

## Introduction and general comments/summary.

1. We are pleased to make this submission to the post-implementation review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which came into force in 2013, making significant changes to the provision of civil legal aid in England and Wales. We welcome the review which is both necessary and timely, and appreciate the efforts of the review team to engage widely with stakeholders. In this submission we draw on insights from within the pro bono community as well as a number of existing resources of which the review team are already aware, including: the stakeholder submission to the Justice Select Committee that LawWorks co-ordinated last year,<sup>i</sup> a survey of legal need in MPs surgeries undertaken with Hogan Lovells,<sup>ii</sup> discussions in the Ministry of Justice's consultative groups,<sup>iii</sup> the stakeholder conference held at Freshfields in June 2018, co-organised with the Legal Aid Practitioners Group (LAPG), and other research and evidence that has become available over the past two years.

2. Whilst stakeholders' views and perspectives both about the impact of LASPO and the future direction of policy towards publicly funded legal services are varied and diverse, we believe that it is possible to distil some key themes. The principle themes are:

- a. The most significant impact of LASPO has been in the area of access to early legal advice, especially in social welfare law, tribunal procedures and family breakdown matters. A wide range of stakeholders believe there is a strong case for investing in more preventative strategies focussed on early advice, information and public legal education in a manner that complements reforms to the way that our justice system works, from tribunals to the family courts.
- b. Following from the above, delivery systems should be designed with the needs and capabilities of users in mind, recognising that vulnerability is a key issue, and that providers need to be flexible in how they respond to client needs and able to deliver at a localised level. This means working to achieve an operationally simpler and less bureaucratic system which both users and providers can navigate more easily, taking into account some groups' additional support needs, and an emphasis on intervening earlier with 'wrap around' support. Issues which need addressing to achieve this include: the procurement system, the functionality of online operating channels, the gateway telephone service, evidential and eligibility criteria, and the exceptional funding mechanism, as well as simplifying the general regulatory and administrative complexity that surrounds the scope and operation of the civil legal aid scheme.
- c. Consistent with putting needs and users at the heart of the system, policy-makers need to adopt a coherent and rational approach to questions of scope, and enable 'problem clusters' to be solved, rather than working on a narrow issue-by-issue basis. The concept of getting help to "those who need it the

most" – a stated objective of LASPO - bears little relation in practice to the hierarchy of legal issues that remain within scope, and within some of the excluded areas there are high levels of need amongst vulnerable population cohorts. Within the existing scope rules there are also contradictions and complexities (eg., for migrants, minors, threatened homelessness related to benefits, and public versus private family law), which some relatively minor adjustments could resolve.

- d. Decisions around policy and operational matters concerning legal aid should be underpinned by a robust evidence base, supported by an empirical and practical understanding of 'what works' and what approaches deliver the best outcomes for those in need of legal support (whether advice or representation), or for those with unresolved legal problems who may lack either the financial or legal capability to achieve a resolution. A common finding from reports by the Justice Select Committee,<sup>iv</sup> the National Audit Office<sup>v</sup> and the Public Accounts Select Committee,<sup>vi</sup> is that work had not been undertaken to collate, assess or evaluate an evidence base to inform or support the changes introduced by LASPO. Other independent reports have identified more systemic issues (eg., systems failures that can drive demand and need for legal advice), and have pointed to the need for policy-makers to adopt a more strategic and joined-up approach to advice and legal services drawing in wider public (including the DWP, local government, etc) and private sector partners and funders. A more evidence based approach would help the Ministry of Justice to better achieve value for money.
- e. The review should look again at some of the underpinning principles, the starting point being the inextricable link between the rule of law and access to justice. The access to justice system must enable legal problems to be settled or resolved on their intrinsic legal merit, rather than by a disparity of resources between parties. Impartiality in our justice system underpins the reputational value of UK law as a global brand, and is core to both supporting business and achieving a just and cohesive society. As the Government says "The legal system must uphold fairness in society: both in business and for individuals."<sup>vii</sup> Maintaining these principles requires that the legal system is accessible for citizens and that it upholds the fundamental rights of a democracy, such as the capacity of citizens to challenge actions by public bodies and private corporations.

3. A particular issue for LawWorks is about the role and interest of pro bono in this area of policy and practice. We restate and emphasise the position, supported by successive Law Officers and leaders of the legal professional bodies, that pro bono *cannot* replace a properly functioning legal aid system or fill the vacuum in response to unmet need left by the retrenchment of public funding. Pro bono does have an important contribution to make to enabling access to justice, and can provide a space for innovation. However, it is important to emphasise that, given specialisation issues, only a proportion of pro bono is devoted to social welfare law. More importantly, pro bono does not operate in a vacuum and needs an infrastructure provided through a strong network of community legal advice agencies. So the closure or retrenchment of law centres and community advice centres, not only reduces the legal services delivered by those organisations themselves but also the contribution and impact of

pro bono. We are clear that while pro bono has a role as a contributor to enabling access to justice, it should be by adding value to and complementing existing services and legally aided provision.

### **About LawWorks**

4. LawWorks is the operating name of the Solicitors Pro Bono Group, an independent charity which provides a range of consultancy and brokerage services to bring together lawyers and law students who are prepared to give their time without charge, and individuals and community groups in need of legal advice and support. Co-located with other charities at the National Pro Bono Centre our work includes:

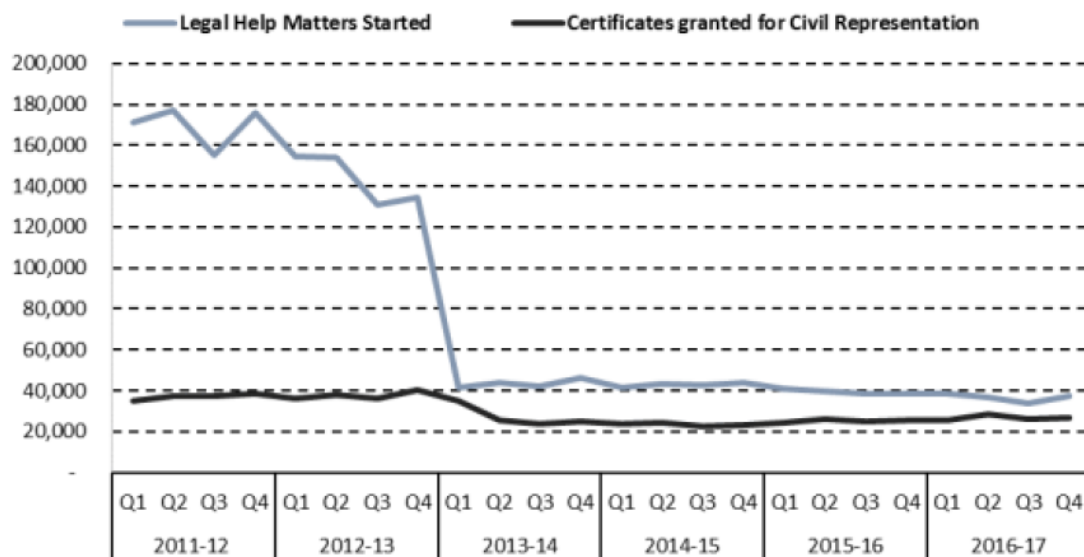
- Supporting a network of over 230 independent legal advice clinics hosted through law schools, advice agencies and other non-profit partnerships across England and Wales;
- Brokering pro bono legal advice for small not-for-profit organisations;
- Running ‘secondary specialisation’ bespoke pro bono casework and representation projects;
- Providing training and resources for individuals, firms and in-house teams undertaking pro bono, and celebrating excellence in pro bono through our annual awards;
- Collaborating with others in the legal support sector, for example: as partners with the Litigants in Person Support Strategy; engaging across the legal profession, and providing a “policy voice” for pro bono.

### **Context for this review**

5. The Government’s objectives for the LASPO reforms were to: discourage unnecessary and adversarial litigation at public expense; to target legal aid ‘to those who need it most’; to make substantial savings to the cost of the scheme; and to deliver better value for money for the taxpayer.<sup>viii</sup> The scope of civil legal aid was significantly narrowed, so that it is no longer available for most private family, housing, debt, welfare benefits, employment and clinical negligence matters. Financial eligibility was also narrowed, civil legal aid fees were reduced and the governance of legal aid was subsumed (through the Legal Aid Agency) into the Ministry of Justice.

6. These changes have severely impacted on the supply and availability of free legal help, especially for access to advice delivered through the private practice and the not-for-profit sector. The amount of legal aid provided for both advice and representation has reduced significantly since LASPO came into effect; the number of cases where legal aid was provided for initial advice has fallen by more than 75 per cent compared with pre-LASPO levels, and the number of grants for legal aid for representation has fallen by 30 per cent. The number of civil legal aid providers has also nearly halved, falling from 4,253 providers in 2011-12 to 2,824 in 2017-18, including solicitor firms and not-for-profit organisations. The Ministry of Justice's own memo captures how stark the reduction in publicly funded legal help has been (see figure 6 reproduced below).<sup>ix</sup>

**Figure 6: Civil legal aid workload summary, legal help and civil representation 2011–12 to 2016–17**



Source: Legal Aid Statistics, January to March 2017

7. There are significant areas of England and Wales where there are advice deserts' For example, the Law Society's analysis of the Legal Aid Agency's data on housing legal aid has shown that that almost one third of legal aid areas in England and Wales have one, or no, provider for this area of law.<sup>x</sup> Given the size of procurement areas, failure to ensure an adequate minimum level of provision cuts-off access to vital support. There are also fewer specialist lawyers and caseworkers in some areas of social welfare law, making the sustainability of legal aid supply more difficult. So for example:

- In July 2016, the only legal aid provider for housing and debt advice in the Cambridgeshire area, Citizens Advice Peterborough, terminated its contract with the Legal Aid Agency. The decision was brought about as a result of difficulties in finding a replacement for its solicitor. Subsequently, a county with a population of 800,000, with 16 wards falling within the 20 per cent of the most deprived parts of England, was left without a legal aid provider in housing and debt.
- Following the withdrawal of a key provider in Hull in 2016, the Legal Aid Agency struggled for several months to plug a hole in the provision of housing and debt legal aid services.
- Two large procurement areas of Shropshire and Suffolk were identified by the Law Society's research as having no legal aid housing provider. This year, Suffolk Law Centre did secure a legal aid contract in housing, but then experienced difficulty recruiting a housing solicitor able to meet the Legal Aid Agency's requirements.

8. A survey of independent clinics in the LawWorks clinics network found similar issues, with all those responding saying it had become harder to refer clients to legal

advice providers, and also seeing an increase in litigants in person (see paragraph 23). The following are some comments from a survey of clinics on the network: .

- *The greatest impact has been in relation to the removal of legal aid funded workers from the local citizens advice service and Law Centre, there are now so few case workers available in areas such as welfare benefits, housing, debt and employment. Employment cases dropped significantly in 2013 with the introduction of Employment Tribunal fees, but we are already seeing a rise in the number of enquires since the fees were abolished last year.*
- *It has added immense pressure to an already strained service. With no or very limited access to legal aid, many clients are left with the daunting issue of being litigants in person or just giving up the fight without access to justice.*
- *Not only a decrease in number of people receiving representation, but [a] breakdown in referral systems for complex problems because of a lack of legal help. Often we have clients who think there is no legal aid available at all any more, even when it might be possible for them in their case.*
- *We are unable to provide advice in certain areas of law, such as welfare benefits, immigration and debt, due to the lack of qualified/experienced supervisors in these areas. As a result of LASPO, and the reduction in specialist case workers in the voluntary sector, it is becoming increasingly difficult to refer people seeking help in these areas. We have also seen a significant rise in family law cases, particularly in relation to child contact disputes.*
- *The perfect storm of LASPO, welfare benefits cuts, increasing indebtedness and reduction in [in our County] of the number of firms doing legal aid work has made for a very hostile environment for anyone seeking access to justice & equality. The NfP sector in [the County] in partnership with the private sector is working hard to meet demand but ultimately we cannot run services on a neutral cost basis and the short termism of the funding regimes place added planning and bureaucratic burdens on an overstretched sector.*

9. An analysis by the Legal Action Group shows that the impact in practice of the scope and operational changes brought in by LASPO has gone far beyond the original intention of the MoJ's target savings, leaving a year on year under-spend in the civil legal aid budget.<sup>xi</sup> The Justice Select Committee also found that the government has underspent on the civil legal aid budget. The committee ascribed the underspend to “an overly restrictive and bureaucratic approach to the exceptional cases funding scheme; poor provision of information on the availability of and eligibility for legal aid; and a lack of understanding of the routes people take to mediation.”<sup>xii</sup>

10. Changes to the provision of legal aid need to be viewed in the context of wider reforms to the justice system, including changes to judicial review, increases in court fees, the (now reversed) fee regime for employment tribunals, and the closure of

more than 230 crown, county and magistrates court as part of an ongoing reform programme, including digital alternatives such as online courts and virtual hearings. In the words of the Equalities and Human Rights Commission (EHRC) these changes have had a "cumulative effect" on people's ability to access justice.<sup>xiii</sup> Moreover, the context in which legal aid operates is wider than the justice system: connecting with other community services, and drivers of legal need - from welfare reform to failures in statutory services, the growing social care challenges, significantly reduced provision for children's centres, funding for domestic violence refuges, and poor outcomes delivered by community rehabilitation companies.

### **Wider systemic impacts**

11. It is necessary to look at wider systemic issues both in order to ascertain whether the LASPO reforms have met their original aims and objectives, and review whether these are the most appropriate objectives for legal aid policy going forwards. Assumptions need to be tested, especially in relation to 'alternative' routes for accessing justice and resolving legal problems, and 'targeting' legal aid to 'those who need it the most.'

12. A key systemic issue is the impact for the framework of our protective system of rights, which risks being eroded through a weakening of affordable routes of redress and enforcement. As the recent Joint Select Committee on Human Rights report on enforcing human rights concludes: "reductions to legal aid and reforms to the system mean that for many people enforcement of their human rights is now simply unaffordable."<sup>xiv</sup>

13. This highlights a problem with basing legal aid for issues engaging human rights and equality law on the notion of 'exceptionality' – ie. through the exceptional funding scheme (ECF). The data suggests that ECF is not functioning effectively to provide a protective mechanism. Uptake of ECF has been significantly lower than the Government predicted; in the first year after LASPO was introduced there were 70 successful ECF grants, against a prediction of 3,700. In 2017-18 the number of ECF grants increased to 1,420, but this still comparatively low number suggests the scheme is not functioning as intended. As the judges in a recent judicial review of the guidance made clear "exceptionality is not a test," rather it is the substantive rights themselves that should determine entitlement to exceptional funding.<sup>xv</sup>

14. The Government anticipated that people with legal problems in areas taken out of scope of legal aid by LASPO would be able to use alternative, less adversarial means of resolution – for example: mediation for family law problems, ombudsman or tribunal services for administrative law issues, and other alternative dispute resolution, conciliation (eg., ACAS) and consumer complaint systems. Notwithstanding the value of these alternative forms of redress, the evidence suggests that these alternatives do not always provide an easy route to justice, and that there is insufficient information and advice on accessing or using them.

15. In family law, for example, there has been a fall in the use of mediation, despite the Government's prediction that it would increase after LASPO was introduced. The National Audit Office (NAO) report, and other studies, suggested that this has been partly attributable to the fact that LASPO reduced the opportunities for clients to be in contact with law firms and therefore to be referred to

mediation.<sup>xvi</sup> In a recent piece of research from Liverpool University commissioned by the EHRC, involving 131 semi-structured interviews, few participants reported using mediation, and those who did reported difficulties in getting the other party to engage with the process.<sup>xvii</sup>

16. Tribunals were described in the Green Paper which first proposed the LASPO reforms as “relatively informal, simple and designed to be accessed by participants without the need for Legal Representation.”<sup>xviii</sup> However, when LASPO passed into law there was a significant slump in tribunal applications, especially for social security and employment claims. Whilst there may not have been a direct causal relationship between cuts in legal aid and declining tribunal usage given other measures also being introduced to reform tribunals (eg. new fee structures, the introduction of mandatory reconsideration, etc), the timing of the reduction is significant. Tribunal receipts fell from over 250,000 in 2012 to 70,000 in 2014. At a systemic level the data can be interpreted as a weakening of access to administrative justice.

17. Another important systemic issue is how civil legal and family law problems or the inability to resolve them, can have wider social and economic costs, including for the criminal law system and the NHS. In relation to crime and re-offending, past analysis of data from the Civil and Social Justice Survey found that 63% of people who had been arrested reported one or more ‘difficult to solve’ civil law problems over the past three years, compared to just 35% of other people<sup>xix</sup> Debt and financial problems, challenges retaining employment, homelessness and family break-down have all been identified as factors which can significantly increase the risk of reoffending. The Law Society’s *Access Denied: LASPO Four years on* (2016) report also refers to the “proven links between young people’s unresolved civil legal problems and their increased likelihood of criminal offending.”<sup>xx</sup> This appears to follow the findings of Youth Access’ research of the impact of LASPO on children and young people.<sup>xxi</sup>

18. There is also a significant body of evidence associating civil legal problems with mental ill health and health inequalities, and demonstrating how law-related problems have been increasingly presenting in GP surgeries and other health settings. The key pieces of research on this are highlighted and pulled together in the Low Commission ‘Advice Services and Health Outcomes’ report.<sup>xxii</sup> For example 65% of sampled GPs in the 2014 GP Omnibus Survey in 2014 reported an increase in patients presenting in their surgeries with some level of social welfare legal need.<sup>xxiii</sup>

19. The original Impact Assessments (IAs) undertaken by the Ministry of Justice which accompanied the LASPO Green Paper outlined some of the risks of wider systemic impacts:

*“As a result of people who no longer receive legal aid tackling disputes in different ways, or of disputes remaining unaddressed, there may be a deterioration of case outcomes. In particular case outcomes might be less fair than beforehand. A significant reduction in fairness of dispute resolution may be associated with wider social and economic costs such as:*

- *reduced social cohesion. For example, failure to apply the rule of law fairly may generate an inclination not to respect rules and regulations and not comply with*

*social norms and expectations, generating social costs. In relation to family cases children would also be affected as well as their parents;*

- *increased criminality. This may arise if unresolved civil or family disputes escalate, or if criminal means are used to resolve disputes in future, or if a known lack of legal aid encourages people to take advantage of others who might find it harder to defend themselves in future;*
- *reduced business and economic efficiency. Failure to enforce rights and not applying the rule of law may undermine work incentives, business uncertainty and the operation of markets;*
- *increased resource costs for other Departments. If civil and family issues are not resolved effectively people might continue to rely upon the state, including because failure to resolve one issue may lead to another arising. This may include health, housing, education and other local authority services including services provided by the voluntary and community sector;*
- *increased transfer payments from other Departments. Similar to the above, reduced resource transfers from the legal aid fund might lead to increased financial transfers to the poorest, e.g. via welfare benefits or tax credits. For example, people who previously received legal aid might use up their own savings in future to finance a case, and in so doing they might pass a benefits threshold.<sup>xxxiv</sup>*

20. A key task for the Post Implementation Review (PIR) team should be to revisit the original impact assessments, and the assumptions behind them with a view quantifying these systemic impacts. Current data and trends, for example on cohesion and crime, are discouraging, although we are not ascribing these directly to legal aid cuts – it is incumbent on the Ministry of Justice though to investigate potentially causative and consequential relationship between wider social indices and its access to justice policies.

21. In respect of ‘costs to other departments’ and other on-costs that can flow from the adverse consequences of legal problems, inability to resolve them, and the cost-benefit effectiveness of legal advice interventions, we can point to a substantial body of research which evidences this. The Citizens Advice “business case” paper, for example, published in 2010, used real outcomes data (from the then Legal Services Commission) to establish a baseline of on-costs avoided for the state, economy and society from accessing civil legal aid.<sup>xxv</sup> There have been a range of other relevant ‘Social Return on Investment’ (SROI) and cost-benefit type of analytical studies and reviews including: the New Economics Foundation (2009),<sup>xxvi</sup> Cookson (2011),<sup>xxvii</sup> Vanguard (2013),<sup>xxviii</sup> Mold and Cookson (2014),<sup>xxix</sup> Rocket Science (2017)<sup>xxx</sup> and the Ipsos Mori Social Research Institute (2018).<sup>xxxi</sup>

22. We would urge the PIR to look at all of these reports, recognise the robust analysis that has been undertaken and take account of their common findings. Both the Public Accounts Committee and National Audit Office have also recognised that there is evidence of ‘on-costs’ arising from the reforms and reduced access to legal aid, both in terms of direct costs for the Ministry of Justice in the way that courts have to handle additional numbers of litigants in person, but also through wider costs to Government.<sup>xxxii</sup>



23. It is difficult however, on the basis of current evidence, to assess the extent to which people unable to access legal aid can resolve their problems by other means, due to a relative paucity of ‘counterfactual’ studies, (ie, studies with randomised control groups directly comparing outcomes between those able to access support and those unable to access support). However, whilst no systemic study exists of the outcomes of population cohorts previously but no longer eligible for legal aid, there are many individual pieces of evidence on what people do when they cannot access legal aid. The EHRC commissioned ‘Liverpool Report’ found that people were largely unable to resolve their legal issues without access to legal aid for advice and representation.<sup>xxxiii</sup> The Ministry of Justice’s own “*Varying Paths to Justice*” report has interesting findings which suggest that early intervention, and access to support and advocacy, are often the determinant factors in whether problems can be resolved.<sup>xxxiv</sup> (The following are direct quotes from the report):

- *For employment problems, “those who decided to pursue a case, obtaining detailed information about tribunal processes and active support by professional advocates at tribunals was valued. The quality of support and advocacy was important.”*
- *For welfare problems, “concerns around loss of income combined with the stress and anxiety generated by the situation influenced participants.... Physical health issues, as well as difficulties such as low levels of literacy or limited resources, hindered participants in dealing effectively with their problem – for example, in understanding correspondence from government departments. Participants tended to let matters drop once all known options had been exhausted. Participants with welfare problems in particular required support to resolve their problem.”*
- *For debt problems “participants facing debt problems were unable to accept that they faced a justice problem until an external party intervened. Anxiety and shame prevented participants from responding to their debt problem.”*

### **Principles and priorities: responding to legal needs**

24. The contexts and wider systemic issues, described above, raise questions about the long-term sustainability of the post-LASPO legal aid scheme, and whether it is fit for purpose given the mismatch between declining supply and growing demand. A thorough review of LASPO requires a return to first principles, and addressing the underlying issues, starting with legal needs.

#### ***Understanding needs***

25. There are empirically well grounded measures of unmet need established through a decade of research and survey work undertaken by the Legal Services Research Centre and researchers at University College London (UCL).<sup>xxxv</sup> The Civil and Social Justice Survey (CSJS) baseline figures have established that approximately one-third of the population experience ‘justiciable’ civil legal problems. The CSJS data further shows that around 10 per cent of people with a legal problem ‘lump it’ and take no action at all, and around 46 per cent handle such problems alone without accessing any formal or informal support or legal help.<sup>xxxvi</sup> More recent research commissioned by the Legal Services Board (LSB), but undertaken by the same research team responsible for the CSJS, suggests that the baseline figure may be closer to one in two people, with 18 per cent doing nothing and 46 per cent of issues handled alone or with the help of friends or family. The most commonly cited

reason in the LSB commissioned survey for not seeking formal legal advice is cost and affordability. <sup>xxxvii</sup>

26. Analysis of the last set of CSJS panel data from 2012 showed 32% of respondents having reported experiencing one or more legal problems in the previous 18 months, rising to 43% in the previous 36 months, or over 27 million civil legal problems arising over 3 years. The most common problems concerned anti-social neighbours, consumer issues, employment and money. Problems concerning care (public law children issues), relationship breakdown, domestic violence, clinical negligence, education and employment were most often severe. Even allowing for slight differences of survey methods, all the data trends point towards the scale of the problem that needs to be addressed, and the evidence around the typology and clustering of legal problems points towards significant areas of unmet need in social welfare areas of law.

27. It is these unmet needs which continue to drive demand for access to free legal advice. This is evidenced by the increased demand on pro bono services and capacity since the availability of publicly legal funded help was so significantly reduced by LASPO. The LawWorks Clinic network's annual clinics reports have demonstrated a year on year increase in clinic activity and the number of enquiries handled by clinics. Between April 2014 and March 2015, there were 43,000 individual enquiries at clinics in the period, a 55% on the previous year. Between April 2015 and March 2016, there were 53,000 individual enquiries, a 24% increase, and between April 2016 and March 2017 58,000 enquiries at clinics in the period, a 10% increase on the previous year. <sup>xxxviii</sup> It is important to note though that most clinics are only able to provide one-off advice, rather than end-to-end resolution services by qualified lawyers, and whilst secondary secondary specialisation programmes are able to provide in-depth casework in some areas of law, under current capacity only low volumes of casework can be delivered. The number of pro bono cases handled under these programmes is, and can only be, small compared with the loss of casework under the legal aid reforms.

28. The Bar Pro Bono Unit (BPBU) have seen similar levels of increased demand. In 2017, the BPBU received 2274 applications for help, over 1000 more than the number of applications received yearly pre LASPO. The average number of applications for help received yearly since LASPO has been 65% higher than the average number of applications in the pre-LASPO years; with the highest rises in immigration and family law.

29. Both LawWorks and the Bar Pro Bono Unit participate in the Litigants in Person Support Strategy, and our partner agencies have also reported increased in demands for their services. The Personal Support Unit (PSU) for example have reached a cumulative milestone of 300,000 contacts through their expanding services, 80% of which took place post LASPO. In 2014, PSU provided practical and emotional support to people facing court alone an average of 2,543 times per month, by the end 2016 this had risen to 438 and by the monthly average reached over 4500. This is an increase of 77% and PSU volunteers now support over 50,000 vulnerable people each year, from 20 locations across England and Wales.

30. However, in looking at the data trends for pro bono and other support services it is important to review and interpret these in context; the data reflects in part the growth of Clinics and PSUs (ie a measure of 'supply' and recorded activity) as much

as it can also provide indicators of rising demand or displaced demand (ie demand and issues displaced from the legal aid system) in a pro bono and legal needs context. The figures are also dwarfed by the number of cases removed from the scope of civil legal aid – at least 650,000 annually,<sup>xxxix</sup> which supports our earlier assertion that pro bono does not have the capacity to ‘pick up the slack’, and especially with demand for more specialist legal advice. The same health warnings should also be applied to interpreting Citizens Advice’s ‘Advice Trends’ data.<sup>xi</sup>

31. Finally amongst other sources of evidence on unmet legal needs and the rising demand for legal support, a recent ‘deep dive’ study of London MPs surgeries casework, undertaken by the law firm Hogan Lovells, a global leader in pro bono, has found that 89% of sessions observed involved problems of a legal nature. The data from the research showed that the three most common areas in which constituents had legal problems were housing (37%), immigration (23%) and welfare benefits (13%).<sup>xli</sup>

### **Scope and reach**

32. Having looked at the evidence of need, taking account of the vulnerability of different client groups, the review provides an opportunity to set priorities for the future of the legal aid system. We accept that resources are finite and it is therefore important to prioritise those in need of help from civil legal aid, such as the most vulnerable families, victims of domestic violence and people at risk of abuse and neglect, victims of trafficking, persecution and child exploitation, older people in the care system, homelessness cases and those facing destitution or removal from the country. However, it is also important that the resources of the legal aid system can be used to help those who are at risk of facing more serious problems or are particularly vulnerable, perhaps through specific targeting of more preventative advice and support. Policy approaches which ration legal aid primarily by scope and area of law cannot always enable support to be effectively targeted towards those who are most vulnerable or most in need.

33. The current scope rules for civil legal aid have had particularly serious and disproportionate impact on disadvantaged and marginalised people, who already experience obstacles in accessing justice and effectively claiming their rights. Amnesty International UK’s report *Cuts that hurt*<sup>xlii</sup> especially highlighted the access to justice situation of:

- Children and vulnerable young people;
- Migrants and refugees who as a group already experience a range of distinct challenges;
- People with additional vulnerabilities, disabilities and/or mental health issues.

34. On the future scope of legal aid we restate the key principles in the ‘Memo to the Justice Select Committee’, and recommend that the following areas of scope and exclusions be reviewed:

- *Asylum, immigration and citizenship status* – it would be consistent with a human rights focused policy to bring refugee family reunion cases, statelessness applications, asylum support appeals and children’s residency rights back into scope.

- *Housing and debt* – this should be widened to protect the most essential housing security rights, enable support when housing benefit issues are the cause of arrears and threatened homelessness, and to protect vulnerable people from aggressive or unlawful enforcement tactics by landlords and bailiffs.
- *Welfare rights* – some specialist welfare benefits advice should be reintroduced into mainstream legal aid provision, perhaps in conjunction with related housing or debt matters; or through an independent tribunal advice scheme to assist appellants in difficult cases and/or help those with limited capacity to comprehend the process or speak for themselves in tribunal hearings.
- *Family law, family breakdown and domestic violence* – the public/private law distinction (which can determine whether a family law matter is in or out of scope) is an unhelpful delineation as far as some of the more difficult circumstances of family breakdown, women’s justice and children’s wellbeing are concerned. Also, despite welcome changes since LASPO, the evidential requirements for domestic violence cases remain restrictive with insufficient credibility given to the experience of victims. We hope that the scope of family law can be extended to cover more contested child custody cases, and to offer early advice about the family justice system.
- *Problem clusters* - cases where one part of the case can be funded by legal aid and other, related, matters are not (for example evictions which are in scope related to benefit problems which are out of scope), present real difficulties for the way that matter starts are allocated. In real-life situations the majority of legal issues are mixed problems and there is significant evidence about the way that social welfare law problems ‘cluster’ together. It is important therefore that the scope rules are drawn sufficiently widely to tackle problem clusters rather than problems in isolation, and to enable mixed cases to be dealt with by legal aid practitioners.
- *Reforming exceptional funding* – as suggested above his category needs to be fundamentally reviewed to ensure that those who may have issues relating to equalities and human rights laws can both access advice, and seek remedies more easily through the legal aid system.

35. The review should look not just at the scope of legal aid, but also at financial eligibility. The original intention of legal aid was to ensure that those with small or moderate means could have access to advice and if necessary representation. However, financial eligibility levels for civil legal aid have reduced over decades from over 70% of the population in the late 1970s, to under 25% currently. A first step towards a simpler eligibility system would be removing the capital test for those on passported benefits, and perhaps to use Universal Credit as a new passport to legal aid eligibility. However instead the MoJ appears to be introducing more complex regulations for a new legal aid eligibility means test for those transferring onto Universal Credit, rather than extending a simpler passporting procedure.

36. Under LASPO all means-tested benefit claimants applying for legal aid have to be additionally means-tested for capital – including equity in the home, whereas previously that was not required. The stringent capital tests exclude those with relatively small amounts of equity. So whereas means testing for benefits excludes

equity in a home, the legal aid means test only excludes the first £100,000 of equity, and only allows £100,000 of mortgage debt. This means anyone with equity in their home of £110,000 is treated as having capital of £10,000, which is above the savings/capital limit of £8,000 to qualify for legal aid.

## Strategy

37. Having identified key principles and priorities, the Ministry of Justice should then consider the most effective strategy for tackling unmet legal need and targeting resources, to ensure the most vulnerable can access effective legal help alongside an early intervention system, to prevent problems becoming more legally complex. Whilst the traditional "judicare" model - a public subsidy system for private practice to deliver casework (through both advice and representation) - has a vital continuing role, other approaches or models should be examined alongside this, including a greater role for technology in reaching more people.

38. Above all Government should take the opportunity of the review to develop an overarching strategy for access to justice. Several independent studies of the legal advice sector, including the Government's own review of not-for-profit advice services in England undertaken by the Cabinet Office,<sup>xliii</sup> have pointed to the importance of a developing a cross-governmental strategy and for the Ministry of Justice to be working with other agencies to deliver better value for money and wider legal advice and support coverage, both in community settings and through online platforms. The Low Commission in particular championed this approach, including delivery within health settings, and has called for the integration of different public funding channels.<sup>xliv</sup> The Commission has proposed that funding for legal support should be shared across the Ministry of Justice, DWP, Lottery funding and local government.<sup>xlv</sup>

39. Just as the Ministry of Justice have published a cross-government Victims Strategy<sup>xlvi</sup> as a system-wide initiative to improve the support offered to victims of crime involving all criminal justice agencies, a similar approach is required for access to justice. A clarifying set of "minimum standards" for access to justice would be a helpful starting point for developing a new strategy – a key proposal from the Bach Commission.<sup>xlvii</sup> The strategy could also draw on learning from the Welsh Government's Advice Services Review and their subsequent initiative to support a "National Advice Network,"<sup>xlviii</sup> and also from the Scottish Government's more recent review of legal aid.<sup>xlix</sup> Other policy elements of a cross-cutting strategy could include 'polluter pays' schemes to incentivise better decision-making and reduce 'failure demand' (eg poor DWP decision-making), the closer integration of legal aid within court and procedural reform programmes, and leveraging in additional resources and innovation from the private and commercial sectors, including as appropriate pro bono.

40. A cross cutting-strategy would therefore be a good opportunity to clarify issues around the interface between legal aid and pro bono, as regrettably the original Green Paper<sup>1</sup> made some profoundly mistaken assumptions and assertions. For example in relation to welfare rights it said:-

*We note that help and advice are available from a number of other sources, including Job Centre Plus and the Benefits Enquiry Line. In some cases, voluntary sector*

*organisations may provide some help and advice, for example, AgeUK on Disability Living Allowance, Attendance Allowance and other benefits. The Child Poverty Action Group and Disability Alliance may assist in some cases. Pro bono groups such as the Free Representation Unit may also be able to assist in representation at tribunals... The presence of these alternatives is not determinative, but makes the provision of legal aid in these cases less likely to be justified.*

*We therefore consider that legal aid is not justified in these cases because the issues are not generally of sufficiently high importance to warrant funding, and the user-accessible nature of the tribunal will mean that appellants are able to represent themselves. In addition, they may also have access to help and advice from other sources in order to help them resolve their issues without recourse to publicly funded legal assistance. Having taken all these factors into account, we propose to exclude all welfare benefits issues from the scope of civil legal aid.*

41. The MoJ's original decision to exclude areas of social welfare law from legal aid was based on the flawed premise that: "Where there are alternative forms of advice and assistance in a particular area of law and there is no reason to believe that these will cease to be available, we consider that it is proper to take them into account in deciding how high a priority should be accorded to the provision of publicly funded legal advice and representation in that area of law."<sup>li</sup> In fact the impact of the Government's successive spending reviews on local authorities has meant cuts to local advice and voluntary sector services to the extent that many services are no longer available, or have been severely reduced, with a knock on effect for pro bono. Secondly it is important to recognise that given all the restrictions on what providers can be paid for under legal aid contracts, legal aid practitioners undertake a great deal of additional unpaid work as part of their casework, although this is rarely recognised as pro bono.

42. Although not explicit, Government policy has built a "pro bono trap" into the structure of LASPO itself, especially in relation to exceptional funding, as it may be open for Government to argue that legal aid is not 'necessary' given either the provision or even perceived availability of pro bono help.<sup>lii</sup> So whilst there is the potential to expand pro bono programmes, there is concern in the pro bono community that this available help could be interpreted to mean that effective access to justice may be assured through means other than publicly funded legal aid. Such were the arguments put by the Government in a case where the potential availability of free legal help provided on a voluntary basis by Islington Law Centre was used as one of the reasons for refusing legal aid.<sup>liii</sup> We believe that it is important that any perceived disincentive for providers of pro bono assistance should be removed perhaps by the introducing a provision, equivalent to that in Germany,<sup>liv</sup> within LASPO or its successor legislation, clarifying that the availability or potential availability of free legal services on a voluntary basis should be disregarded when considering whether the provision of legal aid is 'necessary' or 'appropriate' (see section 10(3) LASPO) under exceptional funding criteria. This would be consistent with the Government's own stated position that pro bono should not be seen as a replacement for legal aid.<sup>lv</sup>

43. Finally any new strategy for legal aid should embed the principles of early intervention. This means firstly that the Ministry of Justice should recognise the strategic importance of Public Legal Education (PLE) as a way of meeting its objective to see people resolving their problems without accessing the courts. The general aims of PLE are to provide the public with the knowledge, confidence and

skills needed to deal with law-related issues so they are better able to help themselves and are less likely to end up in a court or tribunal. PLE will not by itself deal with the issues people face completely – and may even increase demand for information and advice – but it can enable earlier intervention to take place, thus reducing the need for legal support. However, for PLE to work well it needs to be supported in schools, in life-long learning and in the delivery of justice services in the same way that public health, and public health education, are an integral part of health services. Moreover, PLE should not be seen as a replacement for legal advice, but as complementary to it, helping to ensure that the civil justice system is used appropriately, and legal capability and awareness of rights is improved.

44. The second strand of early intervention is to ensure that a range of legal support services can be provided, including early legal advice. The Low Commission refers to there being a “continuum including public legal education, informal and formal information, general advice, specialist advice, legal help and legal representation... Legal aid should be viewed as part of this continuum, rather than as a stand-alone funding mechanism.”<sup>lvi</sup> This spectrum or continuum of support needs to extend through telephone and digitally enabled advice, through to locally-based legal advice and assistance, to targeted face-to-face advice and representation for the most vulnerable. A good approach to targeting is to ensure that information and advice is located in the places—real or virtual—where people already turn for help or to access services (such as GP surgeries, Children's Centres and libraries). For example, there is potential for advice services, with legal aid support, to be redesigned to take advice to health care settings, to the courts (including criminal) and tribunals through duty desk or clinic schemes, and also into local non-advice voluntary organisations.

## **Delivery**

45. The overwhelming message from the stakeholder conference held by the Legal Aid Practitioners Group (in July 2018) and others was the need for a major overhaul of the legal aid bureaucracy, including the commissioning process. Both providers and beneficiaries of legal aid understandably struggle with its rules and operational procedures. The current civil legal aid system is one that nobody would have designed if starting anew, and has become a patchwork of exceptions and exclusions, largely hidden from the public by its complexity. The review should look at actions to simplify the administrative steps in applying for legal aid as this would benefit both clients and providers. For clients the telephone and evidence gateways can be significant barriers to accessing legal aid, whilst for providers the Client and Cost Management System (CCMS) has proven to be inefficient.

46. These delivery system issues could be addressed by working directly with groups of users and specialists to identify and develop solutions that are more fit for purpose. Simpler systems could potentially free up resources. Since LASPO the Legal Aid Agency's administrative costs have increased to over £100m<sup>lvii</sup> - this is around a fifth of the amount currently allocated to civil and family legal aid and more than the LAA's entire expenditure on civil legal help. Clearly these resources could be better directed towards the frontline.

47. The key to effective delivery is to get the commissioning model right, and encourage innovation through lighter touch approaches to performance

management. Procurement of local advice and legal support services could be delivered through grant programmes, where appropriate, rather than competitive tendering. Any new procurement arrangements should also reflect the Public Services (Social Value) Act 2012 in their approach, which recognises the added value which not-for-profit agencies can often bring. Good practice suggests that where consortia of providers are able to come together and work out a plan collaboratively for delivering to their strengths, specialisms and client groups, commissioners get better value for money and clients get better services.

48. There are already models of developing and emerging best practice that can be drawn on, and insights from work on user needs undertaken within the HMCTS programme, including learning shared through the Civil Justice Council. The Litigants in Person Support strategy also provides an example of what can be delivered through collaborative approaches. There are also good local models of “Information and Advice strategies” that could be built on as a framework for local collaboration, with legal aid provision for advice and representation providing core specialist expertise around which other services can cluster.

49. Finally, we would refer to many of the ideas that were discussed at the June LAPG/LawWorks Conference in the session on ‘effective delivery,’ the reports of which have been shared with the PIR team. The importance of developing new delivery models was highlighted in the context of technology opportunities, and the issues of legal aid facing a specialist recruitment crisis, workforce development challenges, and a shrinking supplier base. Suggested solutions mentioned at the Conference included:

- The LAA could partner with the Big Lottery Fund to pilot innovative ways of working with groups facing the biggest barriers to accessing justice, including people with disabilities, children etc;
- Providers need more “delegated powers” to adapt their services and to be more flexible in the way they respond to client needs, including partnering other specialists;
- Some supervision could be done remotely, making greater use of technology;
- Looking at alternatives to the ‘matter starts’ fixed fee based casework allocations system, perhaps moving either to a block-contracting approach that has been used successfully with the not for profit sector, or area based service level agreements as an alternative to tendering;
- Scaling up PLE support for non-lawyers to meet needs in early information, assisted digital, and triage services, but not to replace work that needs to be referred on to lawyers;
- Re-introducing traineeships or new funded apprenticeship routes into social welfare law work, taking advantage of some of the flexibilities that may be offered by the new SRA Handbook and training reforms, and other developments in the regulatory landscape. The Legal Education Foundation’s Justice First Fellowships, for example, have been welcomed in the community legal sector as an important initiative to establish expert trainee roles and career pathways in social welfare law, but there remains a big challenge to develop and sustain the workforce.



## Conclusions

50. In conclusion, we hope that this review will identify and tackle some of the fundamental capacity challenges, and offer some solutions for how innovation in the legal support can be encouraged and supported to address unmet needs, noting that the legal system itself is undergoing significant change for example with the digitisation of court and tribunal services, a project that is presenting both opportunities and challenges. It is essential that some concrete recommendations and next steps come out of this review process, including clarity on whether there will be a further Green Paper next year on legal support (as indicated by previous MoJ Ministers). We look forward to continuing to work with the Ministry of Justice and other access to justice stakeholders on the outcomes of the review.

September 2018

## Endnotes

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<sup>xv</sup> *Gudanaviciene and others v Director of Legal Aid Casework* [2014] EWCA Civ 1622, at 166).

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