

**Written evidence submitted by the Law Society of England and Wales to the Joint  
Committee on Human Rights**

**Human Rights: Attitudes to enforcement**

**February 2018**

*The Law Society of England and Wales is the independent professional body that works globally to support and represent 170,000 solicitors, promoting the highest professional standards and the rule of law.*

**1. Summary**

- 1.1. The Law Society is pleased that the Committee has decided to launch a wide-ranging inquiry into factors which may impede individuals from using the UK's human rights framework effectively.
- 1.2. Our submission focuses on questions included in the call for evidence on legal independence and access to resources.
- 1.3. We note that the Government is currently reviewing the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), and is expected to report by the summer recess 2018.
- 1.4. LASPO has had a major impact on access to justice and the ability of the individual to access the courts, a fundamental human right. The Law Society is concerned that:
  - Legal aid is no longer available for those who need it;
  - Those eligible for legal aid find it hard to access it;
  - Wide gaps in provision are not being addressed; and that
  - LASPO has had a wider and detrimental impact on society.
- 1.5. In June 2017, we published our own review of LASPO, 'Access Denied? LASPO four years on', which assessed the changes introduced to legal aid under the Act.<sup>1</sup> The report made 25 recommendations to Government and highlighted concerns regarding LASPO in three areas:
  - on access to justice;
  - the impact on the wider justice system; and
  - the knock-on costs for the public purse.
- 1.6. We believe that lawyers must not be hindered or intimidated in carrying out their professional duties and acting in the best interests of their clients within the law.

**2. Access to resources**

**Is there the access to justice needed to enforce human rights?**

- 2.1. The lack of legal aid funding in certain areas has raised significant access to justice concerns.
- 2.2. The application of the statutory charge to Human Rights Act (HRA) cases that relate to care proceedings, welfare or deprivation of liberty cases before the Court of

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<sup>1</sup> **The Law Society**, 'Access Denied? LASPO Four Years On', June 2017  
<http://www.lawsociety.org.uk/News/documents/laspo-4-years-on-review/>

Protections, represents a significant hurdle for individuals in enforcing their human rights.

- 2.3. Section 6 of the Human Rights Act states that it is unlawful for a public authority to act in a way which is incompatible with a convention right. Section 7(1)(b) allows victims of an unlawful act to rely on convention rights in any legal proceedings if the applicant is, or would be, a victim of the unlawful act.
- 2.4. The basis of a claim may arise because of actions or inactions by the local authority. If financial compensation is awarded, the problem of the statutory charge emerges.
- 2.5. As individuals are entitled to non-means, non-merits tested legal aid in care proceedings and in a number of deprivation of liberty cases, we consider that the issue of costs should be straightforward - the respondent in these cases should repay the costs of the HRA claim to the Legal Aid Agency (LAA) and the LAA funding for the care/deprivation of liberty proceedings remains unaffected. This would leave the claimant with the amount of damages awarded to them.
- 2.6. The same principle would also apply where the individual has been eligible for means-tested legal aid in a welfare case before the Court of Protection in circumstances where it has either been established or the public body has accepted that their human rights have been breached.
- 2.7. However, the LAA have been applying the statutory charge in these cases to claim back not only the cost of the HRA claim but also the full cost of the underlying care proceedings/deprivation of liberty challenge/welfare proceedings.
- 2.8. The amount claimed back through the charge entirely swallows up the damages awarded and the claimant is left with nothing, resulting in the victim of a significant HRA breach with little more than a declaration from the court and a child or person lacking mental capacity, in effect, having paid for the costs of the proceedings concerning them.
- 2.9. This is a fundamental access to justice issue as the result of the charge being applied in this way may be that a well-founded human rights claim is not pursued. The right to an effective remedy is one of the key elements of human rights protection. Legal aid is a mechanism by which states can ensure that the right to an effective remedy is not illusory but realised in practice. Where one arm of the State is taking back into the State's hands the compensation awarded against another arm of the State for the breach, we believe that is a fundamental failure to provide an effective remedy.
- 2.10. Legal aid is also only available in deprivation of liberty cases on an inconsistent basis. Deprivation of Liberty safeguards are intended to protect vulnerable individuals that lack capacity but without the consistent provision of non-means tested legal aid there is significant risk of a breach of human rights in these cases.
- 2.11. This issue raises clear questions of human rights and discrimination and the current approach constrains access to justice for the most vulnerable members of society.
- 2.12. We believe that non-means-tested legal aid should be available for all Court of Protection cases relating to deprivation of liberty to ensure that the vulnerable individuals in these cases can get access to justice and to the protection they need.
- 2.13. The Charlie Gard and Briggs cases illustrate another anomaly whereby non-means tested legal aid is not available for cases involving decisions about withdrawal or giving

of serious medical treatment, even where the decision may result in the death of the person. This often results in family members not being advised or represented in decisions about the life and death of a family member.

**What effect has the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) had on the ability of individuals to access the courts as a means of enforcing their human rights?**

- 2.14. Four years ago, the then Government implemented LASPO. The reforms set out in part 1 of the Act made the most significant changes to legal aid since its introduction.
- 2.15. Throughout the passage of LASPO, the Law Society argued that the legislation would have a corrosive impact on access to justice and the ability of individuals to access the courts as a means of enforcing their human rights.
- 2.16. LASPO introduced changes to the scope, eligibility and the rates paid for work, and resulted in significant cuts to legal aid spend.
- 2.17. We believe that legal aid is a vital part of a fair and functioning justice system. It makes sure that a person's access to justice does not depend on their ability to pay, and that those who need access to the courts to settle their disputes are assured of that right.
- 2.18. The evidence now available shows that our concerns were justified. Large numbers of people, including children and those on low incomes, are now excluded from areas of free or subsidised legal advice which they cannot realistically be expected to afford themselves.
- 2.19. Migrant children are clearly disproportionately affected, primarily due to LASPO abolishing legal aid for most non-asylum immigration issues. The Children's Society estimates the number of children affected as 3,600 currently in local authority care, and 9,000 to 12,000 living in private fostering arrangements. Their lack of access to legal aid means that these children would, in theory, be forced to represent themselves.
- 2.20. Changes to the means test have been counterintuitive, meaning some of those who are on benefits are perversely deemed able to pay for their own advice. For the few who are still eligible, the availability of legal aid is drying up, resulting in legal aid deserts where advice is either non-existent or minimal.
- 2.21. Until LASPO was introduced in 2013, the maximum gross income cap for financial eligibility for civil legal aid, and all thresholds and allowances within the system, were regularly up-rated to take inflation into account. Since 2013 there has been no such increase. This means that the income cap, (which is currently £2,657 a month for a family which includes up to four dependent children) has reduced in real terms, as have all the fixed allowances for expenditure which the means test takes into account.
- 2.22. The dramatic increase of litigants in person following LASPO has created a severe strain on the court system.
- 2.23. In 2014, the National Audit Office reported that there had been a 30% increase across all family court cases (including those that remain eligible for civil legal aid) in which neither party had legal representation, and a 22% increase in cases involving contact with children (Children's Act private law matters) in which neither party was legally represented.

- 2.24. Often forced to represent themselves due to a lack of legal aid, litigants in person can struggle to understand court procedures and their legal entitlements, and cases involving them take longer to resolve.
- 2.25. The reduction of free or subsidised legal advice can also increase the burden on public services. A lack of early legal advice can cause relatively minor problems to escalate, creating health, social and financial problems, and put pressure on public services. For example, in housing law legal aid is still available to defend possession proceedings – but only where loss of a home is imminent. Free, and early, legal advice could address the issue before getting to this stage.
- 2.26. LASPO provides for exceptional case funding (ECF) for categories of law which are no longer in scope for legal aid and where failure to provide legal services would be in breach of an individual's Convention rights (within the meaning of the Human Rights Act) or other enforceable EU rights relating to provision of legal services. There is strong evidence that the ECF scheme is not fulfilling this requirement.
- 2.27. During the Parliamentary debates on LASPO, the government estimated that there would be 5,000-7,000 applications a year, of which 53-74% would be granted. The reality has been that the application volumes are far lower than predicted. Whilst the number of applications has been improving the number of cases granted for 2016-17 was still only 981 which continues to be far below predicted numbers.
- 2.28. ECF applications are difficult and time consuming. Solicitors only receive payment if the application is successful. The Legal Aid Agency will accept applications from applicants in person but very few have been made and still fewer have been successful.
- 2.29. We believe that the ECF1 application form is not clear enough for lay applicants, who also have to submit the standard means and merits application forms. This is a lot of overly-complex paperwork for someone without legal training. Most lay applicants will, unsurprisingly, lack the specialist legal knowledge to demonstrate that the highly technical criteria of breach or risk of breach of Convention or EU rights apply in their case.
- 2.30. The Government has announced that it is currently reviewing the implementation of LASPO, and it is expected that the review will be published by the summer recess 2018.
- 2.31. The Law Society published our own review of LASPO in June 2017 which made 25 recommendations to the Government which promote access to justice.<sup>2</sup> We urge the Committee to consider our review, and a copy of our conclusions and recommendations can be found at **Appendix A**.
- 2.32. A recent report by Amnesty International, '*Cuts That Hurt*,' highlighted the impact of LASPO on access to justice and human rights protection.<sup>3</sup> It highlights how the cuts introduced have undermined human rights protection in two significant ways:
  - By restricting access to justice; and
  - Through the discriminatory effect on socio-economic grounds.

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<sup>2</sup> **The Law Society**, 'Access Denied? LASPO Four Years On', June 2017  
[<http://www.lawsociety.org.uk/News/documents/laspo-4-years-on-review/>]

<sup>3</sup> **Amnesty International**, '*Cuts That Hurt*', October 2016  
[<https://www.amnesty.org/download/Documents/EUR4549362016ENGLISH.PDF>]

## **What are the implications of the recent Supreme Court judgment on fees in employment tribunals?**

- 2.33. The Supreme Court judgement on fees in employment tribunals confirmed that the Government's employment tribunal fees regime significantly harmed access to justice.
- 2.34. It made clear that access to justice is an enforceable constitutional right and not merely a political concept.
- 2.35. It highlights that the constitutional right of access to the courts is inherent in the rule of law. It is needed to ensure that the laws created by Parliament and the courts are applied and enforced.
- 2.36. We believe that one outcome of the judgment is that when making any future reforms to the justice system the Government will need to provide evidence that access to justice has not been denied to citizens, unless the reforms have been approved by Parliament in primary legislation. If the Government fails to do this then they will leave themselves open to legal challenge.

## **3. Legal Independence**

### **To enforce human rights, it is sometimes necessary for cases to be brought against the Government itself. When the Government is a defendant does it seek to use its power to interfere with legal professionals taking cases?**

- 3.1. The Law Society is concerned by an emerging narrative from Government against "left-wing human rights lawyers", as well as by the recent consultation proposals on barring injured soldiers or their families from taking the Ministry of Defence to court in cases of negligence or clinical injury.<sup>4</sup>
- 3.2. Solicitors who take on human rights cases are bound by the same professional and ethical codes as all other solicitors. They also, by definition, have a strong interest in protecting vulnerable people and challenging injustice. Human rights law and lawyers protect fundamental rights that we all recognise like equality, the right to a fair trial, the right to life and freedom from discrimination.
- 3.3. By their very nature, human rights claims are likely to arise against the Government, Government agencies or departments. Every lawyer's first duty is to the justice system - to see that the law is upheld and that their clients have a fair trial.
- 3.4. We believe that lawyers must not be hindered or intimidated in carrying out their professional duties and acting in the best interests of their clients within the law. They should be independent and not be identified with their clients or clients' cases. This principle is set out in the United Nations Basic Principles on the Role of Lawyers.
- 3.5. A concern in this area is the Government's amendments to the payment of legal aid for judicial review cases. These amendments mean that unlike other services provided under legal aid, payment for work on some parts of judicial review cases is dependent on what occurs in the case.

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<sup>4</sup> **Prime Minister Theresa May** said that we need to end an "industry of vexatious allegations" against UK troops and never again allow "those activist, left-wing human rights lawyers" to "harass and harangue" our troops.

- 3.6. As Judicial Review is the process by which Government decisions are challenged, it is essential that the Government includes an analysis of the impact of these funding changes in its review of LASPO.

**For further information please contact:**

Joe Ferreira (Public Affairs Adviser)

E: [joe.ferreira@lawsociety.org.uk](mailto:joe.ferreira@lawsociety.org.uk)

T: 0207 320 5631

M: 07814 557 881

## **CONCLUSIONS AND NEXT STEPS**

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

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

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

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

### **LASPO has undermined access to justice**

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

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

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

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

The changes resulting from LASPO have created an enormous increase in litigants in person, which has caused strain on the courts. We acknowledge that litigants in person have always been part of the justice system – however, in the past most

of these individuals represented themselves by choice, whereas now they do so because they cannot afford legal fees and are ineligible for legal aid.

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

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

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

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

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

## LIST OF RECOMMENDATIONS

*Note: Recommendations 9 and 10 have been removed as they were adopted by the Government subsequent to the publication of our report.*

### **Recommendation 1:**

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

### **Recommendation 2:**

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

### **Recommendation 3:**

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

### **Recommendation 4:**

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

### **Recommendation 5:**

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

### **Recommendation 6:**

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

### **Recommendation 7:**

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

### **Recommendation 8:**

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

### **Recommendation 11:**

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

### **Recommendation 12:**

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

### **Recommendation 13:**

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

### **Recommendation 14:**

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

### **Recommendation 15:**

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

### **Recommendation 16:**

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

### **Recommendation 17:**

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

### **Recommendation 18:**

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



## **APPENDIX A – CONCLUSION AND RECOMMENDATIONS OF *ACCESS DENIED? LASPO FOUR YEARS ON: A LAW SOCIETY REVIEW***

### **Recommendation 19:**

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

### **Recommendation 20:**

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

### **Recommendation 21:**

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

### **Recommendation 22:**

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

### **Recommendation 23:**

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

### **Recommendation 24:**

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

### **Recommendation 25:**

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