy and the viability of linked categories of legal aid undermine the viability of these practice areas (and therefore the willingness of providers to retain contracts or tender for new contracts).

#### **H. Develop robust research mechanisms for measuring legal need, and link the commissioning of services to that research**

The MOJ is currently developing a high level 'legal needs dashboard', which collates information from various sources such as HMCTS, local authorities and the Department for Housing Communities and Local Government. This dashboard is designed to assist MOJ officials to understand some of the drivers for legal need and the pressure points in the justice system. While we appreciate the intention behind this work, we do not believe it is a sufficiently detailed or

---

<sup>9</sup> Paragraph 130, Final report: Review of legal aid for inquests

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777034/review-of-legal-aid-for-inquests.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777034/review-of-legal-aid-for-inquests.pdf)

<sup>10</sup> Legal Aid Agency, 'Civil news: mandatory telephone gateway phased out', ([www.gov.uk](http://www.gov.uk), 15.5.2020) <https://www.gov.uk/government/news/civil-news-mandatory-telephone-gateway-phased-out> > (accessed 20 July 2021)

robust mechanism for informing the commissioning of services or the development of legal aid/legal needs policy.

We recommend that the MOJ works with external experts from legal practice and legal/socio-economic research fields to develop a mechanism for regularly monitoring and measuring the public's need for legal assistance. Commissioning of services should be informed by and aligned to this measurement of legal need.

## Recommendation I: Judicial Review

### **I. Ensure legal aid is paid for all judicial review cases (irrespective of the outcome of the case)**

Judicial review is an essential tool for holding public bodies to account and levelling the playing field between the individual and the state. Judicial review cases remained within the scope of legal aid post-LASPO. However we heard from practitioner witnesses that changes to the payment mechanisms have discouraged many from bringing proceedings as time-consuming work is done 'at risk' because payment cannot always be claimed if permission is refused to proceed to full judicial review. For true equality of arms, in issues of such importance as the lawfulness of the actions or inactions of public bodies, the public must have ready access to lawyers who specialise in public law. Those without the means to pay for advice and representation must be able to access the assistance they need from specialists under the legal aid scheme. Given the importance of the issues at stake, and the significant hurdles in place during the application stage to establish that a claim has merit, some members of the our Inquiry were of the opinion that public law specialists should not be expected to work at risk. There was, however, no consensus by the Inquiry regarding the recommendations to be made in relation to this.

For an indication of the cost of paying practitioners for the work done during this preliminary stage we looked at the Impact Assessment: Reforms to Judicial Review. This estimated that legal aid providers would experience a fall in income of £1m-£3m per annum when the reform came into effect.<sup>11</sup>

## Recommendation J: Exceptional Case Funding

### **J. Overhaul the Exceptional Case Funding scheme**

Exceptional Case Funding has not provided the safety net that was intended under LASPO. What this has meant in practice is that legal aid is unavailable and as a result fundamental rights are breached in ways not intended by parliament. While LAA statistics<sup>12</sup> suggest that the volume of matters being dealt with under ECF has grown and continues to grow, evidence from our witnesses suggests there is still need for wholesale improvement to the ECF scheme. We would suggest that the process be made more accessible to direct applicants; the evidence required should be simplified; and providers should have increased powers to determine eligible cases. In order for the work to be financially viable, we recommend that the Legal Aid Agency remunerate solicitors and specialist advisers for all applications for exceptional funding under section 10 of LASPO.

---

<sup>11</sup> Reforms to Legal Aid: IA No: MoJ 212, Policy Option 4, 04/02/2014

<sup>12</sup> Legal Aid Agency, 'Legal Aid Statistics England and Wales Bulletin Oct to Dec 2020' (Ministry of Justice, 25.03.2021), figure 11 <https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-october-to-december-2020/legal-aid-statistics-england-and-wales-bulletin-oct-to-dec-2020> (Accessed on 1 June 2021)

There should be an urgent, independent review of all cases granted under Exceptional Case Funding to determine whether there are further areas which should be brought back into scope. If particular types of cases are routinely funded under ECF, we believe they cease to be 'exceptional'. This provides a strong indication that there is a need for scope to be widened to incorporate such cases so that the legal aid scheme is fit for purpose and reflects public legal need. This review process and potential expansion process should be carried out by government on an annual basis.

#### Recommendation K: Means testing

##### **K. Ensure the legal aid means test does not prevent those without means from accessing justice**

We believe that the means test must be overhauled to bring it back to its original purpose – enabling those without the means to pay privately for advice to access publicly-funded legal assistance. We commend Government for carrying out what appears to be a comprehensive review of the means test and we look forward to seeing how their recommendations are implemented over the coming months.

Given the ongoing work in this area, and the knowledge that the government is engaging extensively with a range of legal aid experts as part of that process, we have set out only high level recommendations to improve the means test, which are:

- Increase the income and capital thresholds to enable a greater percentage of the population to access both civil and criminal legal aid. This could assist a large number of those experiencing legal problems who are not financially eligible for legal aid but also cannot afford to pay privately for legal assistance.
- Standardise assessment of those on means-tested benefits with other government departments such as the DWP – this will reduce the administrative burden on clients, practitioners and the LAA.
- Remove capital from the means assessment process where it is clear that such capital cannot be realised and used to pay for legal assistance. Capital locked in a client's home is an example as clients should not be expected to sell their property to access legal support and in reality most legal aid clients are on a low income and cannot secure a lending against their property to pay for legal services.
- Review whether additional areas of legal aid should be 'non-means tested' where the client group is particularly vulnerable and the potential outcome of proceedings involving that group or individuals from that group would have particularly serious consequences
- Review the 'income disregards' that can be taken into account when assessing a client's disposable income to ensure they are a fair reflection of the amount of income that is realistically available to pay for or contribute to legal costs.
- Where clients (or those in their household) are asked to make a financial contribution towards their legal aid, review the thresholds at which contributions are required, the level of contribution required, and the range of people who can be required to contribute.
- Ensure the LAA takes a proportionate and sensible approach to the assessment of means, particularly for clients on low or erratic incomes (such as the self-employed) and for those who have difficulty providing evidence of means.